



**AMG & another v MAM (Miscellaneous Application E010 of 2023)  
[2025] KEHC 6704 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS APPLICATION E010 OF 2023  
DKN MAGARE, J  
MAY 14, 2025**

**BETWEEN**

**AMG ..... 1<sup>ST</sup> APPLICANT**

**JM ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MAM ..... RESPONDENT**

**JUDGMENT**

1. Life could be easier if everyone were honest and did not engage in subterfuge and skullduggery in order to obfuscate issues and steal a march on parties. The matter herein is a story of fraud, and utter disregard for the rule of law. The 2nd applicant, by stealth, sued the district children officer in guardianship application number 1 of 2018. armed with an order of guardianship, issued by the children’s court on 18.10.2018, she moved to the second level, and she filed this application seeking the following orders:
  - a. The matter be heard exparte in the 1<sup>st</sup> instance.
  - b. The Petition filed herein dated he 12<sup>th</sup> day of October, 2023, be heard at the earliest possible moment by this Honourable Court.
  - c. In the interim the court orders stay of the proceedings in Nyeri children case No. 1 of 2018 pending the determination of this petition.
  - d. The court orders an independent medical exam of the respondent to determine her mental capacity in order enable the lower court make appropriate orders in the best interest of the minor in Misc. Application No.1 of 2018.
  - e. This Honourable Court make any other orders it deems fair an just.



2. This court stayed orders in the Nyeri children's case number 1 of 2018. The suit, on two occasions was dismissed for want of prosecution. The court finally reinstated the same and ordered that the parties submit on the main application.
3. The respondent replied to the said application stating that the application dated 12.10.2023, upon which the application was predicated, has been concluded.
4. Before proceeding, I note that the applicants proceeded on a very wrong premise in filing the suit. They intended to have the applicant examined to establish her mental status. Every person is presumed sane. Even where a person is alleged to be mentally disabled, the appointment of a manager is a prerequisite to a suit. A person cannot sue a mentally disabled person and then expect to get orders against the said person without someone to take care of their interests.
5. It is my understanding that mental disorder still has a stigma attached to it. However, whether suffering from a mental disorder or not, the right to human dignity is paramount. In the case of Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & 5 others; United Disabled Persons of Kenya & another (Interested Parties) (Petition 155A of 2011) [2012] KEHC 5406 (KLR) (Constitutional and Human Rights) (18 December 2012) (Ruling) D S Majanja posited as doth;

Unlike the former Constitution which did not recognize and protect the rights of persons with disabilities, Constitution *the Constitution* now has explicit provisions which provide a foundation for the rights of persons with disabilities (see RM (suing through nextfriend JK) v Attorney General (2008) 1 KLR (G & F) 574). The Preamble and the provisions on national values and principles contained in article 19 lay emphasis on dignity, human rights, and social justice for all persons. In giving effect to the provisions of *the Constitution* and the Bill of Rights, the place of persons living on the margins of society must be articulated as required by articles 19(2), 20, and 21. Article 28 protects the right of any person to be treated with dignity.

6. The 2<sup>nd</sup> applicant is a busybody in regard to the dispute over rights of a child. The first applicant and her mother have continuously treated the Respondent as a child of a lesser god. It is irrelevant whether or not she has mental disability. I listened to her and formed an opinion that she is aware of her status. The harassment the Respondent has endured cannot be countenanced. The only people who can protect the respondent, in case there is a need, is her own family.
7. The Applicants have no legal standing to inquire about the privacy of her medical history. The right to privacy is enshrined in Article 31 of *the Constitution* as follows:

Every person has the right to privacy, which includes the right not to have-

- (a) their person, home or property searched;
  - (b) their possessions seized;
  - (c) information relating to their family or private affairs unnecessarily required or revealed; or
  - (d) the privacy of their communications infringed
8. Inquiring into the mental status of a person without a proper reason is not envisaged in *the Constitution*. There was no basis laid for the enquiry. It is not lost on the court that the order arose from a children's matter. The 2<sup>nd</sup> applicant purported to get guardianship for the minor when both parents are alive. Article 53 of *the constitution* provides as follows:

53. Children (1) Every child has the right
  - (a) to a name and nationality from birth;



- (b) to free and compulsory basic education;
- (c) to basic nutrition, shelter and health care;
- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
- (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
- (f) not to be detained, except as a measure of last resort, and when detained, to be held
  - i. for the shortest appropriate period of time; and
  - ii. separate from adults and in conditions that take account of the child's sex and age.

(2) A child's best interests are of paramount importance in every matter concerning the child.

9. The right belongs to the child. The dispute can only relate to access between the 1st Applicant and the Respondent. The 2<sup>nd</sup> Respondent has no place in the dispute between the duo in an open and democratic society.
10. Article 24 provides for a limitation of rights as follows:
  1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—...
11. There is no basis for interfering with the respondent's right to privacy. The application is thus for dismissal.
12. The issue of costs is governed by Section 27 of the [Civil Procedure Act](#), which provides as follows:
  - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
13. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.



14. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

15. The Respondent was in person. However, she is entitled to disbursements. She has attended court since 2021 over this matter. A sum of 25,000/= will suffice.

#### **Determination**

16. The upshot of the foregoing is that I make the following orders: -

- a. The Application herein dismissed, with disbursement costs of Ksh 25,000/= to the Respondent payable within 30 days, in default execution do issue.
- b. The file is closed.

**DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 14<sup>TH</sup> DAY OF MAY, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Ms Naomi Kiarie for the Applicant

Pro se Respondent

Court Assistant – Michael

