



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT MISC. CASE NO. 1161 OF 2013

RWN.....PETITIONER

VERSUS

MKN.....RESPONDENT

NMN.....1ST INTENDED INTERESTED PARTY/APPLICANT

JKN.....2ND INTENDED INTERESTED PARTY/APPLICANT

RULING

1. Through a Petition dated 26/11/2013 filed in court on 29/11/2013, the late RWN petitioned this court for orders that:

- a. PNK (hereinafter called the “Patient”) be declared to be suffering from mental disorder as defined under the Mental Health Act (CAP 284) Laws of Kenya;**
- b. Management Orders of the estate of the Patient be made;**
- c. The Petitioner be appointed as guardian of the patient;**

2. The late RWN described herself as the wife to the subject of the petition, PNK and in the said petition reflected three children of the marriage.

3. The late RWN passed away on 2/11/2014 before the application was heard and was subsequently substituted by one of her sons, MKN.

4. The petition was finally heard and determined on 3/12/2015 and allowed as prayed.

5. The intended Interested Parties filed the application dated 29/11/2019 seeking orders that:

1. Spent

2. Spent

3. THAT upon the hearing and determination of this Application, this Honourable Court be pleased to set aside the order for guardianship issued to MKN on 4th December, 2015.

4. THAT upon hearing and determination of the Application this Honourable Court be pleased to order that the interested parties be included as managers to PNK’s property and have equal rights over his guardianship.

5. THAT MKN be removed as PNK’s guardian due to incompetence and failure to execute his mandate as per the responsibilities bestowed upon him by the law.

6. THAT the costs of this Application be provided for.

6. The application is premised on the grounds set out in the application and is supported by the affidavit sworn by the 1st Applicant, NWN. It is deponed that the late RWN failed to disclose material facts to the court. That the late RWN had separated from PNK who is the subject of the proceedings herein. That it was also not disclosed to the court that the 1st Applicant was married to PNK and they were blessed with a son, JKN, who is the 2nd Applicant herein who was born in the year 1984.
7. That following the separation, the late RWN moved with her three children to the United States of America until the year 2012 when she returned to Kenya. That after her return to Kenya, RWN forcefully evicted the 1st Applicant from the matrimonial home. The Applicants further deponed that the 1st Applicant was initially working as a househelp for PNK and following the separation with the late RWN, their close relationship culminated in a marriage and the birth of their son, the 2nd Applicant. That when RWN died, she was buried at her father's property which under Kikuyu Customary Laws symbolized that she had divorced her husband and could not be buried at her former matrimonial home.
8. The Applicant's contention is that the Guardianship Orders herein were obtained without their knowledge and without their interests being taken into consideration.
9. The Applicants have described the Respondent herein, MKN, as someone who lives in the United States of America and has no interest or capability to manage the affairs of PNK. It is further stated that the Respondent is likely to lock out the Applicants from these proceedings yet the outcome will affect them. That the Applicants as the beneficiaries of the subject herein, PNK, are entitled to an equal say in his matters wellbeing, properties, etc and their interests ought to be protected.
10. The application was opposed. It was denied the 1st and 2nd Applicants are the wife and son respectively to PNK. It was stated that the affidavit of customary marriage exhibited by the Applicants is a forgery. That the said PNK had no capacity to marry the 1st Applicant as he was already married and was mentally sick by the time of the alleged marriage with the Applicant.
11. It was further asserted that PNK lives in Gatundu North, Kiambu County and his needs are taken care of by the Respondent who has engaged somebody to take care of him on 24-hour basis. That the 1st Applicant resides in Nairobi. It is contended that the application at hand has been filed after unreasonable delay, has been overtaken by events and is an abuse of the process of the Court.
12. In response to the averments by the Respondent, the Applicant reiterated the contents of the supporting affidavit and stated that there has been no unreasonable delay as the parties herein have been actively engaged in other cases.
13. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.
14. The Supreme Court of Kenya in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR** defined an interested party as;
- “...Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”***
15. The Supreme Court of Kenya in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** set out the guiding principles for such applications as follows:
- “One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:***
- (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.***
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.***
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”***
16. Taking into account the foregoing guiding principles on whether to admit an Interested Party in the proceedings before court, the main issue in the instant case boils down to whether the Applicants are family members of PNK. There is no dispute that PNK is a person suffering from Mental disorder who requires care and management of his property. Without the settlement of the issue whether the Applicants are family members of PNK, it would not be possible to say whether the Applicants have a stake in the proceedings herein or whether they would be affected by the same.
17. The Applicant's evidence is that the 1st Applicant was married to PNK under the Kikuyu Customary Law. The details of the said marriage have not been disclosed. The affidavit exhibited by the Applicants in which PNK is said to have deponed that he was married to the 1st Applicant under Kikuyu Customary Law is contested by the Respondent as a forgery.

18. The evidence of divorce between PNK and the late RWN is said to be reflected in the order attached to the Applicants' affidavit in support. The said order is dated 27/8/1992 and is issued by the Senior Principal Magistrate's Court, Nairobi Civil Case No. Maintenance 42 of 1992. It is reflected therein that the couple were no longer bound to cohabit and that the late RWN was granted the custody of the three children of the marriage. There is no evidence of any divorce proceedings and the decree thereof. This raises the issue of PNK's capacity to marry the 1st Applicant.

19. The Respondent has exhibited a certificate of marriage under the then Marriage Act CAP 150 Government of Kenya between PNK and the late RWN dated 10/12/1977. The Marriage certificate has not been disputed. Medical documents exhibited by the Respondent indicate that PNK was being treated for mental disorder way back in the year 1991. This once again raises the issue of capacity of PNK to marry the 1st Applicant. By virtue of the application at hand, there is acceptance by the Applicants that PNK is not capable of managing his affairs.

20. Whether the 2nd Applicant is a son to PNK is a matter that cannot be resolved through the affidavit evidence herein. However, questions arise on the dates of marriage given by the Applicants and the date of birth of the 2nd Applicant. The evidence by the Applicants is that the customary marriage was in 1992 between the 1st Applicant and PNK and the union was blessed with a son, the 2nd Applicant, who was born in the year 1984. This date of birth is also reflected on the copy of the ID attached. This arithmetic does not add up.

21. The photographs exhibited in support of the application reflect a man and woman, two women and a child, two women, two men and a child and a man, a woman and a child. The photographs cannot be said to reflect a marriage by the stretch of any imagination.

22. From the undisputed affidavit evidence by the Respondent, PNK lives in Gatundu North, Kiambu County with a 24-hour caregiver. According to the Respondent, the Applicants live in Nairobi. The 1st Applicant has described herself in her affidavit in support as a resident of Nairobi. While the Applicants state that the Respondent has not given any details on the care given to PNK, the Applicants have not shown what care they have been giving PNK since the year 2012 when the 1st Applicant has stated that she was evicted from the matrimonial home. There is also no evidence that reflects that PNK is currently not being taken care of. It is not disputed that MKN is the son to PNK.

23. Having weighed the evidence before this court, I am not persuaded to change the status of the guardianship of PNK or the management of his properties. Consequently, the Application fails with costs.

Dated, signed and delivered at Nairobi this 10th day of June, 2021

B.THURANIRA JADEN

JUDGE