



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBSA

MISC APPLICATION NO. E7 OF 2020

IN THE MATTER OF THE MENTAL HEALTH CAP 248 OF THE LAWS OF KENYA

**IN THE MATTER OF A PETITION FOR ORDERS OF CUSTODY, MANAGEMENT AND GUARDIANSHIP RELATING TO
JO (PATIENT)**

AND

DMO.....1ST PETITIONER /APPLICANT

PR. RMO.....2ND PETITIONER/APPLICANT

AND

DOO AND 15 OTHERS.....INTERESTED PARTIES.

RULING

1. On 29th October,2020 DMO and Prof. RMO (hereinafter “the petitioners”) moved this court by way of a petition pursuant to the Mental Health Act Cap 248 seeking orders as follows;

- a. That this Honourable court to be pleased to appoint the petitioners as guardians of the affairs of JO in accordance with the Mental Health Act with power to sign and file court documents and enter in deed.**
- b. That this honorable court be pleased to appoint the petitioners as managers of the estate of JO in accordance with the Mental Health Act.**
- c. Any other relief that this honorable court may deem just and fit to grant in the circumstances**

2. Contemporaneously filed with the petition application is a Chamber Summons of even date seeking orders as hereunder;

1. The application in the first instance be certified urgent and the same be heard ex-parte and the hearing and determination of the petition filed herein be expedited.

2. The Honourable court be pleased to issue a temporary injunction restraining;

(a) The land Registrar Nyamira Lands registry either by himself or through his servants, employees, workers, assigns and/or any other person whatsoever from causing any transaction whatsoever in the form of sub-division, transfer and/or power of attorney to be registered on all that parcel of land known as NYAMIRA/KITARU/[...] pending hearing and determination of the petition filed herein.

(b) The Land Registrar Kisii Land Registry either by himself or through his servants , employees, workers, assigns and/or any other person whatsoever from causing any transaction whatsoever in form of sub-division, transfer and/or power of attorney to be registered on all that parcel of land known as NYARIBARI CHACHE/B/B/BOBURIA/[...] which was otherwise unlawfully, illegally and fraudulently sub-divided giving rise to all those parcels of land known as NYARIBARI CHACHE/B/B/BOBURIA/[...] and NYARIBARI CHACHE/B/B/BOBURIA/[...] pending hearing and determination of the petition filed herein.

(c) The Branch Manager, Co-operative bank, Kisii Branch either by himself or through his servants, employees, workers, assigns and/or any other person whatsoever from causing any changes and/or changing the signatories to the patient’s bank

accounts of Number [...] and [...] pending hearing and determination of the petition filed herein.

(d) The Registrar General of Marriages either by himself or through his servants, employee, workers, assigns and/or any other person whatsoever from issuing any marriage certificate with regards to the marriage between the patient herein JO and any other person whatsoever pending hearing and determination of the petition filed herein.

3. The Honourable court be pleased to issue an order appointing a qualified physician from Kenyatta National hospital to examine the physical and mental status of the patient, JO and conduct a medical evaluation regarding the patient, JO's ability to make sound judgment and file a report with this honorable court and that the said physician be granted unfettered access to the patient JO.

4. The Honorable court be pleased to issue a mandatory order compelling the administrative department, and/or the custodian of hospital patient's records at NYANGENA HOSPITAL, KISII; OASIS HOSPITAL, KISII and GLAZXY HOSPITAL, KISII and/or any other person thereof in possession of the patient's, JO'S medical and/or treatment records to issue certified copies of the said medical and/or treatment records to the appointed physician for purposes of conducting a physical and mental evaluation on the patient JO.

5. The Honourable court be pleased to issue a mandatory order compelling the Registrar General of Marriages, and the united states of America Embassy in Kenya to provide this Honorable court with the marriage records relating to JN of National Identification Number [...] alias JR in Kenya and in the United State of America respectively.

