



In re WKAL (Subject) (Miscellaneous Civil Application E003 of 2025) [2025] KEHC 4536 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
MISCELLANEOUS CIVIL APPLICATION E003 OF 2025**

JR KARANJA, J

APRIL 8, 2025

**IN THE MATTER OF WKAL
AND IN THE MATTER AN APPLICATION FOR APPOINTMENT
OF A GUARDIAN AD LITEM**

IN THE MATTER OF

GC 1ST APPLICANT

WCK 2ND APPLICANT

RULING

1. The chamber summons dated 10th February 2025, is an application by GC and WCK [Applicants] made under Section 26 of the [Mental Health Act](#) and Order 32 Rule 15 of the Civil Procedure Rules seeking orders to the effect that: -
 - a. WKAL [subject] be produced in court for the purposes of an inquiry by the Court to establish whether by reason of mental infirmity he is incapable of protecting his interests.
 - b. GC and WCK be appointed guardian ad litem of WKAL.
2. The application is based on the grounds that the Applicants are the daughters of the subject WKAL who was medically evaluated and diagnosed with dementia likely secondary to normal pressure hydrocephalus and is currently in a poor state as to make judgement and is reliant on other persons for self-care including cleaning, feeding and movement. Further that, owing to his medical condition, the subject is incapable of defending his interests resulting to mismanagement of his property and finances.

The averments in the supporting affidavits of the applicants dated 10th February 2025 serve to enhance and solidify the supporting grounds with a contention that parcels of land being Nandi/Kipsigak/1X8 and Nandi/Kaboi/1X0 belonging to the subject are on the verge of being transferred without his consent.



3. Order 32 of the Civil Procedure Rules provides for suits by or against minors and person of unsound mind and Rule 15 of the Provision provides for application of rules to persons of unsound mind in the following terms: -

“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 interest when suing or being sued.”

4. The *Mental Health Act* [Cap 248 Laws of Kenya], “inter-alia” provides for treatment and general management of persons with mental illness and for connected purposes. Its purpose and scope includes ensuring that the rights of persons with mental illness are protected and safeguarded.

Section 26[1] of the Act states that: -

“An application for an order for the management and administration of the estate of a person with mental illness may be made to the court, in the following order of priority by: -

- a. A supporter of the person with mental illness, or
- b. The representative of the person where the person with mental illness has not appointed a supporter”.

5. Under Section 2 of the Act, a “supporter” means a person appointed under Section 31 by the person with mental illness to make decisions on behalf of the person with mental illness according to the will and preference of the person with mental illness.

Part XII of the Act provides for care and administration of property of persons with mental illness. Section 26 of the Act falls under this part together with Section 27 which provides that: -

“(1) The court may make such an order as it considers necessary for the administration and management of the estate of any person with mental illness including: -

- (a) An order making provision for the maintenance of the person.
- (b) An order making provision for the maintenance of members of the person’s immediate family who are dependent upon the person, and
- (c) An order making provision for payment of the person’s debts.

(2) The Court may appoint, a manager of the estate of a person with mental illness for the purposes of safeguarding the property of that person.

(3) The Court may for the purposes of Section [1], appoint the supporter or the representative of the person with mental illness as the manager of the estate of the person under subsection [2].

6. The application dated 10th February 2025 was filed by the Applicants in their capacity as the daughters of the subject individual while the latest application vide the Notice of Motion dated 10th March 2025, was filed by sons of the subject individual, EKL and EK [proposed interested parties] seeking the basic order that they be granted leave to be enjoined as the defendants in this suit. They contend that the



subject was diagnosed with dementia and chronic bilateral subdural/haematoma and has been in their care in terms of medical needs, food, shelter and other requirements. That, since they will be directly affected by orders which may be given by the court it would be equitable to have them enjoined in this matter.

7. It is further contended by the proposed interested parties that the subject individual transferred his interests and property to his son long before being diagnosed with the illness aforesaid and that there is a similar matter before this court, being P & A Miscellaneous Application No. E006 of 2025, in which they [proposed interested parties] have applied to be declared administrators, friends and guardians of the subject individual.

However, the Applicants in the main application dated 10th February 2025, oppose this latest application on the basis of the grounds and averments specified in their replying affidavits dated 28th March 2025, in which they contend “inter-alia” that P & A Miscellaneous Application No. E006 of 2025 was filed after the proposed interested parties were served with the main application and is in any even incompetent before the court as the subject individual is alive, but mentally challenged as to require assistance to transact business. That, there is intention to take legal action against the proposed interested parties on behalf of the subject individual for allegedly taking advantage of the subject's mental illness to defraud him.

8. This ruling is in respect of the latest application by the proposed interested parties which is anchored on a multiplicity of provisions of the Law including Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Orders 40[1], 51[1] & [3] and 3A of the Civil Procedure Rules, Section 10 of the Judicature Act, Rule 3[1] and [2] of the High Court Practice and Procedure Rules and Article 159 [2] [d] [e] of the Constitution.

