



REPUBLIC OF KENYA



**Tenai & another v Malel (Petition E031 of 2022)
[2023] KEHC 3224 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E031 OF 2022
RN NYAKUNDI, J
APRIL 20, 2023**

BETWEEN

MALAKI KIBETI TENAI ALIAS MALAKI KIBET TENAI 1ST PETITIONER

TIMOTHY KIPCHIRCHIR KIMALEL 2ND PETITIONER

AND

VILLINE JEMELI MALEL RESPONDENT

RULING

1. The applicants approached this court vide a Notice of Motion dated 14th December 2022 seeking the following orders;
 - a. Spent
 - b. That pending hearing and determination of this application inter-partes and thereafter the petition, there be stay of further proceedings in Eldoret Chief Magistrate's Divorce Cause No 116 of 2022.
 - c. That the Applicants/ Petitioners be authorized to withdraw funds from Kenneth Kibichi Malel's account No 011161XXXXXXXXX at Co-operative Bank for purposes of paying his bill at St. Luke's Hospital, Eldoret.
 - d. That pending the hearing and determination of this application inter-partes and the main petition, the Petitioners/Applicants be appointed jointly as Guardians Ad Litem for the estate of one Kenneth Kibichii Malel with powers to manage, safeguard, prosecute and/ or defend any legal actions brought against his estate.
 - e. That pending hearing and determination of this application inter-partes an order of temporary injunction do issue against the Respondent, her relatives anybody acting under her instructions particularly those currently forcefully living in the residence of Kenneth Kibichii



Malel be ordered to immediately vacate the said premises under the supervision of the OCS, Langas Police Station.

- f. That pending the hearing and determination of the main petition the Petitioners/Applicants be Jointly appointed as Guardian Ad Litem for the estate of Kenneth Kibichii Malel with powers to manage, safeguard, prosecute and/or defend any legal actions brought against the estate of the said Kenneth Kibichii Malel.
 - g. That pending the hearing and determination of this application inter-partes, a DNA test be conducted on the children allegedly sired by Kenneth Kibichii Malel and the Respondent herein with a view of determining their paternity.
 - h. That should the DNA results in (6) above return negative, any certificate(s) of birth issued to any and/or all the alleged children be accordingly rectified by removing the name of the said Kenneth Kibichi Malel as their father.
 - i. That costs of this application be in the cause.
2. The application is premised on the grounds set out therein and the contents of the supporting affidavit deposed by the applicants.

Applicant's Case

3. The applicant's case is that Kenneth Kibichii Malel suffers from mental infirmity and as such the Respondent has taken advantage of his aforesaid mental infirmity to his disadvantage hence rendering appointment of the Applicants/ Petitioners as his Guardian Ad Litem necessary. The applicants contend that the Respondent has instituted Chief Magistrate's Divorce Cause No 116 of 2022 which the said Kenneth Kibichi Malel lacks the legal capacity to defend in person owing to his mental infirmity. That the paternity of the children sired by the Respondent is in dispute hence rendering DNA necessary and further, that the said Kenneth Kibichi Malel is currently hospitalized at St. Luke's Hospital hence requires funds to meet his bills and other incidentals. The applicants stated that it is necessary that preservatory orders do issue in the best interest of justice in order to preserve the substratum of the main petition and Kenneth Kibichi Malel stands to suffer substantial loss and damage should orders sought herein not be granted as prayed.
4. Learned counsel for the applicants swore a further affidavit dated 28th December 2022 and an affidavit dated 25th January 2023 wherein she produced the respondents' disability card and a letter from the treating doctor as evidence that he underwent surgery and had part of his brain removed.

Respondent's Case

5. The respondent opposed the application vide a replying affidavit where she stated that she has been married to Kenneth Kibichii Malel since 2008 and they have been blessed with five issues. She stated that at the time she got married to her husband she was single with two children namely Darius Kiprotich Bichii and Joylene Jepleting Bichii who he offered to adopt and gave them the surname Bichii. She denied that he had suffered any mental infirmity. She further deposed that the petitioners are children of her husband's step brothers and as such they lack legal capacity to bring this petition by dint of section 26(1) (b) of the [Mental Health Act](#) as they are not his near relatives.
6. It was her case that a medical procedure involving the brain does not amount to a mental disorder within the meaning of section 2 of the [Mental Health Act](#). Further, that since he has never been diagnosed with a mental condition, nor treated for any medical condition he is not considered as a person suffering from mental disorder and as such the [Mental Health Act](#) does not apply to him. She



