



**In re ET (Miscellaneous Civil Application 203 & 208 of 2023
(Consolidated)) [2024] KEHC 137 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION 203 & 208 OF 2023 (CONSOLIDATED)**

JRA WANANDA, J

JANUARY 19, 2024

IN THE MATTER OF THE MENTAL HEALTH ACT, CAP. 248, LAWS OF KENYA

IN THE MATTER OF MR. ET

DJT.....1ST APPLICANT

LKM.....2ND APPLICANT

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 208 OF 2023

IN THE MATTER OF SECTION 26, 27 & 28 THE MENTAL HEALTH ACT

IN THE MATTER OF MR. ET

RULING

1. The Application before this Court is the Notice of Motion dated 22/08/2023 filed by the Applicants through Messrs Chemwok & Co. Advocates. It seeks the following orders:
 - a. [spent]
 - b. That the Applicants be granted authority to manage ET's properties; and
 - c. That the Court declares ET unfit to manage his properties due to the mental illness he is suffering from.
 - d. [spent]
 - e. That this Honourable Court may make such orders as it deems fit and just in the circumstances.
 - f. That costs be provided for.



2. The Application is expressed to be brought pursuant to Section 22, 26, 27, 28, 38 and 42 of the *Mental Health Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and “all enabling provisions of the law”. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit jointly sworn by the Applicants.
3. In the Affidavit, the Applicants have deponed that they are daughter and son, respectively of the said ET (hereinafter referred to as “the patient”) who was diagnosed with dementia and which negatively affects his mental fitness to make decisions, that since his diagnosis, the Applicants have been the patient’s caregivers, the patient is incapable of managing his properties, his estate is vast and the Applicants have been assigned by the family to take care of him and that the 2nd Applicant is a village elder. The Applicants deponed further that it has come to their attention that some of their brothers have mischievously changed the patient’s bank account signatures and wiped out his entire savings, that the same brothers have also accessed the patient’s milk and tea accounts and are receiving and utilizing the proceeds to the exclusion of the patient and other siblings.
4. Pursuant to my directions, the Application was served upon the rest of the family members.

Responses

5. The family appears to be split on the Application since while some siblings filed Affidavits in support, others filed opposing Affidavits
6. Dr. RTM swore one such Affidavit in support, filed on 29/09/2023 through the same Messrs Chemwok & Co. Advocates. She deponed that she is the 6th born in the family, that it is true there are weird actions done by their brothers specifically NKT, EKM and JKM, by them changing the bank signatures is indeed terrifying and a criminal act, that their act of withdrawing their father’s monies from his account has tormented not their father alone but all of them, that the actions of their said brothers to the extent that there is now no money to use for their father’s medication, clothing and for his own use is in bad state, and that as a family, they never appointed the said brothers to manage their father’s money
7. The second Affidavit in support was sworn by DJ also filed on 29/09/2023 and also through Messrs Chemwok & Co. Advocates. She deponed that their father was not being taken care of well by some of their brothers, that the issue became serious that they had to call a family meeting, that the family resolved that D, the 1st Applicant, be recalled home from her job as a Secretary in a school to take care of their father, that since then, 2016, their father has been properly taken care of, L, the 2nd Applicant, being a driver, was seconded to be driving their father to and from hospital, all was well until July 2022 when the Applicants took their father to the bank to withdraw some funds for medication when the bank informed them that their father was no longer a signatory, it was then that they discovered that all the money had been withdrawn and they suspected the said of the brothers of being the culprits, and that it is then the Applicants decided to take the initiative to correct the situation. She deponed further that an account be given and action be taken against the culprits.
8. The 3rd Affidavit in support was sworn by BJT also filed on the same 29/09/2023 also through Messrs Chemwok & Co. Advocates. She deponed that she is the last-born daughter in the family, that they are 8 siblings and that she supports the Application herein entirely
9. In opposition to the Application, NKT swore the Replying Affidavit filed on 30/10/2023. He deponed that he has the authority of his brothers, EKM and JKM to swear the Affidavit. He exhibited a copy of such authority. He then deponed further that they are 8 siblings, that the freezing orders granted by this Court on 2/10/2023 have paralyzed the running of their father’s estate and that they



have been forced to use their own money to seek medical attention for their ailing 97 year old father, that their father's estate can comfortably take care of him as well as pay all the workers as they have been doing before the freezing orders were issued, that their father has been unwell since 2019, and that there are people taking advantage of their father's mental inability to take over his property.

