



**In re CWN (Subject) (Family Miscellaneous Application
E007 of 2022) [2024] KEHC 5324 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
FAMILY MISCELLANEOUS APPLICATION E007 OF 2022
AK NDUNG’U, J**

MAY 2, 2024

**IN THE MATTER OF AN APPLICATION BY BTN TO BE APPOINTED
GUARDIAN OVER THE AFFAIRS AND MANAGER OF THE ESTATE OF
CWNANDIN THE MATTER OF GUARDIANSHIP OF SUBJECT – CWN**

BETWEEN

BTN PETITIONER

AND

JNM RESPONDENT

RULING

1. By way of a Notice of Motion dated 25th September, 2023 Bernard Theuri Ndungu (hereinafter, the Applicant) moved this court for orders;
 - a. Spent.
 - b. Spent.
 - c. That pending hearing and determination of this Petition, this Honourable Court be pleased to grant orders for preservation and maintenance of status quo of the estate of CWN including parcels No. Laikipia/Salama Muruku Block XXXX, Laikipia/Salama Muruku Block XXXX (Muruku) and Laikipia/Salama Muruku Block XXXX(Pesi).
 - d. That the costs of this application be provided for.
2. The application is based on the following grounds;
 - a. That the Applicant herein is the son of the Subject herein who is aged 83 years old.
 - b. The Subject was at all material times relevant hereto legally married to one JNK who since has changed his names to JNM, the two having celebrate their marriage under the African



Christian, Marriage and Divorce Act, Cap. 151 Laws of Kenya way back in the year 1974 but have lived together as husband and wife for over 60 years.

- c. That during the subsistence of the said marriage, the Subject and the said JNM have jointly acquired several properties that form part of their matrimonial properties including Laikipia/Salama Muruku Block XXXX, Laikipia/Salama Muruku Block 1/535 (Muruku) and Laikipia/Salama Muruku Block XXXX (Pesi).
 - d. That the Subject has however suffered from mental incapacity whereby she has been diagnosed with hypertension, dementia and psychosis and is there not in a position to manage her own affairs.
 - e. That the Applicant herein has petitioned to be appointed as the guardian over the affairs and manager of the estate of the Subject herein.
 - f. That there is however imminent danger of the properties of her estate being disposed during the subsistence of the proceedings which will be rendered nugatory and the subject will suffer irreparably as her proprietary interests will have been grossly violated.
 - g. That it is necessary that an order do issue for maintenance of status quo of the aforementioned titles until such time as the Petition will be heard and a guardian will have been appointed to manage the estate of the subject.
3. The application is opposed. In a replying affidavit by JNM (hereinafter the Respondent), it is averred that the application is an afterthought where the Applicant seeks to get certain orders relating to land without full disclosure of facts.
 4. Further, that the current application cannot be granted by this Honourable Court as it lacks jurisdiction over land matters.
 5. It is contended that the prayers sought have already been heard and determined and the court is functus officio.
 6. It is urged that the current injunctive orders against land parcels Nos. Laikipia/Salama Muruku Block XXXX, Laikipia/Salama Muruku Block XXXX (Muruku), and Laikipia/Salama Muruku Block XXXX(Pesi) has been brought before the wrong forum.
 7. Ojare Peter, counsel on record for the Applicant, maintains in a supplementary affidavit, that the court has original jurisdiction to issue any order pertaining to this matter in order to protect the sanity of the current Petition.
 8. I have considered the application dated 25/9/2023. The same seeks orders of preservation and maintenance of status quo of the estate of Cecilia Wanjira Ndungu including parcels Nos. Laikipia/Salama Muruku Block XXXX, Block XXXX and Block XXXX (PESI).
 9. In an application in the same file dated 28.10.2022, the Applicant had sought orders:
 - i. That this application be and is hereby certified as of utmost urgency and the same be heard at the very first priority without the requirement of service at the very first instance.
 - ii. That pending the hearing and determination of this application inter partes, an order of temporary injunction do issue restraining the Land Registrar, Rumuruti Lands Registry, either by himself or through his servants, employees, workers, assigns and/or any other person whatsoever from causing any transaction whatsoever in the form of sub-division, transfer and/



or charge to be registered on Parcels No. Laikipia/Salama Muruku Block XXXX, Laikipia/Salama Muruku Block XXXX(Muruku) and Laikipia/Salama Muruku Block XXXX(PESI).

