



**Kagendo & Mwiti (Suing as the legal representatives of the Estate of Thuranira Kaberia (Deceased) v Mutungi & 3 others (Constitutional Petition E005 of 2022) [2023] KEELC 16169 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16169 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
CONSTITUTIONAL PETITION E005 OF 2022**

**CK YANO, J  
MARCH 8, 2023**

**BETWEEN**

**LYDIAH KAGENDO & JOSEPH MWITI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THURANIRA KABERIA (DECEASED) ..... PETITIONER**

**AND**

**SAMUEL MWONGO MUTUNGI ..... 1<sup>ST</sup> RESPONDENT  
DCC TIGANIA WEST SUB COUNTY (ON BEHALF OF MINISTER FOR LANDS) ..... 2<sup>ND</sup> RESPONDENT  
LAND REGISTRAR URUU ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application for determination is the originating summons dated June 17, 2022 brought under order 32 rule 15, order 37 of the *Civil Procedure Rules*, section 1A, 3 & 63 (e) of the *Civil Procedure Act*, the inherent jurisdiction of the court and all other enabling provisions of the law. The applicant seeks the following orders:
  1. That the court finds that the 1<sup>st</sup> respondent Samuel Mwongo Mutugi is incapable of protecting his interests with regard to his affairs due to senile dementia.
  2. That the applicant Kennedy Nkonge be appointed as the 1<sup>st</sup> respondent's guardian *ad litem*.
  3. That the 1<sup>st</sup> respondent's son Ken Nkonge Mwongo be allowed to manage all the affairs of the 1<sup>st</sup> respondent including and not limited to matters attaching his properties the subject of Constitutional Petition No E005 of 2022.



4. That the court be pleased to grant such further or other relief as may be just in the circumstances.
5. That the petitioners herein be condemned to pay costs of this application.
2. The application is supported by the affidavit of Kennedy Nkonge, the applicant sworn on June 17, 2022 and a further affidavit sworn on October 12, 2022 and is based on the following grounds;
  - i. The 1<sup>st</sup> respondent is advanced in age to wit eighty three (83) and has since lost fight for any kind of litigation.
  - ii. The 1<sup>st</sup> respondent is blind thus cannot read and /or write.
  - iii. The 1<sup>st</sup> respondent as a result of his advanced age has since developed senile dementia and thus is incapable of remembering, comprehending and explaining most of the events surrounding his lifestyle and affairs.
  - iv. The 1<sup>st</sup> respondent is also a person of frail health and confined to a wheelchair thus his mobility is exercised with a lot of caution.
  - v. That it is thus necessary to appoint a guardian *ad litem* for him and that his son herein the applicant be appointed to manage his affairs.
  - vi. That no prejudice shall be occasioned on either of the parties to this suit and or the scales of justice.
3. In the affidavit in support of the application, the applicant has annexed copies of his national identity card and that of the 1<sup>st</sup> respondent, a medical report and bundle of receipts and a photograph of the 1<sup>st</sup> respondent confined to a wheelchair.
4. In opposing the application, the 1<sup>st</sup> petitioner filed a replying affidavit sworn by herself on June 27, 2022 wherein it is contended that the application is brought in utmost bad faith in order to delay the expeditious hearing and determination of this matter and thereby defeat the interest of justice. The 1<sup>st</sup> petitioner avers that she knows the 1<sup>st</sup> respondent very well as they hail from neighbouring areas within Tigania West sub county in Meru County and that he is a person of sober mind, good memory and coherent speech. The 1<sup>st</sup> petitioner avers that she has seen the 1<sup>st</sup> respondent talk quite often and has even been attending court the last time being on March 30, 2021 in Tigania PMC E & L case No 40 of 2020 in which he is the plaintiff while the 1<sup>st</sup> petitioner is sued as a 3<sup>rd</sup> defendant.
5. The 1<sup>st</sup> petitioner also pointed out that she was present on May 12, 2022 when the 1<sup>st</sup> respondent was being served with the pleadings in this case. A copy of the affidavit has been annexed. In further support of her averments the 1<sup>st</sup> petitioner avers that the 1<sup>st</sup> respondent swore a verifying affidavit in the said E& L case No 40 of 2020 on September 29, 2020, a copy of which has been exhibited. The 1<sup>st</sup> petitioner denies that the 1<sup>st</sup> respondent is confined to a wheelchair, arguing that he walks on his own, and that the photographs exhibited by the applicant herein are a mere gimmick to hoodwink the court to grant the orders sought.
6. The 1<sup>st</sup> petitioner further avers that in the appeal to the minister which is the subject of this petition, the 1<sup>st</sup> respondent is shown to have testified on his own on February 25, 2022. The said proceedings have also been annexed to the replying affidavit.
7. It is also the 1<sup>st</sup> petitioner's contention that the medical report and receipts relied on by the applicant are not genuine, completely unreliable and unhelpful in this matter. The 1<sup>st</sup> petitioner also wondered



