



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
MISC. APPL. NO. 15 OF 2015
IN THE MATTER OF: CAPTAIN PATRICK GEORGE MUSYOKI (SUBJECT)
AND
IN THE MATTER OF: AIKA NYANGARA GATUNGO and
LISSA WANGU GATUNGO (APPLICANTS)

RULING

1. By an application filed by the Applicant on 10th February, the Applicants sought to be appointed legal guardians of the subject and managers of the subject's estate.

The matter was canvassed *ex parte* on 13th March 2015 and the Court granted the application on the same day by a Ruling delivered on the same date.

2. On 26th March, 2015 and 9th April, 2015 the subject through Counsel filed the applications opposing the *ex parte* orders of 13th March, 2015.

3. On 9th April, 2015 the Applicants filed an application of contempt of Court proceedings against the subject's lawyers and the bank for declining to effect the Court orders of 13th March, 2015.

4. By a hearing of a certificate of urgency the Duty Court Hon. Justice W. Musyoka stayed the orders of 13th March, 2015 pending an *inter-partes* hearing before this Court.

5. The Court and parties discussed the best way to determine the issue at hand; whether the subject was mentally ill at the time the Court issued the orders of 13th March, 2015 that the subject could not ensure his wellbeing and take charge of his affairs.

6. On 22nd July, 2015 the parties proposed and the Court agreed that the way to proceed was to have each of the doctors who attended to and /or filed in Court a medical report to be summoned to appear in Court to produce the report and be cross examined on the veracity of the content in the medical report.

7. The Court gave directions that the

a. Deputy Registrar Family Division would issue witness summons to the following doctors who examined the subject;

- i. Dr. Joseph A. Aluoch on the report of 24th February, 2015, 16th February, 2015 and 26th March, 2015 to testify on 18th August, 2015
- ii. Dr. Marx M. D. Okonji to produce the report of 1st April, 2015
- iii. Dr. Pius Kigamwa to produce the report of 2nd, April, 2015
- iv. Dr. P. Othieno and D. V. K. Talwar of Nairobi Hospital to produce their report and to appear on 18th August, 2015.

8. On 18th August, 2015, the hearing did not proceed due to special personal circumstances that the Counsel for the Applicant and Patient had encountered.

9. On 28th September, 2015 Dr. Aluoch was scheduled to produce the report and to be cross examined in Court. Mr. Wambua Kilonzo Counsel for Dr. Aluoch told the Court that the doctor would not attend the Court. The medical report of 24th February, 2015 he wrote was correct in all material respect and he had nothing further to add to it.

He further informed the Court that the parties and the Court could appoint another medical expert to verify the medical report and file another report in Court. **The doctor also indicated that he was already facing disciplinary proceedings over this matter in another forum.**

Dr. Talwar also declined to attend Court as he was not the examining Radiologist. He only signed the report dated 16th March, 2015 as the Head of Department as a matter of protocol. As such he would not add value to the proceedings.

10. The Petitioner through Counsel sought the Court to compel the two (2) doctors to attend Court.

11. The Respondents through Counsel stated that the doctors ought to attend Court as they are witnesses. The summons were personal to them. Attending Court is mandatory. They informed the Court that pursuant to the medical record the Court made certain orders on 13th March, 2015 and the orders had certain consequences.

Although these orders were suspended the subject lost his home. Counsel for the Objector referred the Court to **Order 16 CPR 2010** which deals with summoning and attendance of witnesses. The Order gives details as to content and service of summons to the witnesses and the expenses to be paid to avail the witnesses in Court.

12. Counsel for Dr. Aluoch and Dr. Talwar stated that they did not depone any affidavits in Court so that they are to be called to be cross examined on the same. The doctors were not appointed by the Court to conduct examinations on the subject and file reports in Court. They were not witnesses for any party to the proceedings.

It is not fair to drag the doctors to Court. No provision of the law has been cited to make it mandatory for the doctors to come to Court in light of the circumstances. The documents relied on in Court were documents filed in the normal course of duty. Dr. Aluoch was not informed the documents would be used in Court.

The parties may agree on a doctor(s) to review the medical report filed in Court and file another report and the Court may decide on it.

ISSUE

Should Dr. Aluoch and Dr. Talwar be compelled to attend Court and testify on the reports and be cross

examined by the parties in Court?

LAW

CHAPTER V of the **Evidence Act Cap 80** deals with witnesses.

Section 127(1) of the Evidence Act Cap 80 states;

“In civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witnesses”

Section 144(2) of the Evidence Act Cap 80 states;

“the Court shall admit the evidence of any fact if it thinks that the fact, if proved would be admissible and not otherwise”.

Order 16 of the Civil Procedure Rules 2010 prescribes compliance and compellability of witnesses in Court.

Section 10(1) (2) and (3) of Order 16 of Civil Procedure Rules 2010 states;

“(1) where a person to whom a summons has been issued, either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.”