- iii. That pending the appointment of legal guardian over the affairs of Cecilia Wanjira Ndungu, an order of temporary injunction do issue restraining the Land Registrar, Rumuruti Lands Registry, either by himself or through his servants, employees, workers, assigns and/or any other person whatsoever from causing any transaction whatsoever in the form of sub-division, transfer and/or charge to be registered on Parcels No. Laikipia/Salama Muruku Block XXXX, Laikipia/Salama Muruku Block XXXX (Muruku) and Laikipia/Salama Muruku Block XXXX (PESI).
 - iv. That the cost of this application be provided for.
10. In a ruling dated 13th September, 2023, this court (Kariuki J), stated:
- “The parties have not been divorced but separated; thus, the Court’s finding is that the right forum for the parties to litigate the dispute in accordance with Section 17 (b) of the *Matrimonial Property Act* is in the Family Court. There is no claim over the parcels of land sought to be preserved, which can only be heard by the Environment and Land Court or this Court if claimed as Matrimonial properties under the relevant provisions of the law. In any case, the Applicant cannot claim the parcels of land on behalf of the subject before he had been appointed to be the subject’s guardian. (Emphasis added)
- Thus, in sum, I find that this court has no jurisdiction to entertain the Application in its form and content.”
11. An application for appointment as a guardian of a person suffering from mental disorder (the subject) or as a manager of the estate of such a person is a necessary application to protect the interests of the subject. Such interests include property owned by the subject and any legal claims he or she may have against any other person.
 12. In the present application, the Applicant’s posits that the Subject is entitled to land as matrimonial property acquired by herself (the Subject) and the Respondent. As correctly put by Kariuki J in the ruling above, such a claim cannot be resolved in the jurisdiction that the Applicant has invoked.
 13. While my respectful view is that the court invoking its inherent powers can issue orders preserving the estate of a subject in a matter like this, such orders cannot be issued in a vacuum. A Subject’s legal right must have been established over the property in question.
 14. The wording in the prayers in the application betrays the applicants. It is yet to be established that parcel numbers Laikipia/Salama Muruku Block XXXX, Laikipia/Salama Muruku Block XXXX (Muruku) and Laikipia/Salama Muruku Block XXXX (PESI) form part of the subject’s estate. That question must of necessity await resolution in a proper suit filed in a court of competent jurisdiction.
 15. In our instant suit, there is no evidence of the Subject’s legal right to the Parcels of land the target of this application. What is clear is that the Applicant believes that the said parcels are matrimonial property. In essence, the Applicant’s position is that the Subject has a cause of action against the Respondent. A cause of action cannot whatsoever be a basis for injunctory orders when enforcement of such a cause of action has not been placed before a court of competent jurisdiction which court would have the opportunity to weigh the evidence presented and decide the matter one way or the other.
 16. If the proprietary rights over the property was prima facie established, the court would not hesitate to preserve the estate. The same would apply if there was a litigation for or against the subject whereby in the interests of justice the court invoking inherent powers would readily grant orders staying such proceedings awaiting the appointment of a guardian/manager.



17. Such is not the obtaining situation in the matter. In a mind boggling state of affairs, instead of the Applicant persuing his application to be appointed a guardian, a very necessary step to give him the locus standi to sue on behalf of the subject in a claim for the said property, the Applicant found it fit to regurgitate the same application he had filed earlier and which had been dismissed by court.
18. Within this background, it is manifestly clear that the best the Applicant needs to do, and in haste, is to prosecute his Petition dated 28th October 2022 where, should a favourable outcome go his way, he would have the necessary *locus standi* to articulate any claims the Subject may have against any person(s) before a competent court(s).
19. With the result that the application dated 25th September 2023 fails and is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF MAY 2024.

A.K. NDUNG’U

JUDGE

