



**Macharia v Macharia & another (Petition E018 of 2023) [2024] KEHC 4505 (KLR)  
(Constitutional and Human Rights) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4505 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E018 OF 2023  
LN MUGAMBI, J  
APRIL 12, 2024**

**BETWEEN**

**GIKONYO MACHARIA ..... PETITIONER**

**AND**

**JOHNSON MACHARIA ..... 1<sup>ST</sup> RESPONDENT**

**PENINIA WANJUNGU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petition is dated 22<sup>nd</sup> December 2022 and supported by the petitioner’s affidavit of even date.
2. The heart of this petition is the Petitioner’s complaint against the respondents, (his parents), whom he alleges that for a period of over 11 years, starting the year 2011 to 2022, they have been having him arrested and detained in police stations and mental health institutions under the pretext that he has a mental illness.
3. The petitioner complained that the respondents actions is a camouflaged plan aimed at dispossessing him of his properties under the guise of mental illness. He thus contends that these actions are contrary to his constitutional rights under Article 28, 29 and 40 of *the Constitution*. Accordingly, the petitioner prays for the following reliefs against the respondents:
  - i. A conservatory order restraining the respondents from further interfering with the petitioner’s constitutional rights by causing his arrest and detention at police stations and mental health institutions.
  - ii. An order of declaration that the respondents have no parental rights over the petitioner.



- iii. An order of prohibition to prohibit the respondents from claiming, interfering and or in any way dealing with the properties belonging to the petitioner namely Gikonyo Macharia and any other properties he may acquire in future.
- iv. Any other or further relief that this honourable court may deem fit to grant.
- v. The petitioner be granted costs of this petition.

### **Petitioner's Case**

4. The petitioner depones that he has been arrested and detained at Kilimani, Industrial Area, Mathare, Mukurweini, Chiromo Medical Centre and Mathare Hospital. He says this has been instigated by the respondents without any justification. These arrests are said to have been done within his premises in Kilimani.
5. He further depones that the respondents made a report to the effect that his own motor vehicle, a Toyota Voxy, Registration No. KBH 824J had been stolen causing him to be arrested while driving the said vehicle and detained at Mukurweini Police Station that day. His car keys were then handed over to the 1<sup>st</sup> respondent.
6. The petitioner claims that he was sedated with haphazard drugs during the said detentions which had an adverse effect to his health. He asserts that the respondents' actions are intended at taking over his properties at Jannah Villa Estate.
7. He contends that the respondents malicious acts have caused him psychological, financial and physical trauma and violated his rights under Articles 28, 29 and 40 of *the Constitution*.

### **Respondents' Case**

8. The respondents did not file any response or submissions in this matter.

### **Petitioner's Submissions**

9. On 6<sup>th</sup> July 2023, Irungu Mwangi, Ng'ang'a T.T and Company Advocates filed submissions on behalf of the petitioner. Counsel reiterated the averments in the affidavit in support submitted that in the absence of the response from the respondents, the allegations were uncontroverted and the Petitioner had established his case on a balance of probabilities.
10. Counsel relied in the case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 where it was held that:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
11. Additional reliance was placed in *Hon Raila Odinga vs Hon Justice Abdul Majid Cockar* High Court Civil Miscellaneous Application No 58 of 1997 Nairobi, *Law Society of Kenya vs Commissioner of Lands & 2 others* [2001] eKLR and *Gouriet vs Union of Post Office Workers and Others* [1977] 2 W.L.R. 310.



12. Counsel emphasized that the respondents' false and malicious actions had undignified the petitioner, depriving him of his right under Article 28 of *the Constitution*. Further that the respondents' action was illegal and threatened his right to property contrary to Article 40 of *the Constitution*.
13. Counsel assailed that the respondents alleged parental rights over the petitioner ceased when he attained the age of majority and had no right to curtail his freedom of association and movement. Counsel thus urged the court to allow the petition and grant the relief sought.

### **Analysis and Determination**

14. The following are the issues for determination:
  - i. Whether the petitioner's constitutional rights were violated by the respondents.
  - ii. Whether the petitioner is entitled to the relief sought.
15. The threshold of a constitutional petition is specificity and precision in pleading alleged violations of constitutional rights and freedoms. This was the holding in the celebrated case of Anarita Karimi Njeru vs Republic (1979) KLR 154 in which the Court stated:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
16. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR asserted the said principle. It held:

“(349) .... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”
17. In any pleading including Constitutional petitioner, the party who makes allegations has a duty to present them. The *Evidence Act* Cap 80 places the burden of proof on the person who alleges the existence of a fact.

Section

107 provides:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



108. Incidence of burden  
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact  
The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
18. The Supreme Court in *Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others* [2020] eKLR reiterated the need for proof of allegations by the person alleging stating thus:  
“[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:  
“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”
19. Further, in *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015)eKLR the Court explained:  
“  
15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...  
16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:  
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.  
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.  
17. The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi* [2013] eKLR considered the applicability of these provisions as follows;  
We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden



and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

20. Equally, in *Edward Akong'o Oyugi & 2 others v Attorney General (2019)eKLR* the Court had the following words to say:

“

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.