6. The Honourable court be pleased to issue an order directing the office of the Director of Criminal Investigations to investigate the illegalities preceding the sub-division, selling, and transfer of the properties comprising and /or that comprised the estate of the patient, JO; as well as the preparation and execution of the power of attorney allegedly signed by the patient, JO and /or any other illegal and/or unlawful commissions thereof and have the perpetrators and /or all those persons involved thereof charged and prosecuted in a court of law.

7. That the petitioners be granted temporal guardianship of JO and management of his estate pending hearing and determination of the petition filed herein.

8. Costs of the medical evaluation be paid from the patient, JO's bank accounts held at CO-OPERATIVE BANK, at Kisii under account numbers [...] and/or [...].

3. According to the petitioners who are a grandson and son to the subject (patient) respectively, the subject herein is aged around 100 years and has exhibited inability to mentally and physically transact any business or take care of himself. That his memory has been affected and he now has episodic confusion and memory lapse to the extent that he disowns his children hence the need to appoint a manager and guardian to manage his estates and affairs.

4. When the aforesaid notice of motion came before the duty Judge, it was certified urgent on 29th October,2020 and the court issued temporary exparte orders in respect of prayers 3 (a), (b) and (c) pending hearing and determination of the application interpartes on 11th November 2020. The court further ordered for the wife and children of the subject to be served. When the matter came up for interpartes hearing, Mr Godia advocate holding brief for Mr. Nyang'acha for the patient and the 7th, 9th, 12th, 14th, 15th and 16th interested parties sought an adjournment to enable Mr. Nyang'acha file his notice of appointment.

5. The court went ahead and granted Mr Nyang'acha a chance to regularize his appointment. Hearing was then fixed for 16th November,2020. On that day, Mr Godia holding brief for Nyang'acha intimated to the court that they had filed a replying affidavit and grounds of opposition seeking to have the file herein transferred to Kisii High Court on grounds that the patient who is sick is residing in Kisii, the properties sought to be managed are also located within Kisii County and that all the interested parties are residents of Kisii County.

6. In his grounds of opposition dated 15th November, 2020, the patient and the 7th, 9th, 14th, 15th, 16th interested parties claimed that the application was bad in law, defective, incompetent, filed in bad faith and fit for dismissal.

7. Mr. Mwambi the 1st petitioner opposed the prayer seeking to have the matter transferred to Kisii High Court for hearing arguing that there was no formal application for transfer. Consequently, Mr Godia sought for more time to file a formal application for transfer of the file to the Registry at Kisii High Court. The court granted him three days to file a formal application seeking for the said transfer.

8. At the same time, counsel agreed that the application be filed and argued together with a preliminary objection dated 24th November 2020 and filed in court the same day in which the 1st petitioner argued that the firm of Nyong'acha and Associates Advocates and counsel Ezekiel Godia Mudavadi cannot purport to be acting for and or representing the Patient herein as they are barred under rule 9 of the advocates' practice rules .That there exists conflict of interest for Nyang''acha or Ezekiel Godia to represent both the petitioner herein and DOO, alias T, JN alias JR, DIO and RM alias RR

9. Subsequently, the 7th, 9th, 12th 14th 15th and 16th interested parties and the patient filed a notice of motion dated 19th November,2010 seeking;

i. That the Honourable court be pleased to discharge and or set aside in entirety the interim orders that were given by this court on 29th October,2020 by Lady Justice N. Mwangi.

ii. That this Honourable court be pleased to transfer this matter to be heard by the High Court of Kenya at Kisii.

iii. That this Honourable court be pleased to strike out the notice herein as it is scandalous, frivolous, vexatious discloses no reasonable cause of action and it is otherwise an abuse of the process of the court.

10. The application is premised upon grounds stated on the face on it and an affidavit sworn on 19th November 2020 by JO. Principally, the applicant's contention is that the wife and a majority of the children of the subject who are also interested parties reside within Kisii. That the subject and his estate the subject of the orders of management is also located within Kisii.

11. He contended that the suit was maliciously filed in Mombasa where the 1st petitioner resides with the sole purpose of forum shopping and without consultation of other family members who are also beneficiaries to the estate.