urged that the petitioners have not produced any medical report diagnosing him of any mental disorder neither have they disclosed the nature of the mental disorder, the hospitals that he has attended and the treatment given. That her husband has been operating his own bank accounts since they got married and they also operate a joint bank account number 0110918XXXXXXX at Cooperative Bank, Eldoret Branch and have been jointly making withdrawals since he is a man of sound mind. Learned counsel for the Respondent submitted that there are glaring facts to shoe the court that Mr. Malel is of sound mind which include the withdrawals from the joint bank account they hold, the objection proceedings he lodged in respect of the estate of the late Priscah Malel vide Eldoret High Court Succession Cause No 97 of 2006, Eldoret Environment And Land Case No260 of 2016 where he was sued and defended himself, the cautions he registered on Pioneer/Langas Block I(Malel)582, 583,587,589,590, 591,403 and 412 on 24th February 2021 which are all in his name among others.

7. She stated that the Petitioners have not laid any basis for DNA testing of their children but are seeking to intrude into their family or private life. Further, that such intrusive inquiry offends the provisions of Article 31 (c) of the Constitution and is unlawful and unconstitutional.
8. Learned counsel submitted the Petitioner in the said divorce cause filed on 9th November 2022 served the Respondent on Mr. Kenneth Kibichii Malel with notice under Rule 7(1) and 14 (6) of the Matrimonial Causes Rules but the said Respondent never entered appearance and for that reason the Petitioner requested for judgment and the case is now fixed for formal proof hearing on 25th January 2023 which hearing notice was duly served. Further, that allowing the prayer for stay of proceedings in the Eldoret Chief Magistrate's Divorce Cause No 116 of 2022 will deny the Petitioner in that Cause her constitutional right of access to justice and right to be heard without delay.
9. Learned counsel for the respondent submitted that the prayer for an order of temporary injunction against the Respondent, her relatives anybody acting under her instructions particularly those currently forcefully living in the residence of Kenneth Kibichii Malel be ordered to immediately vacate the said premises under the supervision of the OCS, Langas Police Station is a jumbled-up prayer because in actual sense the Applicants are seeking an eviction order against the Respondent for allowing her relatives to stay in their matrimonial home. She urged that there is no evidence that the subject herein has ever complained about relatives of the Respondent who are forcefully living in their matrimonial home. She cited the cases of cited the cases of Kenya Limited, v Mark Makwata Okiya Civil Appeal No 69 of 1991: Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125 and Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR in support of this submission.

Analysis & Determination

10. Upon considering the pleadings and submissions, I have identified the following issues for determination;
 1. Whether the said Kenneth Kibichii Malel suffers from mental infirmity as per the Mental Health Act.
 2. Whether there should be stay of proceedings in Eldoret Chief Magistrate's Divorce Cause No 116 of 2022.
 3. Whether the applicants have the capacity to seek orders to be appointed Guardians Ad Litem.
 4. Whether the orders for DNA tests should be granted.



Whether the said Kenneth Kibichii Malel suffers from mental infirmity as per the [Mental Health Act](#).

11. The application is pegged on the mental capacity of Kenneth Kibichii Kimalel as it is the basis upon which the orders for stay of proceedings and appointment of guardians ad litem are sought. Section 2 of the [Mental Health Act](#) defines "person suffering from mental disorder" as follows means a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse."
12. It follows that in order for one to be considered as suffering from mental infirmity, the same requires a diagnosis. The applicants attached what they term as the 'treating doctor's notes' as evidence of the said infirmity. I have perused said letter dated 19th September 1999 and reproduce the doctor's words verbatim;

Kenneth Kimalel is currently hospitalized at this institution. He has undergone surgery in his brain to remove a malignancy. It is anticipated that he will be hospitalized for an indeterminate period of time to undergo radiotherapy, chemotherapy and rehabilitation.

