



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. E018 OF 2021

CNK.....1ST APPLICANT

GBA.....2ND APPLICANT

VERSUS

JWO.....1ST RESPONDENT

PO.....2ND RESPONDENT

RULING

1. The Amended Notice of Motion, dated 11th March 2021, seeks orders to restrain the IG Sacco Limited Kakamega Branch from making payments to anyone by whatever means out of account number 006-xxxx, belonging to PO, referred to as person with disability. It also seeks that the said person be declared as a person with disability, orders be granted to allow the applicants access to him, the applicants be appointed his legal guardians and the managers of his pension from the Ministry of Finance and account number 006-xxxx, and costs of the suit.

2. The background is that the applicants are the wives of the subject person, while the respondents are his son and wife. The subject person is a retired teacher, who is said to be terminally ill and bedridden after suffering a stroke. He is said to be disabled and cannot move or walk without being supported, and cannot communicate well, and often loses speech. He is said to be unable to manage himself. He is said to have memory loss and to be mentally unstable. It is averred that prior to his condition deteriorating, he had appointed, without due process, the 1st respondent as his representative to manage his pension and other monetary affairs. It is submitted that that a huge amount of money has been wrongly moved from his pension account by the 1st respondent in collusion with the cooperative society where the account is held. It is averred that legal guardians be appointed to manage his pension funds, and to trace and recover the moneys that might have been misused. It is stated that upon appointment, the applicants may file a substantive suit against the respondents.

3. The applicants have attached a huge bundle of documents to support their case. The first document, which appears to be an affidavit is faint and illegible. Then there is a bundle of photographs. Followed by a bundle of handwritten medical notes. There is a letter from a medical officer of health, Dr. Chitayi, dated 28th March 2012, saying that the subject person had had a hemorrhagic stroke, and was unable to talk or walk well, and was on medication. There is another letter from the Pensions Department, dated 1st November 2019, awarding to the subject person a monthly pension. That is followed by a statement of account from IG Sacco Limited Kakamega Branch with respect to account number 006-xxxx. There are birth notifications for CMO and CCM. The last document is a fees statement from Kisii University.

4. The respondents have both responded to the application. JWO, the 1st respondent, acknowledges the applicants to be the wives of the subject person. He says the 2nd applicant sold her land to the 1st applicant and relocated to a residence within Kakamega town, which was unknown to the subject person, and that she only visits the subject person whenever she needs money. He avers that she has school going children, whose school fees are paid by the subject person. He further avers that the subject person stays with the 2nd respondent, and cares for him without any support from the applicants.

5. On her part, the 2nd respondent avers to be the first wife of the subject person, and that she has been staying with him and taking care of him since 2011 when he suffered stroke. She asserts that the applicants have never bothered about the subject person ever since he suffered the stroke. He asserts that the subject person is of sound mind and understanding, with respect to his financial affairs, and that he has been going to the bank with the assistance of the 1st respondent to do his financial transactions. She avers that she has never misappropriated his funds. She avers that the 1st applicant had a house next to hers, but never visits the subject person. The said 1st applicant has adult children who also never visit the subject person. She further avers that the 2nd applicant sold land which the subject person gave to her and relocated to another place unknown to the subject person. She reiterates that the 2nd applicant has school going children, whose school fees are paid by the subject person. She asserts that the subject person attends physiotherapy, and is not bedridden as alleged, and walks without aid of a wheelchair. She says that the application is not made in good faith.

6. An order was made on 27th May 2021, for the joinder of IG Sacco Limited as an interested party. The said interested party has not filed any papers, or, at least, I have not seen any papers on record filed by it.

7. The starting point should be with the competence of the application before me. It would appear to be premised on the Persons with Disability Act. No. 14 of 2003. That is a general law, which spells out the rights of persons with disability in general, and how they are to be treated in public and private. It also establishes national institutions to deal with issues relating to person with disability, and spells out the responsibilities of national government with respect to the subject of persons with disability. The law does not provide for appointment of guardians for persons with disability, and for management of their estates. Consequently, there would be no basis for the court to grant orders declaring the subject person a person with disability, appoint guardians over him and vest his estate in those persons. That law does not grant the court with such powers, and the court cannot exercise such powers, under that Act, where they have not been granted to it by that law.

