



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MISCELLANEOUS CAUSE NO 31 OF 2016
IN THE MATTER OF THE MENTAL HEALTH ACT
AND
IN THE MATTER OF PETER KAMENWA KUURI
BETWEEN:
SAMUEL KIMANI KUURIAPPLICANT
AND
PKK.....RESPONDENT

J U D G M E N T

1. The Application now before the Court was not initially filed in the Family Division but in the Constitutional and Human Rights Division of the High Court. It was then transferred to the Family Division as the proper Division of the High Court to deal with an application such as this. The Application is brought by a Petition filed on 9th December 2016 under file number **Misc No 533 of 2015**. On transfer it was given its current number.

2. The Petition is entitled “*Petition for Guardianship Orders under Section 26*”. It does not state which Act it is referring to. It is assumed that it is referring to the Mental Health Act. The Petition seeks the following Orders:

1. THAT PKK is hereby adjudged to be a person suffering from a mental disorder being Chronic Schizophrenia under Section 26 of the Mental Health Act Cap 248 of Laws of Kenya

2. THAT Samuel Kimani Kuuri be appointed as the guardian in respect of the Respondent.

The Petition is verified by the Affidavit of the Petitioner. The Petition has been framed as a suit against the subject. He is named Respondent but has not been served. Nor has there been an application for the appointment of a Guardian ad Litem or Litigation Friend for the Respondent.

3. The Facts and background as they appear from the Petition are briefly that the Petitioner and

Respondent are brothers. The Petitioner appears to be the older brother. They are both the Children of Eliud Kure Gichuhi passed away on 27th August 2014 aged 79 years (see Death Certificate No 0134467) and not 20th August 2014 as stated in the Petition. During his lifetime the Deceased transferred his share a piece of land of which he was the joint owner. It is known as Land Reference No KABETE/KARURA/1536 (hereinafter referred to as “the Property”) to the Respondent PKK. It seems that around August 2014 the Family sought to obtain Letters of Administration for the Estate of Eliud Kure Gichuhi. Unfortunately, that information is not set out clearly in the Petition. From the Chief’s Letter the Court is able to discern that the Deceased was survived by his Widow (Tabitha Wanjiru Kuri), six children and one daughter in law, according to that document.

4. The Petition states in relation to the Respondent, also referred to as “the Patient” notwithstanding that the Application seeks such a designation and which has not been made by any other Court. The Respondent is said to be a 55 year old male. It is alleged that he is suffering from a mental disorder within the meaning of “the Act”. It is said that he suffers from “Chronic Schizophrenia which affects his judgment, attention and concentration since 19th August 1988 and is a subject to be dealt with as provided under the Act. The Petitioner relies on the “report” submitted by a Dr Kisivuli A.J. of Mathari National Teaching and Referral Hospital”. A copy of the “report” is said to be annexed. It comprises a Letter addressed “TO WHOM IT MAY CONCERN” and is dated 3rd June 2015. It states as follows:

“The above named patient suffers from chronic schizophrenia. He has been followed up in this institution since 19th August 1988. He is on daily treatment and medication. The nature of his illness affects his judgement attention and concentration.

Any decision affecting his welfare must be made in consultation with his next of kin and significant others.”

That Letter clearly refers to the question of his treatment and medication and not his capacity, save for in general terms. However it is clear that notwithstanding the Respondent’s alleged illness, his Father found it appropriate to make him a gift of the parcel of land on 5th November 1998 which is 10 years after his initial diagnosis. It can therefore be safely assumed that the Parties’ Father was aware of the condition.

5. Paragraph 4 states “*THAT the Patient became a beneficiary of L.R. No KABETE KARURA/1536 in the estate of ELIUD KURE GICHUHI who died domiciled in Kenya on the 20th day of August, 2014*”. Both statements are untrue. The Deceased passed away in 2004 and the Respondent became a beneficiary on the transfer by gift of the property in question. It did not form part of the Estate whether in 2004 or in 2014. Therefore, the Respondent could not become a beneficiary of the land he already owns on the death of the previous owner. Paragraph 5 seeks an alternative order, namely, “*THAT the Petitioner be appointed as guardian to handle the legal affairs on behalf of the patient in the administration of the estate of ELIUD KURE GICHUHI*”.

6. The Petition refers to an application for letters of administration but does not set out how far that process has gone. Has a Petition been filed? Who are the intended administrators? Of what does the Estate comprise? Those are all matters that the Court should take into account in deciding the prayers sought. Unfortunately, that information is not included in the Petition nor the Verifying Affidavit.

7. The Application came before this Court on 8th May 2017. The Petitioner was represented the Respondent /Subject/Patient was not. The Petition had not been served on any member of the family. The Court also took the view that a Letter addressed “To Whom it May Concern”, cannot be considered to be an adequate report on the Respondent’s diagnosis and prognosis. In the circumstances, the Court made the Orders that:

- a. The Petitioner file a Proper Report from the Treating Psychiatrist within 28 days;
- b. That the Petitioner serve all the other siblings and the treating psychiatrist;

c. The Parties take a date for hearing when the psychiatrist and siblings will attend.