21. The petitioner’s main grievance is that he is has been subjected to a lot of suffering since the year 2011 by his parents (respondents) due to false allegations made by his parents that he has mental illness.

Section 2 of the Mental Health Act defines mental illness as follows:

“person with mental illness” means a person diagnosed by a qualified mental health practitioner to be suffering from mental illness, and includes—

- a. a person diagnosed with alcohol or substance use disorder; and
- b. a person with suicidal ideation or behavior.

22. The Act makes it clear under Part 2 that a person with mental illness retains all his or her rights. In particular, Section 3 states:

Section 3 - Rights of persons with mental illness

Every person with mental illness has the right to—

- a. fully participate in the affairs of the community in any position suitable and based on the person’s interests and capabilities;
- b. access medical, social and legal services for the enhancement of the protection of the rights of the person under the Constitution;
- c. protection from physical and mental abuse and any form of discrimination and to be free from exploitation;
- d. take part in activities that promote the person’s social, physical, mental and emotional well-being; and



- e. receive reasonable care, assistance and protection from their family and the State.

Section 3A - Right to Mental Health Services

1. Every person has a right to the highest attainable standard of mental health services.

Section 3B - Consent to treatment

2. Every health care provider shall, where the person with mental illness has attained the age of majority—
  - a. inform the person with mental illness, of the right of that person to choose an appropriate form of treatment; and
  - b. obtain the written consent from that person before administering any treatment.

23. The petitioner's main complaint is that the respondents are keen on taking over his property on pretext that he is suffering from a mental illness. The Respondents have not come forward to deny or affirm that this allegation as they did not file any response. Even if he were shown to be of unsound mind, the [Mental Health Act](#) still protects a person adjudged to be with mental illness pursuant to provisions of Section 27 of the Act which provide thus:

Orders of the Court

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 the 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).
  4. The court shall, by notice in the Gazette, inform the public of the appointment of a person as the manager of the estate of a person who is suffering from mental illness.
  5. Within fourteen days of the Gazette Notice under subsection (4), any person may lodge an objection to the person appointed as manager.
24. The Court In re of MN alias EMN (A person suffering from Mental Incapacity) (Petition E035 of 2021) [2022] KEHC 10869 (KLR) (23 June 2022) (Ruling) on this issue, observed as follows:

“The case of In Re N M K (2017) eKLR, provide guidelines for the court to consider in determining applications brought under Provisions of Sections 26 and 27 of Cap 248 of the [Mental Health Act](#) as follows:

- “14. in considering an application brought under Sections 26 and 27 of the [Mental Health Act](#), the Court is guided by three main factors:



- a. There must be medical evidence warranting the determination by the Court that the Subject suffers from a mental disorder;
  - b. The person to be appointed to be either a Guardian or Manager must be fit to be so appointed;
  - c. The Court must be satisfied that a proposed Manager will utilize her powers for the benefit and welfare of the Subject.
15. The overriding principle in applying all these factors is that the welfare and best interests of the Subject must be the overall guiding principle.”
25. Turning now to this Petition, the Petitioner wants the court affirm the soundness of his mind to thwart allegations that he says have been falsely made over the years by his parents, i.e. since 2011. The respondents who are his parents did not file any responses meaning that they neither asserted nor denied the claim. That does not however absolve the Petitioner from the responsibility of proving on a balance of probability what he affirmatively asserts in the Petition. In the Book Murphy on Evidence, 14<sup>th</sup> Edition, at pg. 80, the Author writes:

“...if the claimant bears the burden of proof, and fails to persuade the Court that his case has been proved on the balance of probabilities, judgment should be given for the defendant. Moreover, the test is not whether the claimant’s case is more probable than the defendants, but whether the claimant’s case is probably true than not true, i.e. the claimant’s case is measured by reference to the objective standard of probability...”
26. Despite the Petitioner seeking the Court’s intervention in affirming the soundness of his mind and alluding to the fact that he had been taken to mental institutions, he never bothered to call independent medical evidence to affirm his mental status despite stating it has been questioned and caused him to be detained in mental institutions.
27. Further, he went ahead to claim that his parents (the respondents) are after his property. The Petitioner has not provided concrete proof that he has been dispossessed any of his said properties during the period of 11 years he has complained of. In any case, other than merely mentioning that he is propertied, he never tendered evidence of ownership any property that he claims is under threat of being dispossessed.
28. The Petitioner also spoke about numerous arrests and detentions in mental health institutions and police stations but failed to provide proof of those detentions or the dates for the said arrests or detentions in the said mental facilities and police stations yet it was his duty to adduce evidence in support of those allegations. What the Petitioner has excelled in making are bare allegations that he could not support with evidence. As was held *Cia Martiartu v Royal Exchange Corporation* (1923) 1 KB 650 by Lord Brandson:

“...The Judge is not bound always to make a finding one way or the other with regard to facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No Judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of evidence or otherwise, deciding on the burden of proof is the only course for him to take...”



29. Having regard to the foregoing reasons, I find that the Petitioner has not discharged the burden of proving the allegations raised in the Petition on a balance of probabilities. He is thus not entitled to the reliefs sought. I dismiss the Petition with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

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**L N MUGAMBI**  
**JUDGE**

