



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**ELECTION PETITION 36 OF 2009**

**IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF GERISHON KAMAU KIRIMA**

**RULING**

**A: INTRODUCTION**

Stephen Kamau Kirima the Petitioner herein, has filed a Petition dated 2<sup>nd</sup> June, 2009 seeking guardianship of one Gerishon Kamau Kirima, (who is the father of the Petitioner) as well as for management of his estate under Section 26(1) and Section 29 of Mental Health Act (Cap 248) Laws of Kenya, (hereinafter referred to as '*the Act*').

He seeks the following prayers in the said petition.

- a. **THAT Gerishon Kamau Kirima is hereby adjudged to be a person suffering from a mental disorder under Section 26 of the Mental Health Act Cap 248 of the Laws of Kenya.**
- b. **THAT Mohammed Muigai Advocates either by themselves or their appointed agent be and are hereby appointed as the Managers of Gerishon Kamau Kirima's estate which includes any such description of movable or immovable property, money, debts and legacies, power to execute, sign all deeds and instruments relating to or evidencing the title or right to any property or giving a right to receive any money or goods and to proceed to take over and/or institute any litigation and/or claims and also to include not only such property as has been originally in the possession or under the control of any person but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange whether immediately or otherwise.**
- c. **THAT Teresia Wairimu Kamau, Stephen Kamau Kirima and Bishop Jane Gathoni Kirima be appointed as guardians jointly and severally in respect of Kirima.**

The petition contains the lists of dependants/beneficiaries as well as properties of Gerishon Kamau Kirima.

The Petitioner also filed a Chamber Summons of the even date under Certificate of Urgency to seek

interim orders for appointment of Managers and Guardians.

The Court certified the matter as urgent and gave order that an up to date medical report on the physical and mental health of Mr. Gerishon Kamau Kirima be obtained and Dr. Frank Njenga be provided the access to examine Gerishon Kamau Kirima along with other orders.

The said Mr. Gerishon (hereinafter referred to as 'the Applicant'), thereupon filed a counter application dated 8<sup>th</sup> June, 2009 also under Certificate of Urgency to seek orders to set aside the above mentioned ex-parte order and to strike out and/or dismiss the application for inter-parte orders as well as the petition both dated 2<sup>nd</sup> June, 2009.

### **B: The grounds of Preliminary Objection**

The Applicant along with the said application also filed grounds of opposition to the said petition and application dated 8<sup>th</sup> June, 2009 out of which ground Nos.3 and 5 were heard as preliminary points by consent.

They are:

**3. This Court has no jurisdiction to make the orders prayed for.**

**5. The Petition and the application made in the above proceedings violate the fundamental rights of Gerishon Kamau Kirima.**

Opening his submissions Mr. Oraro, the learned lead counsel for the Applicant, submitted that the court has no jurisdiction to grant the petition and prayers sought for by the Petitioner which prayers I have specified hereinbefore.

He emphasized that the court lacks jurisdiction to grant the prayer seeking for adjudgment of the applicant to be a person suffering from a mental disorder under Section 26 of the Act.

In the case of **Owners of the MV Lilian S versus Caltex Oil (Kenya) Ltd.(1989) KLR 1**. The Court of Appeal (Nyarangi J.A) observed that:

**“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, the court has no power to make one more step. Where a court has no jurisdiction, there would be not basis for a continuation of proceedings pending other evidence. The court lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (Emphasis mine)”**

The court in Lillian's case (supra) relied on the definition of 'jurisdiction' (see words and phrases legally defined – Vol.3: I – N page 113) – namely:

**“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statue, charter or commission under which the court is constituted, and may be extended or restricted by the like means ..... where a court takes it upon itself to exercise a jurisdiction it doe not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”**

The Court went further to observe, namely:

**“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court”.**

*(Emphasis mine).*

After basing the foundation of his submissions, Mr. Oraro contended that the reliefs sought by the Petitioner tantamount to breach of the fundamental rights of the persons enshrined under our constitution namely (1). right of liberty and (2) right of property: {See Section 70(a) and Section 72}.