12. He further stated that Mombasa High Court lacks territorial jurisdiction. That the interim orders granted by the honourable court were not prayed for and should therefore be discharged. Further, that the interim orders which were not served upon the respondents have since lapsed. He averred that the prayer that the subject be subjected to mental assessment is a breach of his constitutional right as the burden to prove his mental illness lies with the one alleging mental incapacity.

13. In Submission, counsel for the applicant filed written submissions dated 3rd December 2020 basically reiterating the averments contained in the affidavit in support of the application.

14. Regarding lack of territorial jurisdiction, Mr Nyang'acha made reference to Section 15 of the Civil Procedure Act which provides that a suit should be filed where the cause of action occurred or one of the defendants or defendants resides, works or does business.

15. Making reference to case law, Mr Nyang'acha placed reliance to various authorities regarding the prayer to strike out the entire suit on grounds of being scandalous, frivolous, vexatious and does not disclose reasonable cause of action which I do not find relevant at this stage as I am dealing with the P.O. and the prayer for transfer of the suit.

16. Concerning the preliminary objection, Mr Nyang'acha contended that it does not meet the threshold set out in the case of **Mukisa Biscuits manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696.** According to Mr Nyang'acha, the grounds cited are not points of law but points of facts which needs to be proved specifically.

17. In response, the petitioners /respondents filed a replying affidavit sworn on 21st November 2020 by Daniel Mwambi with authority from the second respondent stating that the ground stated for setting aside the interim orders is baseless and that the application is vexatious, malicious and an abuse of the court process. Further, that the High Court of Kenya has unlimited jurisdiction to entertain any civil or criminal case within the Republic of Kenya.

18. In submission, the petitioners/respondents appearing in person filed their submissions on 3rd December 2020. They submitted that despite being served with a preliminary objection, the applicants did not file any response.

19. Their submissions were basically anchored on three issues;

i. Whether the court should Set aside the interim orders herein

ii. Whether the court should transfer the matter to the High Court in Kisii for hearing and determination

iii. Whether the entire suit should be struck out.

20. They submitted that having filed a suit, they should be given a chance to be heard on merit. In support of this proposition, they cited the case of St. **Patrick's Hill school Ltd Vrs Bank of Africa Ltd (2018) eKLR**, where the court applied the reasoning in **Thomas Edison HD Vs Bathock 1912 15 C.L.R 679 to buttrees** the point that there is a primary precept governing administration of justice that no man should be condemned unheard and no order should be made to the prejudice of a party unless he has the opportunity to defend himself. They averred that the interim orders allowed by the court were lawful and binding on the applicants.

21. Concerning transfer of the matter, they submitted that the court ought to consider four parameters namely; parties, territorial or Geographical area, remedies likely to issue and the subject matter. In support of this contention, reference was made in respect to the case of **Trusted Society of Human Rights Alliance Vs Nakuru Water and Attorney General Nakuru Petition No.5 of 2013**

22. In further support of the fact that Mombasa High court has jurisdiction, the petitioner urged that the High Court jurisdiction is not limited unless there are good reasons which goes beyond the pillars laid out under section 15 of the Civil Procedure Act. To fortify that argument, reliance was anchored on the authority in the case of **Nairobi Milimani commercial and admiralty division civil case No 711 of 2012 between Samuel M W 'Njuguna V Benjamin Achode and 8 Others.**

23. Touching on convenience of the subject and witnesses' attendance in court, the petitioners urged that the proceedings can be conducted virtually.

24. Regarding the prayer to strike out proceedings, they submitted that the same is drastic and draconian hence parties should be given an opportunity to argue their case.

