



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

PETITION NO. 02 OF 2020

IN THE MATTER OF MENTAL HEALTH ACT, CHAPTER 248 OF THE LAWS OF KENYA

AND IN THE MATTER OF MRS. DPN

(A PERSON SUFFERING FROM MENTAL DISORDER)

AND

IN THE MATTER OF PETITION BY ASN, TTN, SKN, LNN, SDN, TO BE APPOINTED GUARD MANAGERS OVER THE AFFAIRS AND THE ESTATE OF MRS. DPN

BETWEEN

ASN, TTN, SKN, LNN, SDN.....PETITIONERS/ RESPONDENTS

AND

MRS. DPNRESPONDENT- SUBJECT

BRITAM ASSET MANAGERS (KENYA) LTD.....CONTEMNOR/APPLICANT

RULING

The case for the applicant

1. Pursuant to Order 22 Rule 22 (1), Order 51 Rule 15 and Order 51 Rule 1 of the 2010 Civil Procedure Rules, sections 1A, 1B, and 3A of the Civil Procedure Act, the inherent powers of the Court and all other enabling provisions of the law, the applicant has under certificate of urgency and through its notice of motion dated 11th May 2010 sought the following orders.

1. spent

2. An order to stay the contempt proceedings application dated 27th April 2010 filed by the petitioners pending the hearing and determination of this application *inter parties*.

3. an order to stay the contempt proceedings application until the determination of the *Petition No. E111 of 2020, Britam Asset Managers (Kenya) Ltd versus Estate of the Late VTN (deceased) and DPN* is heard and determined.

4. The court be at liberty to issue any other orders it may deem fit to grant.

5. The costs of this application be awarded to the applicant.

2. The application is supported by eight (8) grounds that are set out on the face of the notice of motion and the supporting affidavit of the applicant's acting chief operating officer (Esther Chege).

3. The major grounds in support of the application are as follows. On 8th May 2020 the applicant was served with an application for contempt dated 27th April 2020. The said application sought to cite the applicant's head of business development/asset management business

(Ms Njeri Ndirangu) for failing to comply with the order of this court dated 16th April 2020. The applicant was neither a party nor was there any specific order directed against the applicant or against any of its employees including Ms Njeri Ndirangu.

4. Furthermore, the applicant has filed an interpleader application being *Petition No. E111 of 2020, Britam Asset Managers (Kenya) Ltd versus Estate of the Late VTN (deceased) and DPN (now a ward of this court)* for the court to determine the *bona fide* owner of the funds held by the applicant in its wealth management fund (WMF).

5. Additionally, the applicant has no interest in the funds held in their custody in account WMF ***** and its interest is a speedy resolution of the dispute.

6. Finally, it is in the interest of all parties that the interpleader application dated 27th April 2020 be concluded as it will resolve with finality the issues in dispute and that the instant application has been made without delay.

7. The applicant has deposed to a ten (10) paragraphs supporting affidavit through its acting chief operating officer (Esther Chege). The major averments in that affidavit are as follows. The applicant has replicated in its supporting affidavit the same matters that are set out on the face of the notice of motion, except for the following matters. She has deposed that the applicant is the fund manager of account No. WMF ***** held in the joint names of DPN and VTN (deceased) respectively. She also has deposed that on 8th May 2020 the applicant was served with an application for contempt dated 27th April 2020.

8. The deponent has further deposed that the orders given by this court on 16th April 2020 were as follows:

i. THAT the application be and is hereby certified urgent.

ii. THAT custody and care of Ms. DPN be and is hereby vested in her children being ASN, TTN, SKN, LNN, SDN and any decision on her health and affairs of her estate be determined by a majority of any four (4) of them.

iii. THAT the petitioners herewith (*sic*) being ASN, TTN, SKN, Lydia NN, SDN vide a majority of any 4 of them be appointed as the legal custodians of Ms. DPN.

iv. THAT the petitioners and ASN, TTN, SKN, LNN, SDN vide a majority of any 4 of them be appointed as the managers of the affairs of Mrs. DPN.

v. THAT the costs of this application be borne by the Respondent.

vi. THAT the petitioners are at liberty to apply for review and/or variation of the orders generally.

9. Furthermore, the applicant has deposed that none of the orders issued by the court on 16th April 2020 were directed against the contemnor/applicant or any of its employees.

The case for the petitioners/respondents.

10. The petitioners/respondents were granted leave to file a supplementary affidavit in response to the contemnor's replying affidavit within seven (7) days from 12th May 2020. The matter was set down for mention on 21st May 2020 to confirm whether the petitioners/respondents had complied with the order of the court as directed.

11. On 21st May 2020, there was no appearance for the petitioners/respondents. The date for mention was taken by consent of both counsel with Mr. Langat holding brief for Mr. Omwanza for the petitioners/respondents. They failed to comply with the order of the court. The hearing and determination of this matter therefore proceeded *ex parte*.

12. On 21st May 2020 Mr. Tanyasis on behalf of Mr. Michael Muchemi for the contemnor/applicant submitted that the petitioners/respondents have not filed any supplementary affidavit. He therefore applied that the application of the contemnor/applicant be allowed.

Issues for determination

13. I have considered the application of the contemnor/applicant in particular its grounds in support of the notice of motion and the applicant's supporting affidavit. I find the following to be the issues for determination.

