



**Kithinji & another v Mutungi & 3 others (Constitutional Petition  
E004 of 2022) [2023] KEELC 15981 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15981 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
CONSTITUTIONAL PETITION E004 OF 2022**

**CK YANO, J**

**MARCH 8, 2023**

**BETWEEN**

**MARGARET MAKENA KITHINJI ..... 1<sup>ST</sup> PETITIONER**

**BETH KAWIRA KITHINJI (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF MOSES KITHINJI LITHARA –  
DECEASED) ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SAMUEL MWONGO MUTUNGI ..... 1<sup>ST</sup> RESPONDENT**

**D.C.C TIGANIA WEST SUB COUNTY (ON BEHALF OF MINISTER FOR  
LANDS) ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, URRU ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application for determination is the originating summons dated 17<sup>th</sup> June 2022 seeking orders that;
  - i. That the court finds that the 1<sup>st</sup> respondent Samuel Mwango Mutugi is incapable of protecting his interests with regard to his affairs due to senile dementia.
  - ii. That the applicant Kennedy Nkonge be appointed as the 1<sup>st</sup> respondent's guardian ad litem.
  - iii. That the 1<sup>st</sup> respondent's son namely Ken Nkonge Mwango be allowed to manage all the affairs of the 1<sup>st</sup> respondent including his properties the subject of constitutional Petition No. E005 of 2022.
  - iv. That this Honourable court be pleased to grant such further or other relief as may be just in the circumstances.



- v. That petitioners herein be condemned to pay costs for this application.
2. The application is supported by the affidavit of Kennedy Nkonge the applicant sworn on 17<sup>th</sup> June 2022 and further affidavit sworn on 12<sup>th</sup> October 2022 and is based on the following grounds -:
- a) That the 1<sup>st</sup> respondent is advanced in age to wit eighty three (83) and has since lost sight for any kind of litigation.
  - b) That 1<sup>st</sup> respondent is blind thus cannot read and or write.
  - c) 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.
  - d) The 1<sup>st</sup> respondent is also a person of frail health and confined to a wheel chair thus his mobility is exercised with a lot of caution.
  - e) That it is thus necessary to appoint some guardian ad litem for him, and that his son herein the applicant be appointed to manage his affairs.
  - f) 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 originating summons, the applicant has reiterated the above grounds and annexed copies of the national identifies of the applicant and that of the 1<sup>st</sup> respondent, a medical report and receipts, and a photograph allegedly for the 1<sup>st</sup> respondent confined in a wheelchair. The applicant avers inter alia, that 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.
4. In opposing the application, the petitioners filed a replying affidavit sworn by Margaret Makena Kithinji, the 1<sup>st</sup> petitioner herein on 27<sup>th</sup> June 2022. It is the petitioners' contention 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. Relying on advice from their advocate, the petitioners believe that the application is incompetent and fatally defective and should be dismissed.
5. The 1<sup>st</sup> petitioner has dispoed that she knows the 1<sup>st</sup> respondent very well as he hails from Miathene area of Tigania West Sub County which is near Mumui area of the same sub-county where the 1<sup>st</sup> petitioner comes from. The 1<sup>st</sup> petitioner has deponed further that the 1<sup>st</sup> respondent is of a sober mind, good memory and a coherent speech as they see and hear him talk quite often and that the 1<sup>st</sup> respondent has been attending court in Tigania PMC E&L case No. 40 of 2020 in which he is the plaintiff and swore the verifying affidavit, while the 1<sup>st</sup> petitioner is sued as a 1<sup>st</sup> defendants, and that the matter was last in court on 30<sup>th</sup> March 2021. The 1<sup>st</sup> petitioner avers that she was also present when the 1<sup>st</sup> respondent was served with the pleadings herein on 12<sup>th</sup> May, 2022 and that he talked to the process server very clearly and coherently. The affidavit of service has been annexed.
6. The petitioners deny that the 1<sup>st</sup> respondent uses a wheelchair stating that he walks on his own, adding that the photograph annexed to the application herein are a mere gimmick to hoodwink the honourable court to grant the orders sought. The petitioners pointed out that in the appeal to the minister which is being challenged in this petition, it is indicated that the 1<sup>st</sup> respondent testified under oath on 02<sup>nd</sup> March 2021. Copies of the proceedings have been annexed.