25. Commenting on the preliminary objection, the petitioners submitted that the law firm of Nyang'acha is on record as appearing for the Patient and, the alleged wife to the patient one JN, DO, EOO, DIO and RM. That the same firm had prepared a power of attorney where the subject is the donor and JN the donee in which Jane on behalf of the Patient filed a suit being CMC ELC No. 35/2020 Kisii wherein she sought eviction of some squatters and one of the patient's children from West Kaspu/Kodera karabach

26. They further submitted that the firm of Nyang'acha cannot purport to represent the patient yet they are also protecting his interest in the ELC. To that, extent, they urged that legal representation is not absolute and that the test is whether real mischief will in all human possibility result. In galvanizing this proposition reference was made to the holding in the case of **Delphis Bank Ltd Vs Chatt & 6 others (2005) e KLR.**

Determination

27. I have considered the application herein seeking to have the petition and application dated 29th October, 2020 struck out; that this matter be transferred to Kisii High Court for hearing on account of want of territorial jurisdiction and, a preliminary objection arguing that the firm of Nyang'acha should not appear for the applicants on grounds of conflict of interest.

28. From the onset, I wish to clarify that although parties transgressed by arguing on the merits of the application dated 29th October, 2020, I will not delve on these submissions or arguments touching on the main application which is pending determination. To address the merits of the petition and application dated 29th October 2020, which is still pending will be premature hence prejudicial to the outcome of the application. I will therefore not address the issues of striking out the petition/application dated 29th October 2020 and the interim orders granted thereof at this stage. Those issues will be canvassed in the application dated 29th October 2020 and the petition which are yet to come up for hearing.

29. Having clarified on that issue, and having considered the application dated 19th November and the preliminary objection thereof, the following issues does arise for determination;

i. Whether this court has jurisdiction to entertain the matter

ii. Whether this court can transfer this file to Kisii High Court for hearing and determination.

iii. Whether the preliminary objection dated 24th November 2020 is sustainable.

30. Considering that issues number one and two are interrelated, I will deal with them concurrently. It is trite law that jurisdiction is the cornerstone of litigation and without it a court is duty bound to down its tools. See **Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (1989) e KLR** where Nyarangi J held that jurisdiction is everything and without it a court cannot move a step further and therefore should down its tools.

31. There is no dispute that under Article 165 (3) of the Constitution, the High Court has unlimited jurisdiction over civil and criminal matters in the Republic of Kenya. However, those powers are also for good order, convenience and delivery of justice which is further amplified in our statutes among them the Civil Procedure Act.

32. Under section 15 of the CPA, institution of civil suits is determined by territorial jurisdiction which is measured by the court within whose jurisdiction the cause of action accrued, residence of the defendant or defendants or the place where the defendant or defendants work or carries on business.

33. Therefore, in as much as I am in agreement with the respondents that the High Court has unlimited jurisdiction, the court seized of a matter such as this one, has wide discretion to cause transfer of a matter from one High Court registry to the other suo motto after weighing the circumstances giving rise to the case, the possible hardship that litigants are likely to suffer by the hearing being conducted in that particular court and what the end result of justice will dictate. Pursuant to Order 47 rule 6 (2) of the Civil Procedure rules, a court on its own motion or on the application of any party to a suit and for good cause shown, can order that the case be tried in a particular place to be appointed by the court.

34. In **Daniel Kimani Moseka vs Japheth Arthur Mwangi Kiurire (2012) e KLR** the court stated that:

"Suffice it to say that I agree with the holding and reasoning of justice Waweru in Kenya Tea Development Agency Vs Thomas Mboya Oguttu/T/A Ms Oguttu Mboya & and Co. Advocates & another (Nairobi High court case No. 6/2004) (unreported). In that case, Justice Waweru said that there is only one High Court in Kenya which sits at various locations as the Chief justice may appoint. That High Court (established under section ... of the Constitution) has a central office in Nairobi and various district registries. Machakos is one such registry. It is the same High Court that sits in Nairobi and all the various registries. It is not different High Courts. As such, a High Court judge may, in good faith, direct that a case be heard at a different registry if it would be more convenient for the parties or the court or for some other just cause. This is not "transfer" from one High Court to another High Court but a transfer from one registry to another. I am therefore of the opinion that, in an appropriate case, a High Court judge can invoke its inherent jurisdiction or the powers donated in order 47 rule 6 to transfer a case from one registry to another even if those registries are manned by different judges".