8. The law that deals with these matters is the Mental Health Act, Cap 248, Laws of Kenya, whose object is to amend and consolidate the law relating to the care of persons who are suffering from mental disorder or mental subnormality with mental disorder; for the custody of their persons and the management of their estates; for the management and control of mental hospitals; and for connected purposes. Perhaps this is what the applicants had in mind. Part XII, of the Mmental Health Act, which covers sections 28 to 39, provides for judicial power over persons and estates of persons suffering from mental disorder. The said provisions provide for such things as powers of court to order custody managemnet of estates and guardianship, powers of managers in respect of the estate, power to apply property for maintainance of the persons suffering from metal disorder, powers of court over proeprty where no manager has been appointed, execution of conveyances and powers of manegrs under orders of court, furnishing of inventory and annual acocunts, removal of managers and guardians, termination of ppaointment of managers, orders on recovery of the persons previously suffering mental disorder, procedures and powers of the Chief Justice to delegate power to magistrates. Procedures on matters under this Part are regulated by the Rules made under the Act.

9. Clearly, therefore, if the application is premised on the Persons with Disability Act, rather than the Mental Health Act, then it must be fundamentally flawed, in terms of both content and process.

10. Am told that the disability of the subject is physical and mental infirmity, arising from a stroke that the deceased suffered. Mental or physical disability is determined by medical personnel and authorities. It is not enough for the persons coming to court to be appointed guardians of another and to take over his estate to rely merely on their affidavits. They must place on record medical records to show that the subject person was unable to manage their own affairs, hence the application, due to a medical condition, certified by a doctor in the medical report. It is about disability. A doctor must certify the disability, specifically that the subject person was unable to manage themselves and their affairs due to the disability, hence the need for appointment of guardians for their person and managers for their estate. Under the Mental Health Act, clearly the disability must be of a mental nature. Doctors who deal with mental issues are psychiatrists, and the medical report to be placed before the court must be by a qualified psychiatrist, and not just any other doctor. Secondly, Judges, magistrates and Advocates are, mostly, not qualified medical persons, and, therefore, the report to be placed on record must be one prepared specifically for consumption by the court, hence it is referred to as a medico-legal report. Its contents must be aligned to the purpose for which it is required, and, in such case as this, it must be aligned to the purposes of the Mental Health Act.

11. The applicants have not attached a medico-legal report. What I have seen on record are handwritten medical or treatment notes. Such notes are not prepared for consumption by courts for legal purposes, but rather by medical personnel, for diagnosis and prescriptions. They do not qualify as medico-legal reports. In any case, most lawyers, meaning Advocates, Judges and magistrates, cannot interpret whatever the handwritten treatment notes say, since they are in medical rather than legal terms. What is closer to a medical legal report, in the record before me, is the letter, addressed to whoever it may concern, dated 28th March 2012. It merely states what the subject person was suffering from, the treatment he was getting and his physical condition. Firstly, the document is ten years old, and, therefore, it cannot be a true reflection of the current state of affairs. Two, it does not address the mental condition of the subject person. It merely says he was unable to walk or talk well. It is silent on whether he was unable to manage his person and his affairs, for that is what the Mental Health Act is about. A person may be paralyzed, wheelchair-bound and lost of speech, but be in full control of his faculties. Only a psychiatrist can certify a person to be so mentally unwell as to be unable to manage his person and his affairs.

12. The respondents have contested the contentions by the applicants, and have asserted that the subject person was not bedridden as alleged. They aver that he even does his own bank or financial transactions. Unhelpfully, the respondents have not placed on record any medico-legal report by a psychiatrist to support their assertions. I do not, therefore, have any basis upon which to decide whether or not the subject person was in need of care as to require appointment of guardians for his person and managers for his affairs.

13. Consequently, I am unable to grant the orders sought in the amended Motion, dated 11th March 2021, which I hereby dismiss. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF FEBRUARY 2022

W. MUSYOKA

JUDGE

MR. ERICK ZALO, COURT ASSISTANT.

**MRS. CHUNGE, INSTRUCTED BY ELIZABETH CHUNGE & COMPANY, ADVOCATES,
FOR THE APPLICANTS.**

MR. OTINGA, INSTRUCTED BY OTINGA OCHUME & CO., ADVOCATES, FOR THE

RESPONDENTS.

MR. NANDWA, INSTRUCTED BY NANDWA & COMPANY, ADVOCATES, FOR THE INTERESTED PARTY.