8. A Report of the same date was filed on 7th June 2017. It was written by Dr Jumba Joseph who is a Consultant Psychiatrist. The Report sets out that the Respondent has been a patient at Mathari National Teaching and Referral Hospital since August 1988. He was re-admitted in 1992 and upon discharge he did not comply with his medication and would relapse frequently. The Report says *“For the past few years he has been maintained on monthly injections of antipsychotics but has not complied with oral medication. His condition manifests itself by displays of paranoid behaviour and aggression between family members. In 1992 he was noted to have been observed to be unkempt and showing self-neglect. Due to his paranoid tendencies the Defendant finds it difficult to form supportive relationships whether with his family or otherwise”*. The Author of the Report also gave oral evidence to this Court. In his oral evidence the Consultant Psychiatrist confirmed that he was not the treating psychiatrist but had compiled his reports from the Respondent’s records. He confirmed the diagnosis which had been made by several doctors since 1988 namely “paranoid schizophrenia. He said that it is a psychotic illness that can be managed by compliance with medication. He said this patient is un-co-operative and therefore he has to be forceably injected periodically. In response to the question of whether the patient could understand these proceedings, he informed the Court that it would depend on his compliance with medication but the paranoia causes him to be suspicious of everything. In relation to the prognosis, the response was that the Illness has a cyclical pattern. Without medication the patient is liable to relapse into a worse state. The advice that he has been given is to take his medication and have family support to assist. In relation to the question of whether he can manage his own affairs. The Doctor answered that it was a challenge due to the distrust of his family members. He said that opens the patient up to abuse and/or exploitation by strangers for example he is susceptible to selling his property at throw away prices. It is a challenge in these types of cases. In response to the Counsel’s question relating to the patient’s ability to make good choices, the Doctor answered that his judgment is usually impaired.

9. The Court also heard oral evidence from the Petitioner. He told the Court that he was a son of Eliud Kuri and PKK (the Respondent) is his brother. He says that they all live together on the Property. He clarified that to say all the Family members live on the property and he believes they inherited it. He said that half the property was in the name of their Father and half in the name of Peter. He said that the division of the Property had not yet been done. In relation to any assets the Respondent owns the Petitioner told the Court that he owns only the Property. He does not have any bank account or other asset. He does not have any other family or dependents, no wife or children. As to why he was an appropriate guardian, the Petitioner said the family, in particular their Mother had decided. She is also be said to be sick. It can also be assumed she is elderly. From the Affidavit of Service it is apparent that she is illiterate. She lives on the Property. The Siblings who attended Court, Anne and Daniel asked the Court to make the Order.

Law and Procedure

10. The Application is brought under Section 26 of the Mental Health Act. It provides:

26(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.

Section 28 of the Mental Health Act provides:

28. Power to make order concerning any matter with the person

(1) The court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or with his estate, make such order, subject to this Part, regarding such application as, in the circumstances of the case, the court may think fit.

(2) The Minister, the Public Trustee or a manager may take out, as a matter of course, an application in chambers for the determination of any question arising out of the management of any estate in respect of which an order has been made under this Part.

Article 40 of the **Constitution of Kenya** (“CoK”) provides:

Protection of right to property

1(a) *of any description; and*

(b) in any part of Kenya.

Parliament shall not enact a law that permits the State or any person—

2(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

40. (3) (a) *results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*

(b) *is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—*

(i) *requires prompt payment in full, of just compensation to the person; and*

(ii) *allows any person who has an interest in, or right over, that property a right of access to a court of law.*

(4) *Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.*

(5) *The State shall support, promote and protect the intellectual property rights of the people of Kenya.*

(6) *The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.*

These proceedings come under **Order 32 of the Civil Procedure Rules 2010** which provides:

Order 32, rule 15 Application of rules to persons of unsound mind.

11. The provisions contained in rules 1 to 14, SO far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

Analysis and Reasons

12. Therefore the Court has before it an application relating to a subject that is alleged to have an illness of the mind rendering him unable to manage his own affairs. The person bringing that application is a brother who wishes to manage the subject's property with the assent or collusion of other family members. There is prima facie evidence that the property in question was given to the Subject as a gift by his Father. The Applicant seeks to suggest that the same property forms the Estate of their Father who is now deceased. The Petitioner was quite frank with the Court in that he wished to deal with the Property for the benefit of the whole family as if it forms part of the Father's Estate. That gives rise to a conflict of interest between the Applicant and the Subject. The Applicant has not demonstrated to the satisfaction of the Court that is aware of and able to manage that conflict with good conscience and fairness. In the circumstances the Court is not satisfied that the Applicant is a fit and proper person to be a guardian and/or manager over the Respondent and his property and affairs due to that conflict of interest.

13. For the reasons set out above, this Court makes the following Orders:

- a. The Respondent be and is hereby declared to be unable to manage his affairs due to a mental health illness that affects his cognitive ability;
- b. The Public Trustee be and is hereby appointed Manager over the assets of the Subject/Respondent.
- c. The Court finds and Directs that the ½ share in the Property known as Land Reference No KABETE/KARURA/1536 gifted to the Respondent cannot form part of the Estate of the Deceased
- d. That there be a Caution placed against the Property known as Land Reference No KABETE/KARURA/1536 to prevent any dealings without the leave of this Court

Order accordingly,

FARAH S. M. AMIN

JUDGE

Signed and Delivered in Nairobi, this 10th day of May 2017

In the presence of

Court Clerk: Patrick Mwangi

Applicant/Petitioner: Mr Kamau instructed by Karanja-Njenga Company Advocates