13. The letter is from close to 24 years ago to begin with. Further, it does not disclose any mental infirmity or confirm that it is to be considered a diagnosis. Mental infirmity is a serious condition that would render one almost completely out of control of his daily life and therefore a more thorough medical report would be required to suffice the orders sought. It is my strong view that a letter from 24 years ago cannot be proof of mental infirmity. further, a National Council for Persons with Disabilities is not evidence of a diagnosis. The applicants are obligated to attach a medical report by a psychiatrist to demonstrate the mental condition of the subject by an expert in an application of this nature. This principle was enunciated in the persuasive case of case of *In the Matter of Gerison Kirima* [2009] eKLR where the court held:-

The petitioner while bringing in a petition for orders under section 26 of the Act has to show the court by providing medical reports to substantiate the averment made in the petition. The petitioner, when he comes before the Court, has to show prima facie that the person against whom the orders are sought is a person suffering from mental disorder so as to be incapable of coping the ordinary demands of life and the orders sought is for the welfare of the person concerned.

This satisfaction by the court has to be based on the medical reports annexed to the petition. I humbly agree that the court as per the provisions of the Act has no jurisdiction to enter into the arena of dispute so as to assist either party to substantiate their respective claims."

14. As the court is not an expert in the area of medical conditions, it will always rely on an expert for such evidence. In the absence of the same, the applicants have failed to prove that Kenneth Kibichii Kimalel suffers from mental infirmity.

Whether there should be stay of proceedings in Eldoret Chief Magistrate's Divorce Cause No 116 of 2022

15. The application for stay of proceedings is anchored on the claim that Kenneth Kibichii Kimalel lacks the mental capacity to defend the suit in person. Having established that the applicants have failed to prove said lack of mental capacity, it follows that the prayer for stay of proceedings cannot be granted.



Whether the applicants have the capacity to seek orders to be appointed Guardians Ad Litem.

16. Custody and management of guardianship is guided by section 26 of the *Mental Health Act* which stipulates 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 applicants claim to that Kenneth Kibichii Kimalel is their paternal uncle whereas the respondent states that they are his step nephews as they are his half-brother’s children. It is my considered view that they cannot be considered near relatives for the purpose of this application. Further, as Kenneth Kibichii Kimalel has not been proved to lack capacity, the applicants cannot seek said orders as he does not require any guardianship. In the premises, the prayer for appointment as guardians ad litem fails.

Whether the applicants should be authorized to withdraw funds from Kenneth Kibichi Malel’s account No 01116185651200 at Co-operative Bank for purposes of paying his bill at St. Luke’s Hospital, Eldoret

18. The applicants sought to have access to the bank account of Kenneth Kibichii Malel for purposes of paying his hospital bill. In the supporting affidavit, at paragraph 14, they refer the court to a copy of his interim bill annexed as E. Upon perusing the affidavit there is no such annexure as the last annexure is the hearing notice for the divorce cause in the Chief Magistrate’s Court. It is trite law that he who alleges must prove. The applicants failed to annex said bill and therefore there is no evidence that there is a bill to be paid or that Kenneth Kibichii is hospitalized. This prayer therefore fails.

Whether the temporary injunction sought should issue

19. I have considered the prayer for a temporary injunction and it is my considered view that the same is a prayer for eviction orders clothed in a prayer for a temporary injunction. The applicants have not provided any evidence that there is anyone forcefully living in the residence of Kenneth Kibichii Kimalel. Further, given that the applicants have failed to prove that he suffers from mental infirmity, the court cannot grant said orders as he is, as far as this court is concerned, of sound mind, and as has not approached this court for any injunctive relief or an eviction. The applicants have not laid down the basis for said orders by way of fact or law and therefore the same cannot be granted.



Whether the orders for DNA tests should be granted

20. The applicants sought an order for DNA tests to be conducted on the children and if negative, their certificates of birth be rectified by removing the name of the said Kenneth Kibichii Kimalel as their father. Learned Counsel for the applicants has not laid down the legal basis for this order. In fact, the only reference to this prayer is in the application and it is not discussed any further. Given that the applicants have failed to establish that Kenneth Kibichii Kimalel is of unsound mind it follows that there is no basis to interfere with his family or determine paternity of his children if he has not sought the same. I decline to grant these orders as they are unmerited.

21. In the premises the application is dismissed for lack of merit with costs to the respondents.

DATED, SIGNED AND DELIVERED ON THIS 20TH DAY of APRIL 2023

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R.NYAKUNDI

JUDGE

In the Presence of

M/s Isiaho Sawe & Co. Advocates for the Petitioner

Z.K Yego & Co. Advocates for the Respondent

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