why the 1<sup>st</sup> respondent's wife one Dorcas Mwangi who lives with the 1<sup>st</sup> respondent and who testified in the impugned appeal to the minister proceedings is not the one making the application instead of the applicant who was not a witness. The 1<sup>st</sup> petitioner avers that the applicant who is a police officer has an interest in the subject land and that he was in the company of the 1<sup>st</sup> respondent when he confronted the 1<sup>st</sup> petitioner and threatened her with eviction in order to inherit the land.

8. The application was canvassed by way of written submissions. The applicant filed his submissions dated October 14, 2022 through the firm of Mutuma Gichuru & associates advocates while the petitioner filed theirs dated November 18, 2022 through the firm of Calpeters Mbaabu & advocates.

### **The Applicant's Submissions.**

9. The applicant submitted *inter alia*, that the 1<sup>st</sup> respondent is not a mental patient within the meaning of the [Mental Health Act](#), but is suffering from an ailment diagnosed as senile dementia and that the application herein has been properly brought under the provisions of order 32 rule 15 instead of the [Mental Health Act](#). The applicant also cited the provisions of order 2 rule 14 of the [Civil Procedure Rules](#) which provides that "no technical objection may be raised to any pleading on grounds of any want of form"
10. The applicant relied on the case of [DT Dobie Co Ltd vs Muchina](#), [Dickson Karaba Vs John Ngata Kariuki & another](#) and [Dyson Vs Attorney General](#) and submitted that the application properly falls under the provisions of order 32 rule 15 of the [Civil Procedure Rules](#). The applicant also argued that if the court finds it is necessary to have a full-fledged enquiry into the matter, the applicant is willing to submit to the directions of the court in the interests of justice. The applicant relied on the case of [In re DMN](#) [2019] eKLR, [in re AFO](#) [2022] eKLR and [In re SMW \(Patient\)](#) [2022] eKLR.

### **The Petitioners Submissions**

11. The petitioners submitted that the 1<sup>st</sup> respondent is of good health condition and that a cursory look at and perusal of the receipts relied on by the applicant show that they are engineered and tailor-made for this matter because they do not bear the name or refer to the 1<sup>st</sup> respondent, do not bear the stamp of the alleged chemist, do not bear any signature of the issuer and from one chemist in a span of four years from 2017 to 2021. The petitioners also pointed out that the said receipts are not by any treatment notes or card from any health institution.
12. It is also the petitioner's submissions that the medical report relied on by the applicant is not genuine. This is because it is not drafted on a letter head of the alleged medical practitioner, is not stamped among others. The petitioner's submitted that the applicant has failed to discharge the burden of proof placed on him by section 107, 108, 109 and 112 of the [Evidence Act](#) and urged the court to dismiss his application with costs.

### **Analysis And Determination**

13. The court has considered all the material placed before it. The main issue for determination is whether the court should grant the guardianship orders sought in the application. The petitioners have submitted that the applicant has not complied with the provisions of section 25 of the [Mental Health Act](#), cap 428 Laws of Kenya. The originating summons herein is brought under the provisions of order 32 rule 15 of the [Civil Procedure Rules](#) which states 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.”

