



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC CIVIL APPLICATION NO. 26 OF 2019

IN THE MATTER OF SECTION 26 AND 28 OF THE MENTAL HEALTH ACT CAP. 248 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR APPOINTMENT AS

GUARDIAN AND MANAGER OF THE AFFAIRS AND ESTATE OF HARRISON

MURATHI KIRIAMBURI (A PERSON SUFFERING FROM MENTAL DISORDER)

IN THE MATTER OF AN APPLICATION UNDER ORDER 32 RULE 15 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF

STEVEN KARIUKI KIRIAMBURI.....1ST APPLICANT

CHARLES MUNYI.....2ND APPLICANT

VERSUS

JANE GATURI KIRIAMBURI.....1ST INTERESTED PARTY

POLY WAMBETI MUREITHI.....2ND INTERESTED PARTY

FELISTER GICUGU KIRIAMBURI.....3RD INTERESTED PARTY

MERCY WAMBOGO KIRIAMBURI.....4TH INTERESTED PARTY

EVANS NJERU KIRIAMBURI.....5TH INTERESTED PARTY

JUDGEMENT

1. By an Amended Petition dated 22 August 2019 and filed in court on the same date, the Applicants invoked **Sections 26 and 28 of the Mental Health Act, cap. 248**, Laws of Kenya and Order 32, Rule 15 of the Civil Procedure Rules, 2010 and sought for prayers that HARRISON MURATHI KIRIAMBURI be declared as a person suffering from a mental disorder hereinafter “the subject” and that they be appointed as the joint guardians of the subject and as well as being appointed as joint the managers of the estate of the subject with the powers to:-

Take any action necessary to seek and obtain medical treatment for the subject

Take any action necessary subject to the provisions of the Mental Health Act for the protection and preservation of the estate of the subject including collecting all monies payable to him, paying out all his just debts, managing his businesses and executing his deeds and documents on his behalf.

Maintenance and other necessary outgoings of the estate of the subject.

Take any other necessary action to preserve and protect the interest of the subject.

2. The Amended Petition is supported by the Petitioners' further Affidavit jointly sworn on 24th February 2020 in which it was averred inter alia that they are the subject's brother and nephew respectively. That the 5th Interested Party chased the subject out of his home as a result of his illness, causing the 2nd Petitioner to host and care for the subject at his Kirigi home. That the Petitioners have since built the subject a house on his land parcel no. Gatari/Weru/3711.

3. That the Interested Parties' allegations of the Petitioners' purported sale of the land parcel no. Gatari/Weru/3711 is untrue, scandalous and a fabrication intended to defeat the petitioners' cause. In fact, so it was further averred, that it is the 5th Interested Party who has been selfishly cultivating the said land since 1994 and has recently been joined by the 1st and 3rd interested parties.

4. The Interested Parties/respondents opposed the Petition by filing grounds of opposition and a replying affidavit sworn by the 1st Interested Party on behalf of the others. It was averred that the Petitioners have never in any way supported the subject and that the subject has always been under the

care of the Interested Parties. That the 1st Petitioner wanted to sell the subject's land parcel no. Gatari/Weru/3711 prompting them to register restrictions against the said land. As regarding the subject's place of residence, she averred that the subject rotates in the family members' homes where he is accommodated but he has never gone to the 1st Petitioner's home. She added that even the 2nd Petitioner's mother who is the 2nd Interested Party herein is not in support of the Petition. It was her averment that the said land is being cultivated by the 3rd and 5th Interested Party.

5. Initially, it was agreed that this Petition be heard by way of oral evidence. However due to the Covid-19 Pandemic, parties took directions on 20 July 2020, to proceed by way of written submissions. The Petitioners in their written submissions submitted that the subject's mental condition was not disputed by the Interested Parties and indeed was confirmed by a letter from Dr. J.N Thuo of Embu Teaching and Referral Hospital.

That it was not in dispute that the subject is the registered owner of the Land Parcel No. Gatari/Weru/3711.

6. It was further submitted that the Petitioners have the required locus standi to seek the orders in the Amended Petition by virtue of being the subject's brother and nephew respectively and in line with the provisions of Section 26(1) (a) of the Mental Health Act which stipulates that such guardianship can be issued to any close relative of the unsound person. Reliance was given to the case of **EAA versus Republic (2016) eKLR**.

7. The petitioners cited Section 27(4) of the Mental Health Act create a trust relationship between the Petitioners and the subject and as such the Petitioners could only hold the subject's property on his behalf as his trustees thus placing on the Petitioners the burden of accounting to both the Court and, in this case, the Interested Parties as far as the management of the property is concerned.

8. That the Petitioners' argued that their intentions are legitimate and that the main aim is to cultivate the said land and apply the proceeds in maintaining the subject. It was their submission that the 1st Petitioner incurred the costs of acquiring the title of the subject land in 2016 and has since never acted in a manner likely to suggest that he wanted to dispose of the land. It was denied that the petitioners were ever summoned to the area chief on allegations of attempting to sell the subjects land.