10. He deponed further that prior to their father falling ill, he the deponent and the said EKM have been managing the Tiret Farm and its Kapsabet Kenya Commercial Bank Account, that prior to their father falling ill, he had appointed his said brother EKM and JKM to assist him (father) to manage the Tiret Farm and Kabiyet Savings & Credit Co-operatives Society Limited account, and that their father had also appointed the deponent and the said EKM to manage the Tiret Farm and his Kenya Commercial Bank Eldoret Branch Account.
11. He further deponed that the Applicants have never been caregivers of their father, that sometime in early this year, some unknown people stole their father's property ownership documents, that they made a report to the police about the theft, that they sought the services of a caregiver whom they pay to take care of their father, nobody had appointed the Applicants to take care of their father, that earlier the Applicants had been withdrawing funds from their father's accounts for their personal use and without their father's consent, that he and his said brothers, EKM and JKM are ready to account for any funds withdrawn from their father's accounts, no irreparable loss would be suffered by the Applicants if the orders sought are denied, in any event, it is the deponent and his brothers, EKM and JKM who shall suffer injury because they have been taking care of their father.

Hearing of the Application

12. On 19/11/2023 when the parties appeared before me, it was agreed that the Application be canvassed by way of written Submissions. I then gave strict timelines for filing of the Submissions. However, none of the parties has filed any Submissions to date. I trust that since the Applicants' Advocates never filed Submissions, the opposing side could not file theirs since they were to file theirs within 14 days after being served. For this reason, I have written this Ruling without the benefit of the parties' written Submissions.
13. It also transpired that curiously, 6 days after the Application herein was filed on 22/09/2023, the said 3 brothers opposed to the Application herein, NKT, EKM and JuKM on 28/09/2023 had filed their own parallel Application *vide* the Petition filed in Eldoret Miscellaneous Civil Application No. 208 of 2023 seeking similar orders to those sought herein by the Applicants. Most likely, they were not aware that the Applicants herein had already preceded them in doing so. For that reason, and since the rival Applications are based on the same set of facts, by the consent of the Advocates for the parties, I consolidated the two Applications. The Ruling herein therefore serves as one decision for the two matters.
14. For the above reasons, I shall for the sake of convenience, refer to the said NKT, EKM and JKM as Respondents in this Ruling.

Analysis and Determination

15. Upon considering the record, including the Affidavits presented, I find the issue that arises for determination herein to be "whether it has been established that the Patient herein is suffering from mental disorder to such an extent as to be incapable of managing his affairs". The second issue that ensues is, "if indeed the Patient is suffering from such mental disorder, who then should be appointed to manage his affairs?"



16. The Applicants have invoked, *inter alia*, the provisions of Section 26 and 28 of the [Mental Health Act](#). Section 26 provides as follows:

- “ 1) The court may make orders—
- (a) for 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.

17. The definition of “a person suffering from mental disorder” is provided in Section 2 of the [Act](#) to mean the following:

“A person suffering from mental disorder” means a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse.”

18. The Applicants have inexplicably not furnished to the Court to support their Application. However, on their part, the Respondents have exhibited a copy of a Medical Report dated 21/08/2023 from St. Luke’s Orthopaedic & Trauma Hospital. They have also exhibited a copy of a Discharge Summary from the same hospital indicating that the Patient was admitted thereat on 29/07/2023 and discharged on 31/07/2023. The Medical Report is signed by one Dr. Eunice Temet and states, *inter alia*, as follows:

“This is to inform you that ET is on treatment and follow up at our hospital for Dementia. He developed progressive memory loss four years ago.

He requires supportive care by his family members to carry on his duties and responsibilities including selfcare.

Kindly accord him any necessary assistance.”