7. In addition, the 1<sup>st</sup> petitioner states that certificate of official search from the lands office shows that the 1<sup>st</sup> respondent herein obtained title deed over the subject land as late as 14<sup>th</sup> March 2022, and that ordinarily, he must have signed to acknowledge receipt of the same. The petitioners aver that the medical report relied on by the applicant is not genuine and completely unreliable. It was also pointed out that the 1<sup>st</sup> respondent's wife, Dorcas Mwongo is alive and in good health and was listed as a witness who testified for the 1<sup>st</sup> respondent in the appeal to the minister. The petitioners contend that the applicant has an interest in the land and even threatened the petitioners with eviction, and vowed to support his father who had allegedly given him the land as his inheritance.
8. The application was canvassed by way of written submissions.

### **Applicant's Submissions**

9. The applicant filed his submissions dated 14<sup>th</sup> October, 2022 through the firm of Mutuma Gichuru & Associates Advocates wherein they identified two issues for determination to wit, whether these proceedings ought to have been initiated under the provisions of the *Mental Health Act* and whether they are properly brought under the provisions of order 32 Rule 15 of the *Civil Procedure Rules*.
10. The applicant's counsel submitted 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. That the 1<sup>st</sup> respondent has not been found to be suffering from a mental disorder as defined in Section 2 of the said *Act*.
11. It is the applicant's submissions that dementia is an umbrella term for a group of cognitive disorders typically characterized by memory impairment, as well as marked difficulty in the domains of language, motor activity, object recognition, and disturbance of executive function the ability to plan, organize and obstruct. That generally, dementia is an illness of older adults and referred to the definition by Meriam –Webstar.
12. The applicant's counsel submitted that Mental Health Legislation is aimed as much at social control of feared behavior as protecting the ill/incompetent, while guardianship legislation offers a more holistic response that better meets the patient's needs and could be extended to supplant mental health legislation. In this regard, the applicant's counsel urged the court to the invitation by the petitioners that to a conclusion that the 1<sup>st</sup> respondent should be adjudged to be of unsound mind to fall under the provisions of the *Mental Health Act* as his condition falls under the provisions of Order 32 Rule 15.
13. It is the applicant's submissions that even if the court were to be persuaded that the proceedings ought to have been initiated by way of petition as opposed to originating summons, the court ought to be reluctant to dismiss the same on a technicality. The applicant's counsel cited the provisions of Order 2 Rule 14 and relied on the case of *DT Dobie Co. Ltd v Muchina, Dickson Karaba Vs John Ngata Kariuki & another, Dyson Vs Attorney General*. The applicant submitted that the case properly falls under the provisions of Order 32 Rule 15 of the *Civil Procedure* and urged the court to allow the application.

### **The Petitioner's Submissions**

14. The petitioners filed their submissions dated 18<sup>th</sup> November, 2022 through the firm of Calpeters Mbaabu & Co. Advocates wherein they submitted *inter alia*, that their reasons for opposing the application are because the 1<sup>st</sup> respondent is of good health condition and that the reliefs relied on by the applicant are tailor made because they do not bear the name of, 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 (s) of the same, not accompanied by any treatment notes or card from any health institution, among others. It is



further submitted that the medical report relied on by the applicant is fake because it is not drafted in a letter-head, not stamped, does not indicate the alleged medical practitioner to be a doctor, it is not accompanied by an official receipt for charges to prepare the report, among others. The petitioners submitted that the applicant has not controverted the averments in the replying affidavit and has failed to discharge the burden of proof placed on him by sections 107, 108, 109 and 112 of the [Evidence Act](#), Cap 80 Laws of Kenya.

