



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
HIGH COURT CASE NO. 168 OF 2011

C W M.....PETITIONER

VERSUS

A W M & 3 OTHERS.....RESPONDENT

RULING

1. The application I am called upon to decide is dated 29th August 2011. It seeks two main orders – review or variation of the orders made on 16th May 2011 and payment of amounts due to the plaintiff and the daughters of the deceased. The application is premised on the facts set out in the affidavit in support sworn by the plaintiff.
2. The applicant primarily seeks the involvement of the police in the enforcement of the order made on 16th May 2011, especially the temporary injunction restraining the defendants from meddling, selling, wasting or mismanaging the property of M R pending the hearing and determination of the suit. Her case is that the orders have not been complied with and that the involvement of the police has become necessary for the enforcement of the orders.
3. The application was served and the first defendant swore an affidavit on 29th November 2011 in reply to the application. She avers to have the authority of the 3rd and 4th defendants to swear the affidavit. She challenges the validity of the proceedings before the court on the basis that the same ought to have been brought under the Mental Health Act, Cap 248, Laws of Kenya. She argues that that was not disclosed to the court when the court made the orders of 16th May 2011. She further challenges the authenticity of the power of attorney under which the plaintiff has come to court. She asserts that both she and the plaintiff are illiterate and could not have possibly signed the alleged power of attorney. She goes on to tell how in 2006 the family sat and with the aid of elders agreed on the management of the property of the said M R.
4. The reply prompted the filing of a further affidavit by the plaintiff, sworn on 27th January 2012. The plaintiff argues that the suit ought not to be brought under the provisions of the Mental Health Act as the orders sought in the suit relate to preservation of the estate and not its management. She denies that she is guilty of non-disclosure of material facts, saying that the defendants ought to have raised that argument in their reply to the application of 4th May 2011; the had defendants been secured but did not reply to the application. She denies knowledge of the meeting allegedly held on 2006. She denies controlling or

managing any part of the estate of M R, and asserts that it is in fact the defendants who are in control of the said estate. She states that the power of attorney was executed in 2003 and cannot thereafter be a forgery.

5. It was directed on 7th March 2012 that the said application be disposed of way of written submissions. Both parties filed written submissions. The plaintiff's submissions are dated 22nd March 2012 and were filed in court on 23rd March 2012; while the defendants' submissions are undated and were filed in court on 18th June 2014. The plaintiff's submissions were highlighted on 18th July 2012.

6. The plaintiff submits that she would like the orders made on 16th May 2011 varied to enable the police facilitate adherence to the said orders as the defendants have failed to comply with them. The oral submissions made on 18th July 2012 are a regurgitation of the facts as set out in the two affidavits filed by the plaintiff, as well as the written submissions dated 22nd March 2012.

7. The defendants in their written submissions reiterate that the proceedings are defective and ought to have been brought under the Mental Health Act. They further argue that the requirements for review have not been met, for there is neither discovery of new matter or evidence that was not within the knowledge of the applicant at the time of the prosecution of the application dated 4th May 2011 nor is there error or mistake given for the review. They also argue that by virtue of Order 40 rule 6 of the Civil Procedure Rules the orders made on 16th May 2011 had lapsed.

8. From the papers filed herein by both sides, it is clear that M R suffers from mental illness or his mind has been afflicted by ill health or senility. Both parties are in agreement that the dispute before me relates to the estate of the said M R, who is still alive. The dispute, from the facts, is about the control of his estate. Control is all about management of an estate.

9. The estate of a person can only be managed on behalf the owner of the property in two instances, where the owner is dead and where his mind is afflicted by mental illness. Where the property owner is dead, his estate is governed in accordance with Law of Succession Act and an administrator is appointed under that law to manage the estate of the deceased. Where property owner suffers mental illness, his estate is to be governed in accordance with the Mental Health Act, and a manager shall be appointed under that law to administer the estate of the afflicted.