19. Based on the said Medical Report and the Affidavits on record, it is apparent, and it is not contested, that the Patient indeed suffers from a mental disorder and that the disorder has occasioned the diminution of his mental capacity and adversely affected his cognition and with it, the ability to take care of his affairs. Inasmuch as the family members are split over management and authority of the patient’s properties, they unanimously agree that, due to his condition, the Patient is unable to manage his affairs.



20. In the circumstances, I make a finding that the subject is a person suffering from a mental disorder within the definition of the *Mental Health Act*.
21. I may mention though that none of the parties has made any disclosure to the Court on whether their mother, wife to the Patient, is in existence and in case she is, what her views on all these issues is.
22. One more thing, the Respondents, the said NKT, EKM and JKM allege that prior to their father falling ill, he gave them authority or appointed them to manage his affairs including operating bank accounts and businesses. They also state that their father has been ill since the year 2019. Strangely, the letters of authority that they have exhibited are all dated the year 2022. The questions that linger are, if the Patient has been suffering from the dementia condition since the year 2019, how then was he in the year 2022 still able to sign the letters of authority? Was the Patient, a 97-year-old, even in his right senses to do so? If indeed he did sign the letters, did he even know what he was signing? Why did the Respondents conceal and/or not disclose the existence of such letters of authority or the change of bank account signatories to the rest of the family? Generally, why the secrecy among only the three of them?
23. The accusations by the Applicants that the Respondents have been fleecing the Patient's bank accounts no doubt stems from this unexplained secrecy by the Respondents. In the circumstances, and even if it eventually turns out to be baseless apprehension, one cannot blame the Applicants for harbouring such suspicions. Although the Respondents on their part, also in turn allege that earlier the Applicants had been withdrawing funds from their father's accounts for their personal use and without their father's consent, the Respondents have not elaborated further on this allegation of their own. As a result, the Court is unable to act on it.
24. Be that as it may, I will say no more on the lingering questions since this Court has not been moved to interrogate the same.

Final Orders

25. In the end, I direct as follows:
 - i. It is hereby declared that that the said ET, the subject of these proceedings (hereinafter referred to as "the Patient") is a person suffering from a mental disorder within the definition contained in the *Mental Health Act* and accordingly, is unfit to manage his properties due to the mental illness that he is suffering from.
 - ii. Regarding the persons within the family to be granted authority to manage the Patient's properties and act as his Guardians, I direct that, within 21 days, each of the two opposing sides particularized hereinbelow as A and B, respectively, nominate one person from its side who shall then be appointed by the Court to jointly carry out such duties of managing the Patient's properties and acting as his joint Guardians.



<i>A</i>	B
<i>DJT</i>	NKM
<i>LKM</i>	EKM
<i>DJ</i>	JKM
Dr. RTM'	
<i>BJT</i>	

- iii. For avoidance of doubt, the general powers of the two persons to be appointed as joint managers and/or Guardians will not include the power of alienation, sale or transfer of the subject's immovable assets but will include all the powers necessary for the management of such and other assets, and to plead and prosecute and/or defend any action brought by or against the Patient in respect of any of the assets forming part of his estate.
- iv. Within a period of sixty (60) days from the date hereof, the said NKT, EKM and JKM shall each file and serve respective individual Affidavits in Court giving a full and accurate inventory of the assets and liabilities of the Patient and an elaborate and clear Account detailing the manner in which they have managed the affairs of the Patient including the manner in which they have utilized or disbursed funds held in the Patient's respective bank and co-operative accounts and any other income arising from the Patient's assets or properties and the manner in which they have managed the Patient's any other properties including, but not limited to, the Patient's businesses, motor vehicles and title deeds since the time when they took over management thereof. The Affidavits shall also include disclosure of the amounts of money that were in the respective bank and co-operative society accounts at the time when they took over management thereof and the amount currently held therein as balance. The Affidavits and matters stated therein shall also contain sufficient and clear supporting documentation.
- v. Due to the consolidation referred to above, this Ruling also disposes of or addresses the parallel Application instituted vide the Petition filed in Eldoret Miscellaneous Civil Application No. 208 of 2023.
- vi. This being a family matter, I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JANUARY 2024

.....

WANANDA J.R. ANURO

JUDGE