“(2) where the Court has reason to believe that such evidence or production is material, and that such a person has, without lawful excuse, failed to attend or to produce the document in compliance with the summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.”

“(3) in lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12.”

Based on these provisions of law and the submissions by Counsel for all parties this Court finds as follows;

- a. The doctors are not compellable witnesses in this case. They are not parties to the suit. They did not examine the Subject for purposes of the Court proceedings. They did not depone and file affidavits. They examined patient in their normal way, in the course of duty and their reports were used by the parties to justify their position in the case.
- b. The Doctors were called to testify, produce reports and undergo cross examination pursuant to an effort by this Court and the parties and their Counsel to broach and agree to a process of determining whether at the time this Court heard the application of 10th February, 2015 and gave *ex parte* orders the Subject was in a proper mental state or not to adequately cater for his well being and conduct his affairs. The calling of doctors arose out of amicable agreement in resolving the medical state of the Subject as at 13th March, 2015.

- c. Therefore, whereas Court orders ought to be complied with; in this instant the doctors were not informed and aware that their routine duty reports would be used as evidence and culminate to testifying in Court. They were not involved in preparation of medical reports for the purpose of producing them in Court. In fact it is the converse; the parties used these reports to support their respective positions in the matter.
- d. Ideally the doctors ought to abide by the summons and attend Court to testify on the examination they carried out. However, this case is unique because, although this Court appointed Dr. Aluoch, Dr. Okonji and Dr. Lule to treat the Subject as was done before in January, 2014 and as per the document attached to the application and thereafter file medical reports, their efforts were curtailed by events that culminated with the stay of the Court orders of 13th March, 2015.

Therefore the Court cannot force them to come to Court to testify over matters that they were to undertake as per the Court order were not completed but stopped midway. In short the parties cannot have their cake and eat it.

- e. The Court is also concerned and therefore reluctant to force Dr. Aluoch to attend Court to testify, produce the medical report and withstand cross examination for the following reasons;

In the affidavit sworn and filed by the Subject Patrick George Musyoki of 9th April, 2015 at Paragraph 14 he deponed that he made a formal complaint to the Medical Practitioners and Dentists Board as regards the medical report dated 25th February, 2015 by Dr. Joseph A. Aluoch. He asserted that the report was illegally obtained without his consent, knowledge and therefore was in violation of his constitutional rights and used to deceive the Court to grant the orders of 13th March, 2015.

The copy of the complaint is marked as “PAN (2)”. The Court finds arising from the fact, whereas it is the subject’s right to pursue redress for any grievances he has, in light of the current situation, Dr. J. Aluoch is subject to another legal forum for disciplinary proceedings of alleged professional misconduct. During the pendency of the suit proceedings it would also not be fair for him to attend Court and state anything that would incriminate him in the pending proceedings.

Therefore by virtue of **Section 10(2) of Order 16 Civil Procedure Rules 2010** the Dr. Aluoch’s abstinence from Court proceeding is a lawful excuse not to attend Court.

- f. The concern for the Court is whether not calling Dr. Aluoch and Dr. Talwar will cause any prejudice to the parties that they have not been accorded a fair hearing?

The Court being mindful of the fact that Dr. Aluoch is exempted by the Court from attendance and to ensure there is no prejudice to all parties orders;

- i. Although the Doctors will not be compelled to attend Court; the parties are at liberty to call the Applicants/Petitioners’ to testify and be cross examined during the proceedings
- ii. The parties may make proposals that another independent medical expert to review the medical report(s) and give a final report to the Court
- iii. All Counsel may submit on the veracity and probative value of the Dr. Aluoch and Dr. Talwar medical reports
- iv. The same views of non compellability of the proposed doctors to attend Court to testify will apply to all and any doctors’ *mutatis mutandis*.

FINAL ORDERS

1. **It is for the above reasons and circumstances that this Court vacates the witness summons issued for Dr. Aluoch and Dr. Talwar and the parties are at liberty to explore the above avenues or any other proposals.**

2. A part from that, the Court shall proceed with doctors' evidence if any and the hearing *inter-partes* of the two (2) applications pending in Court.
3. No. order as to costs.

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF OCTOBER, 2015

M. MUIGAI

JUDGE

In the presence of:

Mr. Wambua Kilonzo for the Dr. Aluoch and Dr. Talwar

Mr. Midenga holding brief Miyare for Petitioners.

Mr. Muli holding brief Kiragu Kimani for 2nd and 3rd Respondents

Mr. Midenga – We seek leave to appeal and a certified copy of the Ruling.

Mr. Muli holding brief for Mr. Kiragu Kimani for the 2nd and 3rd Respondents seek leave to appeal the Ruling.

COURT: The certified copies of the Ruling to be availed. Leave to appeal granted.

M. W. MUIGAI

JUDGE