The grounds for the application are contained in the body of the appropriate Notice of motion and supported by the averments of the first proposed interested party in his supporting affidavit dated 10th March 2025.

9. The application was canvassed by way of written submissions which were duly filed herein by the respective advocates Messrs. Korir, Jepleting & Company Advocates and Messrs. Annasi Momanyi & Company Advocates on behalf of the Applicants in both applications.

Having considered the application on the basis of the supporting grounds, pleadings and rival submissions, it was apparent to this court that the basic issue arising for determination is whether the application is competent and proper before this court and if so, whether the proposed interested parties have demonstrated by way of credible facts and evidence that they deserve to be enjoined as parties and/ or interested parties in this matter.

10. With regard to the first issue, the application is brought by way of notice of motion which in itself presupposes that there is an existing suit or a proper suit for which the applicants ought to be enjoined as interested parties or more specifically, as defendants rather than Respondents in the main application which is also brought by way of a notice of motion.

Both applications come under the title description of Civil Miscellaneous Application No. E003 of 2025 and ought therefore be classified as ancillary and supplementary proceedings or actions which are not strictly civil suits or actions. Such applications are meant to address matters that arise during a civil case without being part of the main dispute or suit. They deal with issues which arise during the civil proceedings and are therefore procedural and ancillary matters in nature.

11. Thus, Miscellaneous Applications such as the present applications herein are not the primary means of commencing suit or action. The legal framework thereof is provided by the Civil Procedure Act and



the Rules made thereunder. Therefore, such applications ought to be anchored on a suit which as a general rule can only be instituted by way of plaint, petition or an originating summons. A Notice of Motion is not legally recognized as an originating process. It can only be within a properly instituted suit [See, *Chacha & Another Vs. Orbit Chemical Industries Limited & Another* [2024] eKLR, *Prote Energy Limited Vs. Hashi Energy Limited* [2019] eKLR and *Norah Ndunge Henry & Another Vs. Abednego Mutisya & Another* [2022] eKLR].

12. Under Section 2 of the *Civil Procedure Act*, the term “suit” means all civil proceedings commenced in any manner prescribed and under Section 19 of the Act every suit shall be instituted in such manner as may be prescribed by Rules.

Order 3 Rule 1 of the *Civil Procedure Rules* provides that every suit shall be instituted by presenting a plaint to the court or such other manner as may be prescribed.

The general rule is that a suit can only be instituted by way of a plaint, petitioner or an originating summons.

13. Herein there is no suit upon which the present application is anchored and indeed, for an order that the proposed interested parties be enjoined as defendants. This position would ironically apply to the circumstances obtaining in the main application which along with the present latest application may be viewed as being gross abuse of the Civil Procedure Process and the entire related process.

In the absence of a suit lawfully and properly instituted the present application by way of the notice of motion dated 10th March 2025 is rendered defective, improper and incompetent before this court suitable for an order of dismissal on that basis alone.

14. But, if the application were proper and competent before this court, then the proposed interested parties would be entitled to an order to be enjoined in the matter as interested parties, more specifically, Respondents, on the basis of their opposition to the main application which is seemingly targeted at them. This is because the entire cause of action is founded on the welfare of the subject individual WKAL, who happens to be the father of the Applicants in both applications and being old and sickly is currently in need of protection and care of the law now that it is clear that his children are squabbling over his property while he is still very much alive in a manner akin to “killing him softly” or wanting him dead at a time not ordained by almighty God.

No doubt, all his children have a stake or interest in his earthly possessions and that is why the application by the proposed interested parties was a foregone conclusion if it were proper before court.

15. In any event, a person is allowed to make an application to be enjoined as a party or interested party with leave of the court and such leave may be granted if the Applicant demonstrates a valid or legal interest in the proceedings and show that his joinder is substantial rather than peripheral or driven by self-ego.

A court may even on its own motion join any interested party to the proceedings before it if it considers it to be necessary to achieve its goal of doing justice to all.

16. Order 1 Rule 10 [2] of the *Civil Procedure Rules* empowers the court to join to any proceedings any necessary parties whose presence is crucial to enable the court to do justice between the parties. It provides that: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or



whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

17. Rule 2 of the *Constitution* of Kenya [Protection of Rights and Fundamental Freedom] Practice and Procedure Rules 2013, defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation and Rule 7 provides that an interested party can apply to be enjoined or the court can move “suo moto” and enjoin a party to proceedings before it.
18. Indeed, with regard to the second issue for determination herein, the answer would be in the affirmative. Otherwise, as a whole, the application be and is hereby dismissed on the basis of the first issue for determination with the parties bearing their own costs and the Applicant’s in the main application being advised to re-consider the application and decide whether or not to proceed with it given the holding of this court hereinabove regarding the competence and property of the proposed interested parties application.

DELIVERED AND DATED THIS 8TH DAY OF APRIL 2025

HON. J. R. KARANJAH,

JUDGE