Further, it was submitted that the 2nd Petitioner has since 2011 assumed the role of a guardian to the subject when he took the subject in to care for him.

9. The Interested Parties submitted that firstly, they did not grant the Petitioners consent as a family to file the present Petition. Secondly, that the receipts and treatment notes for the subject, filed by the Petitioners do not in any way prove that the Petitioners have been taking care of the subject and that the said documents were allegedly taken from the subject. It was further submitted that if the Petitioners are appointed as the guardians, they will move the court to have the subject land sold for their own personal interests. In the ultimate, they urged that the 5th Interested Party be appointed the guardian.

10. It is undisputed that the subject is a person of unsound mind unable to manage his affairs. Indeed Dr. Thuo's letter dated 8 May 2018 confirmed that the subject has been suffering from a mental illness since 1981. The only issue in dispute and for determination by the court is who among the parties herein should be appointed joint guardians.

From the affidavits and submissions on record, it appears that the main reason the Interested Parties in opposing the petition is that they are apprehensive that petitioners have an intention of disposing the subject's land. This was the main reason why the interested parties registered restriction against the title of the said land. I note that the only copy of the title on record has no evidence of any encumbrance registered against it.

11. That notwithstanding, the Interested Parties have a duty to prove their allegations. **Section 107(1)(2) of the Evidence Act, Cap 80** is instructive in this regard and provides as follows with respect to civil suits:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

There is also the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in **sections 109 and 112** of the **Act** as follows:

(3) 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

(4) 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

The petitioners must prove the allegations in the petition to the satisfaction of this court. Affidavit evidence and medical reports have been filed in this regard which this court was examined.

12. The interested parties must discharge the burden of proof of their allegations that the petitioners have in the past attempted to sell the subject's land and that they are not capable of taking care of the subject. Copies of summons from the Area Chief's letter or an affidavit sworn by him to that effect would have been of assistance in proving their opposition to the petition especially in the allegation of intended sale of the subject's land by the petitioners. It is trite law that he who alleges must prove. In my considered view the Interested Parties failed to demonstrate the substance of their case save for a letter by their counsel dated 12/01/2018 requesting the Land Registrar Embu to place a restriction on L.R Gaturi/Weru/3711.

It was not explained why the Interested Parties did not apply to be appointed guardian to the subject earlier knowing very well that the subject cannot manage himself and had to wait until the Petitioner's came to court for them to lodge a cross-petition.

13. The Petitioners told the court that the 5th Interested Party who is a brother to the subject chased away the subject from his home due to his mental illness. It is at this juncture that the 2nd petitioners took the subject to their own home and started taking care of him. Yet this, the 5th respondent/interested party is whom the Interested Parties are recommending to the court to be appointed guardian of the subject. The court has not been convinced that the 5th respondent has what it takes to be appointed a guardian for the subject.

14. It is not in dispute that the subject has suffered mental illness since 1981 and that the 2nd petitioner took him for care in 2011. In the year 2016, he built the subject a home from where he provides full custody, basic needs including food, clothing and medication with the assistance of his father the 1st petitioner.

15. It is important to look at the provisions of the Mental health Act in relation to this petition and the issues raised herein.

A guardian appointed under the Act is deemed to be a trustee of the subject; this is so provided by **subsection (4) of section 27** of the Act which states:-

(1) (4) For the purposes of this Act and the Penal Code (Cap. 63) a manager shall be deemed to be a trustee under any other law for the time being in force.

Once the order for appointment is granted, a trust relationship is created between the applicant and the subject and thus the subject's estate that may be vested in him will only be held on behalf of and for the benefit of the subject. In any event, the trustees will not be able to dispose of the property without court's authority as provided for under **Section 27** of the act. In addition, **Section 33(1)** of the Act requires the manager or guardian provide an inventory and annual accounts of the subject's estate.

Section 26 of the Act, empowers the court to make orders for the management of the estate of a person suffering from mental illness among other orders. This provision takes care of people like the Interested parties who may feel like their future inheritance rights may be interfered with.

16. In my considered view, the petitioners have demonstrated that the subject suffers mental illness which the Interested Parties do not dispute. Both parties agreed on the contents of Dr. Thuo J. N. It has been established that the petitioners have been taking care of the subject since 2011 to date and that he is unable to manage his own affairs. The petitioners are a brother and a nephew of the subject who are covered by the Act as close relatives.

17. For the last nine(9) years the two petitioners have taken the subject and cared for him with a mutual financial plan that has culminated them building a home for the subject. It has not been alleged that the subject has lacked the essentials of life in the hands of the petitioner.

18. It is my finding that the petitioners have discharged the burden of proof in this Amended Petition and it is therefore successful. I enter judgment in favour of the petitioners jointly in terms of prayers (a) (b) and (c) of the petition.

19. The cross-petition is hereby dismissed.

20. Each party will meet their own costs of the petition.

21. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2020.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Kiai for Kabathi for Petitioners

Ms. Muthoni Ndeke for interested parties