Of course, these fundamental rights are not absolute and constitution has provided certain exceptions showing under what circumstances these rights could be curtailed. (See Section 71 and 72(h) of the constitution).

I shall quote Section 72(1)(h) which stipulates the exception to general right of protection of property:-

**“(h) in the case of a person who is, or is reasonably suspected to be of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community. (emphasis mine).**

Be that as it may, it is a reality that the Parliament has, to cater for those persons of unsound mind and to promulgate the provisions of law in consonance with the above constitutional stipulations, has enacted Mental Health Act (Cap 248) (hereinafter referred to as **the Act**).

In Section 2 thereof “**person suffering from mental disorder**” means to be a person who has been **found to be so suffering under** the Act and includes a **person diagnosed as a psychopathic person** with mental illness and person suffering from mental impairment abuse.

It was further contended that three categories of patients are specified under the Act: (a) Voluntary patients, {Section 10 (b)} involuntary patient (section 14) and (Emergency Admissions who can be received by the Mental Hospitals.

It was stressed that when it is the case of involuntary patient to be received in Mental Hospital it is a mandatory requirement that the application by the spouse or relative shall be accompanied by a recommendation in duplicate by a medical practitioner who shall, when practicable, be the usual medical practitioner attending the patient to be admitted.

However, after perusing and considering carefully these provisions, I do tend to agree with Dr. Muigai, the learned counsel for the Petitioner, when he submitted that these provisions are not relevant so far as this matter is concerned. I am of a considered opinion that these provisions do apply to the patients seeking the admission or for whom the admission is sought for or deemed necessary under emergency.

However, I may hasten to note here without hesitation, that the court is always obliged to have a proper look of the spirit and purport of the Act and can pick clues for the requirements which should be fulfilled before a matter is brought before the court and after considering which, the court can exercise powers over persons and estates of persons suffering from mental disorder.

The relevant sections of the Act, in my opinion, are Section 26 and Section 28.

It may be appropriate to quote them:

**“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) Where upon 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.**

**(28) (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 of 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.**

Mr. Oraro further submitted that the said provisions of the Act (including the definition Section) refer only to persons suffering from mental disorder, while the English law extends to the persons suffering from mental impairment and according to him the court has no jurisdiction to adjudge any person and to declare him as a person suffering from mental disorder and that the court can only make orders as provided under the Act. The persons coming before the court has to show to the satisfaction of the court, that the person in respect of whom the orders are sought for is a person suffering from mental disorder, on the date of presentation of the application.

It is contended in short by the Applicant that court cannot order for further medical report or investigation in respect of him when the medical report produced in support of the application has not satisfied the court. The court cannot go beyond the words of the Act.

As against the aforesaid contentions raised by the Applicant, Dr. Muigai, the learned counsel for the Petitioner contended, and rightly so as observed hereinbefore, that the rights are not absolute and the Act is promulgated to cater for persons suffering from mental disorder. He emphasized the words appearing in Section 26(3), to wit **“where upon inquiry it is found”**. It was also contended that under Section 28 of the Act the court has been given power to:

**“make such order, subject to this part regarding such application as, in the circumstances of the case the court may think fit”.**

Thus according to him, the court has powers to call for further evidence to satisfy itself that the person before it is suffering from mental disorder. The courts, according to him, is not a rubber stamp to be affixed on the medical reports submitted. The ultimate jurisdiction is simply before the court and the court is not barred from conducting any inquiry in that respect and it calls upon the court to make a finding that the subject is or is not a person to whom the Act applies.

After the above submissions, Dr. Muigai contended that the preamble of the Act does give indicator to the scope of the Act and supports the submissions made by him.

The preamble of the Act which came into effect on 1<sup>st</sup> May, 1991 stipulates as under:

**“An Act of Parliament to amend and consolidate the law relating to the care of persons who are suffering from mental disorder or mental sub-normality with mental disorder, for the custody of their persons and the management of their estate for the management and control of mental hospitals; and for connected purposes.”**

I have also noted that the Act is divided into 16 parts out of which parts V, VI, VII, VIII and IX relate to

the admission or reception for treatment by the mental hospital of the persons suffering from mental disorder.