14. On the other hand, the [Mental Health Act](#) provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons. Section 2 of the said [Act](#) defines “persons suffering from mental disorder” as “a person who has been found to be suffering under this [Act](#) and includes a person diagnosed as a psychopathic with mental illness and person suffering from mental impairment due to alcohol or substance abuse.”
15. In this case, the 1<sup>st</sup> respondent has not been found to be suffering from mental disorder, but said to be suffering from an ailment described as senile dementia due to his old age. Therefore, because the 1<sup>st</sup> respondent has not been adjudged to be of unsound mind to fall under the [Mental Health Act](#), in my view, the applicant was within his right to bring the current application under the provisions of order 32 and not the [Mental Health Act](#). It is therefore my finding that the application herein is properly before the court and I will proceed to consider its merits.
16. In the case of [MMM V AMK](#) [2016] eKLR, Mativo J ( as he was then) while interpreting the provisions of order 32 rule 15 stated as follows”

“I have given the above rule complete system of thought and in my considered opinion and interpretation, five principles outlined below can be discerned from this rule. These principles are designed to protect people who lack capacity to make particular decisions, but also to maximize their ability to make decisions, or to participate in decision making as far as they are able to do so. These are-;

1. A person must be assumed to have capacity unless it is established that he/she lacks capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.
4. An act done, or decision made under the above rule for or on behalf of a person who lacks capacity must be done, or made in his/her best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”

17. In this case, the medical evidence adduced by the applicant shows that the 1<sup>st</sup> respondent has developed senile dementia which has made him incoherent and lost touch of place, time and person. The petitioners have however challenged the authenticity of the documents presented by the applicant and insisted that the 1<sup>st</sup> respondent is of good health. In [MMM Vs AMK](#) (*supra*) Mativo J went on and stated-;

“However even if both parties had submitted medical evidence confirming their opposing positions, or identical positions, would such a position have satisfied the requirements of order 25 rule 15 cited above. I do not think so. The answer to the said question can be found in the procedure provided under order 32 rule 15 of the [Civil Procedure rules](#), 2010 reproduced above which provides as follows-;



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

18. The court in above case found that for a court to find that prima facie, the person is incapable of protecting his interests, the court is required to hold an inquiry as provided under order 32 rule 15, that is examine the said person in court and considered the medical evidence.
19. Accordingly, I find that since no inquiry has been conducted, the orders sought herein are premature and if granted at this stage, the same will offend the clear provisions of order 32 rule 15 of the Civil Procedure Rules.
20. However, even a cursory look at and perusal of the documents relied on by the applicant, the same as rightly submitted by the petitioners appear to be not genuine. For example, the receipts annexed to the affidavit in support of the originating summons are dated July 3, 2017, December 12, 2017, May 8, 2018, July 14, 2020 and December 20, 2021 all issued by Nakpharm Chemist. I note however that the said receipts bear serial numbers 0758, 0759, 0761, 0762 and 0763 which are almost in a continuous series. The said receipts were issued in a span of about four years. It is questionable therefore whether one chemist could have issued receipts to the 1<sup>st</sup> respondent with successive serial numbers in such a long period of time. Were there no other customers in those four years? Moreover, the said receipts do not bear any stamp. Therefore, I am in agreement with the petitioners submissions that these receipts have been tailor made for this matter, and unfortunately to mislead the court into granting the orders sought herein.
21. In addition, the medical report relied on by the applicant is not only in a plain paper and signed by one who has not even shown his title of a doctor. The same also does not bear any stamp from the alleged practitioner.
22. Accordingly, I find that it is not even necessary to order for an inquiry by the court as to the mental status of the 1<sup>st</sup> respondent since the documents relied on are not genuine. The documents relied on by the applicant in support of his application raise a lot of doubts as to their authenticity and I am not persuaded that the 1<sup>st</sup> respondent is in the state alleged to be in. Moreover, there is no evidence to show that other family members of the 1<sup>st</sup> respondent, including his wife consented to the filing of this application.
23. I am therefore not convinced that the application has been made in good faith.
24. I find that the application is without merit and the same is dismissed with costs to the petitioners.
25. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 8<sup>TH</sup> DAY OF MARCH 2023.**

**In the presence of**

C/A Kibagendi

Carl Peters for petitioner/respondent

Ashaba for 1<sup>st</sup> respondent

No appearance for A.G for 2<sup>nd</sup> – 4<sup>th</sup> respondents

**C.K YANO**



**JUDGE**

