



**In re NMM (A Person Incapable of Protecting his Interests) (Environment & Land Petition E011 of 2021) [2022] KEELC 3911 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3911 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND PETITION E011 OF 2021**

**JM ONYANGO, J**

**JULY 28, 2022**

**IN THE MATTER OF NMM (A PERSON INCAPABLE OF PROTECTING HIS INTERESTS)  
IN THE MATTER OF APPLICATION BY PETERSON OGERA MOTURI JACKSON  
AND JACKSON OMAIYO MUTURI AND HESBON NYANG'AYA MOTURI  
IN THE MATTER OF SECTIONS 26 AND 28 OF THE MENTAL HEALTH ACT  
IN THE MATTER OF ORDER 32, RULE 15 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**PETERSON OGERA MOTURI ..... PETITIONER**

**AND**

**CHARLES MWEBI MOTURI ..... 1<sup>ST</sup> RESPONDENT**

**JOSHUA OSEKO MOTURI ..... 2<sup>ND</sup> RESPONDENT**

**NYACHAE GILBERT MOTURI ..... 3<sup>RD</sup> RESPONDENT**

**MILKA MOTURI ..... 4<sup>TH</sup> RESPONDENT**

**JUDY MOTURI ..... 5<sup>TH</sup> RESPONDENT**

**HAPPINESS MOTURI ..... 6<sup>TH</sup> RESPONDENT**

**TABITHA MOTURI ..... 7<sup>TH</sup> RESPONDENT**

**MARY MOTURI ..... 8<sup>TH</sup> RESPONDENT**

**CALLEN MOTURI ..... 9<sup>TH</sup> RESPONDENT**

**JANE MOTURI ..... 10<sup>TH</sup> RESPONDENT**

**EDDY MOTURI ..... 11<sup>TH</sup> RESPONDENT**

**DENNIS MOTURI ..... 12<sup>TH</sup> RESPONDENT**



## RULING

### Introduction

1. By an amended Petition dated November 18, 2021, the petitioner filed suit against the respondents seeking the following reliefs:
  - a. NMM be produced in court for purposes of the court establishing whether by reason of unsoundness of mind or mental instability or mental infirmity, he is capable of protecting his interests.
  - b. NMM be submitted for medical examination before a medical expert.
  - c. This Honourable Court do appoint a Public Trustee to be a manager of the estate and a guardian of NMM.
  - d. Costs of the Petition be provided for.
  - e. Any further relief as the Honourable Court may deem fit and expedient to grant.
2. In support of his Petition, the Petitioner claims that he is the son of NMM, a person he claims to be incapable of protecting his interests. He avers that his father who is married to three wives is the registered proprietor of 4 properties being:
  - a. Central Kitutu/bwageturio/161
  - b. Central Kitutu/mwogweta/1714
  - c. Central Kitutu/mwabondusi/647
  - d. Nyaribari Chache/BB/boburia/420
3. He further states that his late mother Grace Kemunto Motuir died and her remains were interred on parcel No. Central Kitutu/bwageturio/161 after a long battle in court started by the Respondents in 2004 which lasted for one year.
4. He avers that his father was the one who paid for all the mortuary bills and constructed a home on parcel Central Kitutu/bwageturio/161 for the Petitioner and his two brothers Jackson Omaiyo Moturi and Hesbon Nyang'aya Moturi.
5. Contemporaneously with the Petition, the petitioner filed an Amended Notice of Motion dated November 18, 2021 seeking an order of temporary injunction barring the respondents whether by themselves, their agents, servants, or persons acting on their behalf from selling, dealing, interfering, alienating or disposing of the 4 parcels of land listed hereinabove pending the hearing and determination of the Petition. The application was supported by the grounds listed on the face thereof and the Petitioner's Supporting Affidavit sworn on November 18, 2021.
6. In response to the application, the Respondents filed a Replying Affidavit sworn by Charles Mwebi Moturi (the 1<sup>st</sup> respondent) on February 1, 2022. In the said affidavit Charles Moturi averred that he was the eldest son of NMM who is the registered owner of the suit property. He averred to that his father's properties had not been disposed of as claimed by the Petitioner and that the same were still intact.



7. He claimed that the Petitioner was a stranger to the respondent's father and he should be barred from harassing his father to give him a share of his property. He also claimed that the petitioner has never stayed on any of his father's property and thus should not lay claim over the same.
8. On the issue of the Petitioner's mother being buried on the one of the parcels of land belonging to their father, he averred that his father was compelled to bury her on his property because he had cohabited with her and had a son with her who was not the Petitioner.
9. He stated that even though his father was old and diabetic, he was of sound mind and disposition and his condition has never affected his mental health. He contended that his father had in 2012 allocated all his sons parcels of his land save that he had not transferred the said portions to any of his children.
10. He also contended that the petitioner lacked locus standi to institute this suit as his father who was the registered owner of the suit property was alive and of sound mind.
11. The court directed that the application dated November 18, 2021 be disposed of first by way of written submissions. Both parties filed their submissions which I have considered.

### **Issues for Determination**

12. The main issues for determination are:

Whether the court has jurisdiction to hear and determine this application and whether the order of injunction should be granted.

### **Analysis and Determination**

13. The Petitioner has filed his Petition under section 26 and 28 of the *Mental Health Act* and order 32 rule 15 of the *Civil Procedure Act* seeking amongst other orders, an order appointing a Public Trustee to manage the estate and a guardian of NMM, a person he alleges to be incapable of managing his interests. These provisions of the law provide a comprehensive procedure for the appointment of a person to manage the estate of any person suffering from a mental disorder.
14. Section 26 of the *Mental Health Act*, provides as follows:
  1. The court may make orders— (a) or the management of the estate of any person suffering from mental disorder; and (b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.
  2. Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.
  3. Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.



15. Order 35 rule 15 of the Civil Procedure Rules provides that;

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.

16. In the case of Isaac Kipkemboi Chesire & 4 others vs Joseph Kimitei Kwamboi & 7 others (2016) eKLR, the court held that:

“The law on management of an estate of a mentally ill person is enshrined in the Mental Health Act. Orders for the appointment of a person to manage the estate of any person suffering from mental disorder are provided for under section 26 of the Mental Health Act. The import of this section is that the order for guardianship ad litem is to be made by the court which is defined at section 2 as the High Court. It follows that orders for the management of any property of a mentally disabled person can only be made by the High Court.....”.

17. It is clear from the above decision of the court which I agree with that this court has no jurisdiction to grant the prayers sought in the Petition. Since the court must down its tools for lack of jurisdiction, this court cannot grant the orders sought in the application.

18. For the avoidance of doubt, the orders of status quo issued herein ex-parte are hereby discharged. The upshot is that the application dated November 18, 2021 is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

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**J.M ONYANGO**

**JUDGE**