I also have noted and do reiterate that such admissions for involuntary patient must be accepted by the In-charge of Mental Hospital only on an application supported by appropriate recommendation by the medical practitioner as provided specifically in Section 14(3), (4) and (5) and his stay shall be restricted to the period provided under Section 14(6) of the Act.

In part XII of the Act, the High Court is given powers to make orders for management and custody of the persons suffering from mental disorder. Although Section 55 gives power to the Chief Justice to make rules of procedure, the same has not yet been made and thus, the procedure adopted in the English Act of 1959 is being adopted by our jurisdiction. To make it more complicated the term '**mental disorder**' is not defined either in the Act or in any of the legal or ordinary dictionary. I may note the definition of '**mental illness**' from Medical Dictionary (Butterworth) 2<sup>nd</sup> Edition and I quote:

**“(1) A disorder in thought or mood so substantial that it impairs judgment, behaviour, perception of reality, or the ability to cope with the ordinary demands of life.**

**(2) Mental disease that is severe enough to necessitate care and treatment for the afflicted person’s own welfare or the welfare of others in the community”.**

Taking clue from the above definition, I may proceed to interpret Section 26(3) of the Act which is relied upon by Dr. Muigai. On perusing the wordings of the said subsection carefully, I formed an opinion that the “**inquiry**” stipulated in the said sub-section is restricted to the finding whether the person 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 and the stipulated inquiry should precede only before making an order as to the custody of the person suffering from mental disorder. In other words before restricting his personal liberty.

This provision is obviously meant to safeguard the human right of personal liberty which is one of the fundamental rights which needs to be very dearly preserved and respected. I may hasten to add that both learned counsel did agree, and rightly so, to the interpretation suggested by this court.

Section 28 of the Act which seems to grant discretion to the court to grant and make such order as it deems fit to grant, has apparently placed a limitation to the said discretionary power, by stipulating that such power is '**subject to this part**' which is Part XII of the Act.

In furtherance to the above observation, I intend to rely on the definition in the Act and specifically the words i.e. “**found to be so suffering under the Act**” and '**diagnosed as a psychopathic person with mental illness**”.

These words taken on their face value presuppose that the person should be shown to be such person suffering of mental disorder by the persons seeking orders from the court.

The Act, as is ordained by its pre-ambule, is enacted to provide for provisions relating mainly to the **care of the persons suffering from mental disorder**.

All the actions by the relevant authorities and applications to be made either seeking admission for the persons in Mental Hospital or seeking the judicial order under Part XII should be directed towards the care and welfare of the persons and preservation of their estates against wastage or plunder by greed of the relatives or others.

In view of the aforesaid observations made, I do tend to agree that the Petitioner while bringing in a petition for orders under Section 26 of the Act, has to show to the court, by providing medical reports to substantiate the averments made in the Petition. The Petitioner, when he comes before the Court, has to show prima facie that the person against whom the orders are sought is a person suffering from mental disorder so as to be incapable of coping with the ordinary demands of life and the orders sought is for

welfare of the person concerned.

This satisfaction by the court has to be based on the medical reports annexed to the petition. I humbly thus agree that the court, as per the provisions of the Act, has no jurisdiction to enter into an arena of dispute so as to assist either party to substantiate their respective claims.

As per general practice evolved, the petition under Section 26 of the Act is made ex-parte and I do find that the court shall be very wary of making an order which can go to the extent of deprivation of a person's liberty and property. I hope this precedent shall embalm a principle of safeguarding the rights of persons whatever their status are in the society.

With these observations and findings made on the powers of the court as regards the provisions of the Act, I shall hear the applications before the court.

I direct so, as the counsel had agreed not to dwell into the merits of the case at the stage of this ruling.

Dated, Signed and Delivered at Nairobi, this 10<sup>th</sup> day of July, 2009.

**K.H. RAWAL**

**JUDGE**

**10.7.09**