15. The petitioners submitted that the applicant has not demonstrated any prejudice or injustice which the 1<sup>st</sup> respondent will suffer if the application is not allowed, arguing that if the application is allowed, the petitioners will not have the opportunity to challenge the 1<sup>st</sup> respondent himself with regard to the impugned proceedings in the purported appeal to the minister, case No. 143 of 2020.
16. The petitioners submitted that the 1<sup>st</sup> respondent has not been adjudged to be of unsound mind and cited Order 32 Rule 15 of the [Civil Procedure Rules](#). The petitioner's submissions is that the court has not been moved to inquire and satisfy itself that by reason of the unsoundness of mind or mental infirmity, the 1<sup>st</sup> respondent is incapable of protecting his interest in this petition. That the provisions of Section 26, 27 and 28 of the [Mental Health Act](#) have not been complied with. It is the petitioners' submissions that the originating summons herein is alien in constitutional petitions and that the relief sought is supposed to be applied for through a petition as provided under Section 28 of the said [Act](#). The petitioners urged the court to dismiss the originating summons with costs.

### **Analysis and Determination**

17. 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 herein.
18. The petitioners have submitted that the applicant has not complied with the provisions of Section 26 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”
19. The [Mental Health Act](#) provides for the case 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”
20. In the present application, 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 advanced age. Therefore, since the 1<sup>st</sup> respondent has not been adjudged to be of unsound mind to fall under the provisions of the [Mental Health Act](#), in my view, the applicant was within his right to bring his application under the provisions of order 32 of the [Civil Procedure Rules](#) and not under the [Mental Health Act](#). I therefore find that the originating summons herein is properly before the court, and I will proceed to consider its merits.



21. In the case of *MMM V AMK* [2016] eKLR, Mativo J. ( as he then was) while interpreting the provisions of order 32 Rule 15 of the *Civil Procedure rules* stated as follows-;

“I have given the above rule complete system of thought and in my considered opinion, and interpretation, five principles can be discerned from these rules. 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 effectively achieved in a way that is less restrictive of the persons rights and freedom of action”

22. I have perused the documents annexed to the affidavit in support of the originating summons herein. The receipts are shown to be dated 3<sup>rd</sup> July 2017, 12<sup>th</sup> December 2017, 8<sup>th</sup> May 2018, 14<sup>th</sup> July, 2020 and 20<sup>th</sup> December, 2021, all issued by Nakpharm Chemist. However, it is not only interesting to note that the said receipts do not bear any stamp, but also are in very close series to wit; 0758, 0759, 0761 and 0763. The question that arises is whether a chemist located at Makutano, opposite Meru Central along Kinoru road, which is said to be within the outskirts of Meru town could have issued only two other receipts, serial numbers 0760 and 0762 to other customers other than the 1<sup>st</sup> respondent in a span of about four years. I do not think that is possible that the 1<sup>st</sup> respondent was the only person to buy goods from the said chemist for close to four years. Therefore, I do agree with the petitioners submissions that a cursory look at and perusal of the receipts annexed to the applicant’s supporting affidavit are suspicious and are engineered and tailor-made for this matter.

23. In addition, the medical report relied on by the applicant is not only in a plain paper and signed by one who has not shown his title, but also does not bear any stamp of the alleged medical practitioner. I find that the medical evidence that the applicant relies on to allege that the 1<sup>st</sup> respondent is suffering from dementia to be suspicious and unreliable and I do not think that they are genuine. The documents relied on by the applicant in support of his application raise a lot of doubts as their authenticity and I cannot be persuaded by them to arrive at a conclusion that the 1<sup>st</sup> respondent is in the state alleged to be. Moreover, there is no evidence to show that other family members of the 1<sup>st</sup> respondent consented to the application.

24. I am of the considered view that the applicant has not satisfied this court that the 1<sup>st</sup> respondent is incapable of conducting his defence in the case against him.

25. I find the application to be without merit and it is hereby dismissed with costs to the petitioners.

26. Orders accordingly.



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

In the presence of

C.A Kibagendi

Carlpeters for Petitioners

No appearance for Ashaba for 1<sup>st</sup> respondent/applicant

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

**C.K YANO**

**JUDGE**

