



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

PETITION NO. 9 OF 2010

IN THE MATTER OF SECTION 28 OF THE

MENTAL HEALTH ACT CAP 248

AND

IN THE MATTER OF ORDER 32 RULE 15 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF JBK

VNK.....1ST APPLICANT

EMK.....2ND APPLICANT

RGK (Suing as next friend).....3RD APPLICANT

VERSUS

LMK.....1ST RESPONDENT

HWM.....2ND RESPONDENT

RULING

1. The applicants VNK, EMK and RGK are children of the Ward JBK. On 5th March 2015 vide **High Court Misc. Petition No. 31 of 2015** they were appointed as managers and guardians of the Ward following a report by a psychiatrist, and a determination by the court, that the Ward had dementia, irreversible condition that impaired his testamentary capacity and rendered him incapable of running his affairs.

2. In an application dated 22nd November 2016 the interested parties LMK (1st respondent), YNK and AWK sought, among other things, to vary the orders issued on 5th March 2015 to include LMK as an administrator of the estate of the Ward. She was applying in her own capacity and on behalf of AWK. and YNK. The case of LMK was that she is the second wife of the Ward, and that YNK and AWK. are their children; that the applicants are the children of the Ward by his first (late) wife, and that they (applicants) had not made reference to them in the petition leading to the orders of 5th March 2015.

3. There is an application dated 18th November 2016 by HWM (the 2nd respondent) who claimed that she was the third wife of the Ward, married under Kikuyu customary law in October 2013. She stated that the Ward had assumed parental responsibility over her son AJM. She raised allegations of fraud against the applicants.

4. The applications dated 18th November 2016 and 22nd November 2016 are pending hearing in **High Court Misc. Petition No. 31 of 2015**.

5. In the instant case, the applicants filed a petition seeking several declarations and orders, including the following:-

- (a) that the 1st respondent is not and has never been married to the Ward;
- (b) that the 2nd respondent is not and has never been married to the Ward;
- (c) an order that the respondents do cease and desist from asserting that they are the wives of the Ward; and
- (d) that the respondents have violated the Ward's rights under **Articles 27 and 28** of the Constitution.

6. In response, the 1st respondent filed a preliminary objection dated 11th February 2019 whose grounds were that –

- (a) the court has no jurisdiction to hear the matter;
- (b) the application is an abuse and excessive use of the order appointing the applicants as guardians and managers; and
- (c) the application is *subjudice* as there is a case raising similar matters involving the same parties that is under active judicial consideration in **High Court Misc. Petition No. 31 of 2015**.

7. On 25th February 2019 the 2nd respondent filed her own preliminary objection dated 20th February 2019 based on the following grounds:-

- a) the court has no jurisdiction to try this matter; and
- b) the petition is bad in law, misconceived, untenable and the same amounts to an abuse of the process of the court and merely intended to vex and embarrass her.

8. The present ruling seeks to determine the two preliminary objections. Mrs Judy Thongori for the 1st respondent, Mrs Wambugu for the 2nd respondent and Mr. Kiragu Kimani for the applicants were directed to file written submissions on the objections, which they did.

9. It is material that the petition was filed under **section 28** of the **Mental Health Act (Cap 248)** and **Order 32 rule 15** of the **Civil Procedure Rules**. **Order 32** deals with suits by or against minors and persons of unsound mind. **Rule 15** of the **Order** states that:-

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

10. Under **rule 1(1)**, a suit by the Ward shall be instituted in his name by the applicants. This petition was instituted in the name of the Ward. The Ward has been adjudged to be a person who is mentally ill; who has an irreversible mental deficit to the extent that he cannot manage his estate or life. Under **Order 32 rule 15**, he is incapable of protecting his interests when sued or being sued.

11. The petition was brought under **section 28** of the **Mental Health Act** and **Order 32 rule 15** of the **Civil Procedure Act**. **Section 28(2)** provides as follows:-

“The Minister, the Public Trustee or a manager may take out, as a matter of course, an application in chambers for the determination of any question arising out of the management of any estate in respect of which an order has been made under this part.”

12. It was the submission by Mr. Kiragu that under the provision jurisdiction has been given to the petitioner to seek the resolution of the questions in this petition. He stated that the use of the words **“any question”** means that any legitimate matter can be placed before the court including whether the respondents are the wives of the Ward. He went on that the question whether the respondents are wives of the Ward is important –

“to the affective management of his estate due to the implications of such status to their claim to his property.”

13. I agree that it is important for the question whether or not the respondents are wives of the deceased to be determined. This is because such determination will have an implication on whether they will be asked to join the applicants in the management of the estate of the Ward.

14. **Section 28(2)** can only come into play after the appointment of a manager of the estate of a Ward, and there has arisen a question relating to that management. The question will be determined in the petition by the court which made the appointment. Otherwise, the **Mental Health Act** was never intended to discuss or determine any other issues. If, like in this case, the applicants claim that the respondents are not the wives of the deceased, in which case both sides have to call substantive evidence and witnesses on the issue, this is a dispute beyond the **Act**. If the question was simply that the respondents were admittedly the wives of the Ward and the applicants have, without reference to them, sought the determination that the Ward is mentally ill and they be appointed to manage his estate, an application in the petition for them (the respondents) to be joined to be heard on those questions and to participate in the management would be appropriate.

15. Indeed, in **High Court Misc. Petition No. 31 of 2015** the respondents sought the variation of the orders made on 5th March 2015 to include them as administrators/managers of the estate of the Ward. The basis of their prayer was that they were wives of the Ward. The

issue of whether they were wives became contentious when the petition said, in answer to the application, that they were not. It therefore became necessary, I determine, for the applicants to file the substantive petition herein under **Order 32 rule 15**, in the name of the Ward, to have the question whether or not the respondents were wives to be determined. The two petitions relate to two separate and distinct disputes. The dispute in the instant petition could not possibly have been raised, heard and determined in the petition in **High Court Misc. Petition No. 31 of 2015** which had been filed to determine whether or not the Ward was a mental patient incapable of managing his affairs, and to appoint the manager of such affairs. The question of mental infirmity is decided on the basis of an inquiry in which the court examines the relevant witnesses, the Ward himself and the relevant medical records (**M.M.M. –v- A.M. [2016] EKL.R**).

16. In short, therefore, it is not true that, in view of the dispute in **High Court Misc. Petition No. 31 of 2015**, this Court lacks jurisdiction to determine the dispute in the instant petition. The preliminary objections raised by the respondents are not sustained and shall be dismissed.

17. The question of costs shall abide the petition.

DATED and DELIVERED at NAIROBI this 24TH day of SEPTEMBER, 2019.

A.O. MUCHELULE

JUDGE