



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**MISC. APPLICATION NO. 22 OF 2020 (O.S.)**

**AUGUSTINE MAINGI KIRIGIA.....APPLICANT**

**VERSUS**

**KANJA SPYRANO (suing as the legal representative of**

**the Estate of SILVINO RUKUNGA M'ITIRIA).....1<sup>ST</sup> RESPONDENT**

**JOAN KIRIGIA .....2<sup>ND</sup> RESPONDENT**

**DAVID NDUMBA MURIIRA alias**

**EUTCHUS NKUUBI .....3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR, MERU.....4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL .....5<sup>TH</sup> RESPONDENT**

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**RULING**

1. By his Originating Summons dated 11<sup>th</sup> March, 2020, the applicant sought several orders. These included, a stay of execution in **Meru Cmcc No. 23 of 1995; Meru E & L No. 223 of 2018 and Meru Cmcc E & L Misc Application No. 1 of 2019** pending the hearing and determination of the instant summons.

2. He further sought an order that **Maria Kathira alias Kathira Kirigia (“the patient”)** be held to be incapable of protecting her interest with regard to her affairs due to her mental illness, dementia and old age. In the premises, the applicant prayed that he be appointed the *Guardian Ad Litem* of the patient for the purposes of defending her interest in the aforesaid suits and the children of the patient **i.e Augustine Maingi Kiriga and Lawrence Muthuiya M’Kirigia** do jointly manage all her affairs.

3. It was the applicant’s averment that due to old age, ill health and dementia, the patient has difficulties in moving, memory loss and mental condition that has rendered her incapable of protecting her interests with regard to her affairs.

4. In support of his application he attached a letter dated 11/12/2019 from the Medical Superintendent, Mathare Teaching and Referral Hospital. The same stated that the patient was first diagnosed with Psychiatric depression in 1972 and taken to Meru Hospital. However, there was default in medication which led to deterioration of her mental state. That currently she is completely mentally unstable and being managed with minimal mental drugs. Attached also were orders emanating from the courts in respect of the above noted suits.

5. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents opposed the application through a Preliminary Objection and Replying Affidavit dated 5<sup>th</sup> June 2020. They contended the application was an attempt by the applicant to sneak an appeal through the back door and that the application lacked merit. They further contended that the patient had actively participated in the cases and was ably represented by two law firms.

6. I think from the onset the applicant approached the Court wrongly. The view the Court takes is that the prayers for stay of execution and matters relating to the suits pending elsewhere or concluded cannot be raised in a petition to adjudge someone mentally ill such as the one before court.

7. The proper procedure should have been to lodge a Petition for appropriate orders under the **Mental Health Act**. In this regard, the prayer

for stay of execution is bad in law and is struck out with costs. The applicant was misguided in dragging the respondents into a proceeding that should have only involved him, the patient and her family.

8. Although the matter was brought by way of Summons instead of a Petition, the Court is prepared to overlook that mistake and deal with the same for the sake of substantive justice.

9. From the letter dated 11/12/2019 by the Medical Superintendent, **Mathare Teaching and Referral Hospital**, the patient suffers from chronic dementia. There is however, no certificate issued in terms of the **Mental Health Act, Cap 248 Laws of Kenya** on the mental capacity of the patient.

10. In **M M M v A M K [2016] Eklr**, the court held: -

*“Dementia is an umbrella term for a group of cognitive disorders typically characterized by memory impairment, as well as marked difficulty in the domains of language, motor activity, object recognition, and disturbance of executive function – the ability to plan, organize, and abstract. Generally speaking, dementia is an illness of older adults.*

*Is dementia a mental illness? Concepts in legislation are based on a dichotomy between mental infirmity and mental illness that has changed over time. This change is the result of shifting perceptions about the basis of illness and disease and the causation of mental symptoms. Mental health legislation is aimed as much at social control of feared behaviour as protecting the ill/incompetent. Guardianship legislation offers a more holistic response that better meets the patient's needs and could be extended to supplant mental health legislation.*

*In this regard, I find that the said A M K has not been adjudged to be of unsound mind to fall under the provisions of the Mental Health Act....”*

11. **Order 32 Rule 15 of the Civil Procedure Rules** provides:-

*“The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued....”*

12. **Rule 15** contemplates an inquiry by the court as to the condition of the person sought to be adjudged ill. This court has to inquire into the status of patient before coming to a determination whether to make the orders sought or not.

13. In this regard, the preliminary objection is ordered dismissed. I order that the said **Maria Kathira alias Kathira Kiriga** be examined at the Meru Teaching and Referral Hospital and a report and Certificate, if any, be produced before this Court within 10 B days.

**DATED** and **DELIVERED** at Meru this 30<sup>th</sup> day of July, 2020.

**A. MABEYA**

**JUDGE**