35. Equally in **Miqdad Enterprises Vs National Bank of Kenya Limited (2017) e KLR**, Justice Yano allowed transfer of an ELC case from Mombasa to Malindi ELC which was seized of territorial jurisdiction given that the land in question was located in there. Agreeing with the said application, Justice Yano while citing the case of **Hangzhou Agrochemical Industries Ltd Vs Panda flowers Limited (2012) e**

KLR held as follows;

“I concur with the decision of the learned Judge and borrowing his words, I wish to state that there is only one Environment and land court in the Republic of Kenya sitting in different stations. I also agree that there being only one Environment and Land court the word “transfer” does not apply to one registry. Although there is only one court in Kenya which sits in different stations as directed by the chief justice, it is not forbidden for a judge of ELC sitting in one location to order a transmission or allocation of a case file before him or her to another judge sitting in another station”.

36. From the above quoted authorities, there is no doubt that a High Court has unlimited jurisdiction which is also provided in the constitution. Such powers by extension does include inherent powers or authority whether prompted suo motto or on being moved by a party, to cause a transmission of a file from the registry where it is sitting to another High Court registry. It follows therefore, that the High Court reserves residual powers to direct transmission of a file from one High Court registry to another where the situation so dictates in the interest of justice. Such circumstances would include consideration of; the location of the subject matter; number of potential witnesses and their residences, where the cause of action arose and likelihood of parties suffering unnecessary hardship or expense.

37. In the instant case, the subject of these proceedings is a man approaching 100 years and sickly. All interested family members reside in Kisii. The estate sought to be managed is located also in kisii. In the event the court desires to see and interrogate the subject, physical contact or hearing or visit might be necessary. If necessary, witnesses will attend court. Given the distance from Kisii to Mombasa, it is obvious that it will be costly in terms of transport, accommodation and other attendant costs.

38. This will obviously cause unwarranted hardship and suffering. I do not find any justification in filing the case in Mombasa registry instead of Kisii High court registry. The motive is not clear except to make an inference that it is likely to punish the majority of the interested parties. I am satisfied that this is an appropriate case to transfer from Mombasa High court registry to Kisii High court registry for eventual hearing and determination at Kisii High court.

Whether the preliminary objection is sustainable.

39. The petitioner/respondent got concern that the firm of Nyang’acha appearing for the interested parties and the patient is also appearing for the same Patient and his alleged wife in some land dispute before CMC ELC Kisii. That the same firm drew a power of attorney between the Patient and his alleged wife.

40. It is trite law that a preliminary objection is argued on pure points of law which if determined will in limine determine the suit (See Mukisa Biscuit(Supra)).

41. The grounds upon which Nyang’acha is sought to be disqualified from representing the Patient and the other interested parties are matters of fact which will be determined from a different perspective. What mischief is likely to arise or conflict of interest if Nyangacha represents the patient in this case. We are dealing with a case seeking to declare the patient as being unfit in discharging his daily affairs and not a land dispute as the petitioners seems to argue. The appearance of Nyang’acha in these proceedings in my view does not in any way pose a conflict of interest.

42. The issue at hand is a petition under the mental health Act. The facts are totally different from those in the ELC case. If that point ever comes to pass like say he is to be cross examined on any legal document prepared by himself, the firm of Nyang’acha will then be asked to step aside so that his clients will get another lawyer.

43. At his stage, I am not convinced that there is a good ground to disqualify Nyang’acha’s law firm from representing a client he is representing in another suit.

44. In a nutshell, the preliminary objection is hereby dismissed and the application dated 19th November, 2020 allowed only to the extent that the the Deputy Registrar is hereby directed to forward the file herein from Mombasa High Court registry to Kisii High C ourt registry for hearing and determination. Mention at Kisii High Court on 18th January 2021 for further directions. Interim orders in place are hereby extended.

Dated, signed and delivered virtually this 22nd day of December 2020

.....

J. N. ONYIEGO

JUDGE