1. Whether the contemnor applicant has made out a case for the grant of an order of stay of the instant contempt proceedings application dated 27th April 2010 filed by the petitioners pending the hearing and determination of the application *inter parties*.

2. An order to stay the contempt proceedings application until the determination of *Petition No. E111 of 2020, Britam Asset Managers (Kenya) Ltd versus Estate of the Late VTN (deceased) and DPN*.

3. Who bears the costs of this application?

Issue 1

I find that the application is unopposed.

14. The first issue for determination is whether I should stay the contempt proceedings application dated 27th April 2010 filed by the petitioners/respondents pending the hearing and determination of this application *inter partes*. I find that the affidavit of the contemnor/applicant is credible.

15. It appears that no specific order issued by the court on 16th April 2020 was directed against the applicant or against any of its employees including Ms Njeri Ndirangu.

16. I find that the liberty of the contemnor/applicant is threatened with both the potential danger of being committed to civil jail for up to six months and/or be sentenced to a monetary fine. There is also the potential risk of her property being attached and sold (sequestered).

17. I therefore find that the applicant has made out a case for the grant of an order of stay of the contempt proceedings application dated 27th April 2010 filed by the petitioners/respondents pending the hearing and determination of the application *inter partes*.

Issue 2

18. The second issue for determination is whether this court should stay the contempt proceedings application until the hearing and determination of the interpleader application in *Petition No. E111 of 2020, Britam Asset Managers (Kenya) Ltd versus Estate of the Late VTN (deceased) and DPN* (filed in the High court registry in Nairobi).

19. The issue raised, by this application, is one of public importance to warrant careful consideration by this court. First, the interpleader application is pending hearing and determination in the commercial division of this court in Nairobi. In law therefore the *sub judice* rule applies. This rule prohibits public debate of matters pending hearing and determination before the court. The rule is intended to ensure the just and fair determination of the case that is pending in the trial court. This is a constitutional requirement in terms of article 50 (1) of the 2010 Constitution of Kenya. The *sub judice* rule is one of the many pillars in support of ensuring a fair and just trial of a case. The rule also enhances the decisional independence of the trial court.

20. In the instant application, counsel for contemnor/applicant has invited this court to determine the instant application for stay of the contempt proceedings by citing the interpleader application in *Petition No. E111 of 2020, Britam Asset Managers (Kenya) Ltd versus Estate of the Late VTN (deceased) and DPN* (filed in the High court registry in Nairobi), which is pending for hearing and determination in the commercial division of this court in Nairobi, in support of their application.

21. First, since I have already found that the contemnor/applicant has made out a case for the grant of an order of stay of the contempt proceedings application until the hearing and determination *inter partes* of the contempt proceedings application dated 27th April 2010 filed by the petitioners/respondents; it is moot to decide whether the contemnor/applicant has made out a case for the grant of an order of stay of the contempt proceedings application until the hearing and determination of the interpleader application in *Petition No. E111 of 2020, Britam Asset Managers (Kenya) Ltd versus Estate of the Late VTN (deceased) and DPN*.

22. Furthermore, the *sub-judice* rule requires that I should not consider issue No. 2 for the reasons that I have set out in the above foregoing paragraphs. I therefore decline the invitation (submission) of counsel to make a finding that I should also grant an order of stay of the contempt proceedings application until the hearing and determination of the interpleader application in *Petition No. E111 of 2020, Britam Asset Managers (Kenya) Ltd versus Estate of the Late VTN (deceased) and DPN*. To do so, might prejudice the just and fair determination of the interpleader application, that is pending in the commercial division of this court in Nairobi. I therefore decline to do so.

23. However, the said invitation of counsel to make a finding in that regard, clearly shows that the contemnor/applicant should have filed the interpleader application in this court here in Narok, to avoid a situation of creating a multiplicity of suits with the attendant danger of having conflicting judgements or rulings emanating from this court and the court in Nairobi.

24. Furthermore, I have observed that the interpleader application is filed by way of an originating summons pursuant to Order 34 Rule 1 and 2 of the 2010 Civil Procedure Rules. The said application is not filed under section 47 of the Law of Succession Act and its implementing rules of procedure namely the Probate and Administration Rules in Rule 73. It is open to debate as to which statute and rules are applicable. Those are matters for the commercial division of the High Court to decide.

25. In the premises, I hereby only grant the contemnor's application in terms of prayer No. 2 of its notice of motion dated 11th May 2020. The other prayers are hereby not allowed.

Issue 3

26. This is an interlocutory application in respect of an application for contempt proceedings arising out of the estate of the late *VTN (deceased)* and her mother (*DPN*), who now is a ward of this court and for that reason each party is to bear for its own costs.

27. In view of the fact that this application was brought under certificate of urgency and the fact that the petitioners/respondents are acting on behalf of the respondent-subject (now a ward of this court) of these proceedings, I hereby direct that the hearing and determination of the main application be given priority in terms of its disposal.

28. Those are the orders of this court.

Ruling signed, dated and delivered at **Narok** this **3rd** day of **June, 2020** vide video link in the presence of Mr. Kiarie Mungai for the petitioners/Respondents and Mr. Obura for the contemnor/applicant.

J. M. Bwonwong'a.

J U D G E

03/06/2020