



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 21 OF 2013

MARY MUNYAO KITHOME PLAINTIFF/APPLICANT

VERSUS

JANET NDUNGWA KITHOME DEFENDANT/RESPONDENT

RULING

1. The **Notice of Motion** dated 14/5/2013 is predicated on **section 3** and **3A** of the **Civil Procedure Act (Cap 21, Laws of Kenya)**, **Order 40** of the **Civil Procedure Rules 2010** and all other enabling provisions of the law.
2. The application seeks the following orders:-
 - a. **“Spent.**
 - b. **Spent.**
- c. **THAT** pending the hearing and determination of this suit or further orders of this Honourable Court, the Defendant/Respondent either by herself and/or through her agents, servants and/or assignees or any of them be restrained from managing, receiving or drawing income, making collections from, operating, interfering or meddling with, attempting in any manner whatsoever to adversely deal or in any way dealing with the suit property, more particularly a school in the name and style of Makindu Sunrise Academy, an estate known as Quality Estate and a guest house known as Quality Guest House, all situated in Makindu within Makueni County.
- d. **THAT** pending the hearing and determination of this suit or further orders of this Honourable Court, the Defendant whether by herself and/or through agents, servants and/or assignees be restrained from doing the following acts or any of them that is to say from operating, managing, interfering, making withdrawals from or deposits to, attempting in any manner whatsoever to adversely deal or in any way whatsoever dealing with the bank account, whose details are captured hereunder, or in any manner opening and/or operating future bank accounts in respect to the suit property:-

Account Name: Joseph Kithome;

Account Number: 1116057042;

Bank: Kenya Commercial Bank Limited;

Branch: Makindu.

- e. **THAT** the Plaintiff/Applicant be and is hereby granted power and authority by an order of

the court, until such or further orders of this Honourable Court, to manage, operate, deposit, receive and draw income from, make collections from in any way whatsoever deal in the suit property and do all such things as appear necessary in execution of her powers and duties and on behalf of and for the maintenance and other benefits of Mr Kithome and for making provisions for his dependants and other persons or purposes affected by or arising from the suit premises.

f. **THAT pending the hearing and determination of this suit or such orders of this court, the court be pleased to issue an order allowing the Plaintiff/Applicant to access, deal in, make deposits and withdrawals, manage, control and otherwise operate the bank account, numbered 1116057042 and held at Kenya Commercial Bank Makindu Branch, and to do all things necessary and incidental thereto including executing and endorsing all documents and instruments connected therewith on behalf of and for the maintenance and other benefits of Mr Kithome and for making provisions for his dependants and other persons or purposes affected by or arising from the suit premises.**

g. **THAT costs of this *ex-parte* application be in the cause.”**

3. The application is supported by the affidavit of the Applicant, **Mary Munyao Kithome**. According to the said affidavit, the Applicant is the wife of **Joseph Kithome Kisilu** who is the registered owner of the suit property and the sole signatory to the bank accounts in question. That the Applicant’s husband has been taken ill and is incapable of performing any tasks or making any decisions. The Applicant’s complaint is that the Respondent who is a daughter to the said **Joseph Kithome Kisilu** (Applicant’s husband) by the 1st wife (deceased) and her agents have taken advantage of the aforesaid situation and taken charge of the family’s business, hence the current application.
4. The Applicant subsequently filed another application dated 19/6/13 in which she sought a prayer that she be appointed the guardian of **Joseph Kithome Kisilu** (her husband) and the manager of the estate of **Joseph Kithome Kisilu** and all the matrimonial properties and to keep a proper record of the income and expenses therefore and that **Joseph Kithome Kisilu** be declared to be suffering from mental disorder. The application is supported by the affidavit sworn by the Applicant, **Mary Munyao Kithome**. According to the said affidavit, the Respondent’s husband’s health had deteriorated and the Respondent had removed him from their **Makindu** matrimonial home to their **Masamba** village and abandoned him there under the care of distant relatives.
5. The Respondent filed a replying affidavit in opposition to the application dated 14/5/2013. According to the Respondent, the father, **Joseph Kithome** is an adult of sound mind capable of conducting his businesses and interacting with his family. The Respondent contention is that the Applicant has no capacity to take control of the property in question.
6. The Respondent also filed a replying affidavit in opposition to the application dated 19/6/2013. The said affidavit reiterates the contents of the earlier affidavit herein. It was further averred that the provisions of **Order 32** of the **Civil Procedure Rules** have not been complied with.
7. The two applications were canvassed simultaneously by way of written submissions which I have duly considered.
8. It is not in dispute that the properties the subject matter of this suit are registered in the name of **Joseph Kithome Kisilu**. The bank accounts in question are also in the name of **Joseph Kithome Kisilu**. It is a contentious issue whether or not the said **Joseph Kithome Kisilu** lacks mental capacity or not.
9. Going by the averments in the affidavits of the Applicant that the said **Joseph Kithome Kisilu** has no capacity to handle his affairs, the question to be answered first is whether the Applicant has the capacity to institute the suit here.
10. **Order 32 rule 15** provides as follows:

“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.”

The Applicant has not complied with the above provisions of the law.

11. **Section 28** of the **Mental Health Act** provides as follows:-

1. **The court may, upon application made to it by petition concerning any matter connected with a person-suffering from mental disorder or with his estate, make such order, subject to this Part, regarding such application as, in the circumstances of the case, the court may think fit.**
2. **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. The Applicant has also failed to comply with the said provisions of the law.

13. Without going into the merits or otherwise of the application, I find the Applicant has no capacity to file the applications. Consequently the applications are incompetent and I hereby strike out the same with costs to the Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **29th** day of **September** 2014.

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B. THURANIRA JADEN

JUDGE