10. The instant suit is brought under neither of the two statutes. This raises the issue of the validity of the suit – whether the plaintiff has the capacity to commence the suit. She moved the court on the strength of a power of attorney, where the afflicted allegedly donated power over his property to her and the 1st defendant. The power of attorney was allegedly executed on an undisclosed dated in 2003. The 1st defendant has renounced it in her replying affidavit. I note from the medical records availed to me, especially the report by Dr. Ngugi Gatere dated 21st July 2010, that his mental problems started in 2001. The power of attorney was therefore executed as a time when the mind of M R was already afflicted. I have also noted that the suit is brought by one of the alleged donees of the power of attorney against her co-donee, seeking the execution of the latter from the management of the property of the exclusion. I note too that the said power of attorney is not properly dated, and its execution has been challenged.

11. A power of attorney is executed by a donor who donates power to the donee over the donor's property. The said power of attorney is made by a person of sound mind, who can revoke it at any time, so long as he is of sound mind, during his lifetime. A power of attorney operates only during the donor's lifetime or during periods or moments of his lucidity, that is for as long as he has the capacity to revoke it. As it is in this case, the donor is now lacking mental capacity and the power of attorney is therefore, not effective. The plaintiff cannot therefore assert any right under the power of attorney to exercise control over the estate of the afflicted. Control over the estate can only be exercised within the framework of the Mental Health Act. The competence of the suit before me therefore is doubtful.

12. The Motion dated 29th August 2011 is premised on the review provisions in Order 45 of the Civil

Procedure Rules. Review is triggered by an error on the face of the record, discovery of new matter or other sufficient reason. In this suit it is not alleged that there is an error on the face of the record nor that there has been discovery of new matter or evidence that was not available on 16th May 2011 when the orders were made. There is also nothing on record to show error on the face of the record or discovery of new matter. The plaintiff has not sought to place the application under the third limb – other sufficient reason. I believe prayer I of the application is grantable under the third limb, that the non-compliance of the orders of 16th May 2011 by the defendants is sufficient reason for reviewing Order 1 of the said orders to require the police to facilitate the enforcement of the order.

13. Should I allow prayer 1 of the application on the basis of the third limb of Order 45 of the Civil Procedure Rules? I think not. The orders made on 16th May 2011 were restraining orders grounded on Order 40 of the Civil Procedure Rules. Order 40 rule 3(1) provides for action that may be taken in cases of disobedience or breach of any of the terms of an injunction. If there had been non-compliance or disobedience or breach of the orders of 16th May 2011, the plaintiff had the option of enforcing compliance by invoking Order 40 rule 3(1). I agree with the defendants that the police need not be involved in a pure civil matter where there are clear provisions on punishing those who breach injunctive orders or fail to comply with them.

14. Secondly, prayer 1 asks me to review Order 1 of the orders of 16th May 2011 so as to require the police “*to supervise the change over as initially ordered by this court in respect of the estate of J M R*” Prayer 1 does not correlate to order 1 of the orders of 16th May 2011. Order 1 is a temporary injunction “*against the defendants restraining them... from meddling or otherwise selling, wasting and/or ... the property of M R pending the hearing and determination of this suit.*” The said order does not command “*change over.*” The variation therefore that is sought in the application dated 29th August 2011 does not simply seek introduction of the police to facilitate compliance with Order 1 of the orders of 16th May 2011, it goes beyond it. It seeks a fundamental change of Order 1 of the orders of 16th May 2011 from a temporary injunction to an order compelling the changeover of the control and management of the estate of M R. Yet a basis has not been laid for such a fundamental variation of Order 1 of the orders of 16th May 2011.

15. Prayer 2 of the application dated 29th August 2011 prays for accounts. I do not quite understand why the plaintiff has sought this prayer, for the said prayers were granted as order 4 in the orders of 16th May 2011. Prayer 2 is word for word order 4 of the orders of 16th May 2011. The prayer is therefore superfluous.

16. In view of everything that I have said above, I find no merit in the application dated 29th August 2011. The said application is available for dismissal, and I hereby dismiss the same with costs.

17. What is more, I have already stated that the suit herein ought to have been commenced under the Mental Health Act, as it relates to the estate of a person who suffer mental illness. The suit concerns the control and management of the estate of such a person; such suits are brought under the Mental Health Act. The parties ought to have moved the court for appointment of managers of the estate of the afflicted. As currently framed the suit before me is incompetent. I hereby strike out the suit in its entirety. The defendants shall have costs of the suit.

18. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 11th DAY OF December 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Kimani advocate for the respondent.

In the presence of Mr. Murage advocate for the applicant.