



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO 8 OF 2017

IN THE MATTER OF THE ESTATE OF JOSIAH KIIO MUTISO

BETWEEN

JOSIAH KIIO MUTISO.....SUBJECT

AND

AGNES NDUMI KIIO.....PETITIONER/APPLICANT

RULING

1. On 13th October, 2017, Agnes Ndumi Kiiio herein referred to as the petitioner/applicant came to court by way of a petition dated 6th October, 2017 filed under certificate of urgency seeking for orders of the court appointing her as manager of the estate of **Joshua Kiiio Mutiso** thus having powers to manage affairs of the said **Joshua Kiiio Mutiso**.
2. While petitioning the court, the petitioner specifically, sought for special powers to be allowed to participate and receive just inheritance for the said subject vide **Machakos Succession Cause No 639 of 2013- Estate of Mutiso Munyao**.
3. The petition herein is premised on the grounds deponed in a supporting affidavit sworn by the petitioner herein on the 6th October, 2017. The necessity in filing this application under Section 26, 27, 29 and 30 of the Mental Health Act crystallized from the fact that the subject is an elderly man, whose health has been declining for a considerable period of time from 2007 and is unable to manage the family affairs and even follow up court proceedings.
4. Given that the subject's general medical and mental condition has drastically deteriorated and also considering that while in the said condition his siblings are out to disinherit the entitlement from the subject's late father's estate, the applicant opted herein to step in and fill the gap as a manager.
5. In total, the subject sired six children who are alive namely Catherine Nduku (Daughter), Mutua Kiiio (Son), Mwanzia Kiiio (Son), Mary Kiiio (Daughter), Ndinda Kiiio (Daughter) and Mwikali Kiiio (Daughter). The petitioner has not obtained consent to petition the court for the orders sought from the subject's children and neither is there an affidavit of no objection to that effect.
6. There is no medical report but a letter written by Dr. J. Mutunga, for the Medical Superintendent, Machakos Level 5 Hospital marked AKN-4 which letter does not indicate that he has impaired ability to make decisions but merely states that he has been attending the outpatient clinic for the past 10 years and requires close monitoring.
7. The applicant pleaded with the court for the application to be allowed. She however has not indicated what she will do if the order sought is granted.
8. In further support of her application and as a proof of the existence of the estate, the applicant has annexed no ownership documents, but a grant of letters of administration intestate issued on 23rd October, 2013 in respect of the estate of her husband's late father MUTISO MUNYAO SIMU being succession cause No. 639B/2013 Machakos High Court. Equally, she attached a letter dated 27th September, 2017 from the Assistant Chief Kasinga 1 Sub-Location listing the applicant as being married to the home of the late MUNYAO SIMU by his son, the subject who is of unsound mind.
9. During the hearing, none of the applicant's children testified. There is no oral evidence of how the subject's general medical and mental condition had degenerated. The applicant's advocate told the court that the subject has been having mental issues and thus is unable to manage his family affairs and follow up court proceedings. There is a court case Succession Cause 639B of 2013 where he is appointed beneficiary and the applicant would like to be appointed administrator of the estate of the subject pursuant to the Mental Health Act Cap 248.

I am not satisfied that no business can be transacted unless a manager/administrator is appointed, neither has it been demonstrated who will greatly suffer if the application is not allowed.

10. I proceeded to interview the subject and observed the old man whom in my own assessment was able to communicate. His speech is audible, and his answers dependable.

11. Having gone through the petition herein, supporting affidavit, annexures attached thereto and having heard the testimony of subject, this court has to determine whether the applicant/petitioner herein meets the criteria and or conditions set under the mental health Act and in particular Sections 26 and 27, 29 and 30. Issues for determination therefore are:-

- Is the subject suffering from any sickness?
- If the answer is yes, is he suffering from any mental disorder pursuant to the **Mental Health Act** as consequence?
- Does he require any medical or personal care?
- Does he have an estate that would require administration and management by a manager?
- Is the applicant related to him and or is she a suitable person;
- Is there consent from interested persons?
- What will be the manager's mandate in managing and or administering the estate?

12. A petition and or application for appointment of a guardian under the Mental Health Act Cap 248 is clearly spelt out in Sections 26 and 27.

Section 26 (1) provides:

“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 relative or any other suitable person”.

13. In line with this provision, the applicant has neither proved nor clearly convinced the court that the subject is suffering a mental disorder and or loss due to what his doctor J. Mutunga described in his one-sheet report marked AKN-4 as “not stable and requires close monitoring”.

14. His children have not confirmed his condition whether by way of affidavit or oral testimony in court. The court had the advantage of engaging the subject aged 60 years and in my assessment, I saw an agile person who was well aware of his environment. He was aware that he was in court. He was able to name and know the marital status of his children. I am convinced beyond reasonable doubt that the subject herein referred to as Josiah Kiio Mutiso is not sick and definitely not of a person suffering from mental disorder.

15. Is the petitioner related to him and or suitable" According to his testimony, the letter from the Assistant Chief and the affidavit sworn in support of petition, it is clear that she is the wife and indeed suitable to act as manager. As I said earlier, there is no evidence as to whether or not there is objection from anybody as I am not aware that the family members are in agreement.

16. Regarding the existence of an estate capable of being managed and or administered, the petitioner has not attached any bank statements or general ownership documents to show that the subject owns property and therefore one questions the need to appoint a manager to oversee management and administration of the same, if any.

17. Having found that the subject is neither sick nor suffering from mental disorder and that there is nothing to show that he has an estate found suitable to manage and administer, the Application is left with no limbs.

18. The Applicant herein should wait for the confirmation of grant in **Machakos High Court Succession Cause No.639 of 2013** wherein her husband is listed as a beneficiary and she could thereafter be at liberty to manage the assets distributed to her husband if there is such an arrangement by his household.

19. Having considered the pleadings herein, testimony by the subject and evidence placed before the court, and having considered the relevant law in this case, Mental Health Act, I am not persuaded that the Petitioner has made her case to the required degree hence I do disallow the Application/Petition with no order as to costs.

It is so ordered

Signed, Dated and delivered at Machakos this 21st day of November, 2018.

D.K. KEMEI

JUDGE