



**NWM v JMM & another (Civil Appeal 279 of 2019)
[2024] KECA 1319 (KLR) (27 September 2024) (Reasons)**

Neutral citation: [2024] KECA 1319 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 279 OF 2019
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
SEPTEMBER 27, 2024**

BETWEEN

NWM APPELLANT

AND

JMM 1ST RESPONDENT

MWM 2ND RESPONDENT

*(Being an Appeal from the Judgement of the High Court of Kenya at Nairobi
(Machelule J) dated 22nd March 2017 in Family Division Misc. Appl. No. 49 of 2016)*

REASONS

1. This appeal was disposed of by way of written submissions. The appellant’s submissions dated 16th March 2020 were filed through the firm of Muriu Mungai & Co. Advocates, while those of the respondent dated 1st July 2024 were filed through the firm of Wandabwa and Co. Advocates.
2. During hearing in plenary on 3rd July 2024 learned counsels Ms. Muthee and Ms. Munyao appeared for the appellant and the respondent, respectively. Each reiterated what they had stated in their written submissions. At the end of the hearing, the appeal was dismissed with costs awarded to the respondent and the reasons to be given later. These, therefore, are the reasons for the judgment.
3. This is the first appeal brought by NWM the appellant, against the judgement, decree, and orders of A. O. Machelule J (as he then was), dated 22nd March 2017 in the High Court at Nairobi, Milimani Law Courts Family Division in Misc. Appl. No. 49 of 2016. The appeal was brought under Article 5 of the Constitution of Kenya and the Mental Health Act Cap 248.
4. The brief background to the matter is that on 1st February 2015, Mr. SKM (the deceased), donated a Power of Attorney to the 1st Respondent to receive and recover all money due to him, settle his accounts, manage his properties, receive rents, commence and/or prosecute and defend on his behalf



any suits and claims. The Power of Attorney was registered at the Lands Office on 7th December 2015 as P/A No. xxxxx/1.

5. The appellant filed a Petition dated 4th April 2016 in Misc Application No. 49 of 2016 and a Notice of motion dated 11th April 2016 seeking orders:
 - i. That there be a temporary injunction restraining the 1st Respondent from using and interfering with the affairs of the deceased by virtue of the Power of Attorney pending the hearing and determination of the suit.
 - ii. That custody and care of the deceased be granted to the petitioner (Appellant) and the Interested Party (2nd Respondent) pending the hearing and determination of the Application.
 - iii. That the Petitioner (Appellant) and the Interested Party (2nd Respondent) be appointed the Legal Guardians of SKM.
 - iv. That the Petitioner (Appellant) and the Interested party (2nd Respondent) be appointed as Managers of the affairs of SKM.
6. The appellant swore a further affidavit dated 25th July 2016. In response to the Petition, the deceased swore an affidavit dated 31st August 2016, wherein he attested to the fact that he had duly donated the Power of Attorney registered as P/A No. xxxxx/1 to his son, the 1st Respondent.
7. Muchelule J (as he then was), heard all the parties and on 22nd March 2017, he delivered a judgement that subsumed the application in the petition. The learned Judge held that the deceased had an understanding of the nature of the business he was undertaking, thus he had no mental incapacity. Further, that the court lacked jurisdiction to grant orders under the [Mental Health Act](#) Cap 248 against a subject who had no mental incapacity.
8. Dissatisfied with the judgment the appellant filed a memorandum of appeal dated 19th June 2019 and lodged in the registry at Nairobi on 25th June 2019. The appellant complains that the learned Judge erred in law and fact on several grounds as follows:
 - i. By determining the entire petition and delivering the judgement dated 22nd March 2017 on the Petition dated 4th April 2016 whereas what was before the Court for determination was the Notice of Motion Application dated 11th April 2016.
 - ii. By failing to consider that directions had not been issued for hearing of the petition and/or main petition and the said petition had not been fixed for hearing.
 - iii. By manipulating the court's record hence reaching a wrong determination.
 - iv. By failing to consider all the applications that were pending before the court.
 - v. By failing to furnish the appellant with hand written proceedings despite the requests to enable the appellant ascertain the position of the proceedings.
 - vi. By determining that the subject had no mental incapacity when he donated the Power of Attorney to the Respondent whereas there was no material evidence before Court to warrant such a determination.
 - vii. By making findings and holdings on matters that were not argued before him.



9. The appellant therefore, prayed that the appeal be allowed and the judgement and orders of 22nd March 2017 be set aside. She also prayed for the costs of the appeal and such other or further orders as the Court may deem fit in the circumstances.
10. In the appellant's submissions dated 16th March 2020 she submits that the trial court should not have delivered a judgement before hearing the main suit. After hearing parties on the appellant's application dated 11th April 2016 the court could only deliver a ruling dismissing or allowing the said application. She relies on Order 21 Rule 1 of the Civil Procedure Rules 2010.
11. The appellant contends that whereas her application was dated 11th April 2016, and she complied with directions by filing her submissions as directed on 3rd May 2016, the Respondent filed his submissions on 26th January 2017, 8 months out of time. The appellant submits that the court ought to have looked at the evidence adduced and heard parties with regard to the issues raised in the Petition before granting orders on the mental state of the donor at the time of donating the power. She relies on Section 26(3) of the Mental Health Act.
12. The appellant cites the case of Philio Mururi Ndaruga v Gatemu Housing Co-operative Society Limited (2016) eKLR on the duty of the court to do justice between parties: on Patriotic Guard Limited v James Kipchirchir Sambu [2018] eKLR on the necessity of fair trial: and, on Section 4(3) of the Fair Administrative Action Act No. 4 of 2015 on the right to be provided with notice, where an administrative action is going to affect an individual.
13. The appellant urges that her right to fair hearing in accordance with Article 50 of the Constitution was violated as she was not accorded an opportunity to present her case or prosecute the petition. She is, therefore, urging this Court to accord her justice by setting aside the offending judgment delivered by the court on 23rd March 2017.
14. In the respondents' submissions dated 1st July 2024, it is averred that the appeal is moot as it has been overtaken by events. This is because the Power of Attorney is no longer available after the donor died in May 2017, shortly after the judgement was delivered. That upon the demise of the deceased the law of succession kicked in and is now the operative law. On the mootness of the appeal, they rely on the decisions in National Assembly of Kenya & Another v Institute for Social Accountability & six Others [2017] eKLR and Okiya Okiiti & 2 others v Attorney General & 4 others [2020].
15. The respondents urge that the jurisdiction of the court to appoint a guardian can only be invoked where the subject is suffering from a mental illness as stipulated under section 26(1) and (2) of the Mental Health Act Cap 248. They also rely on Re S (FG) Mental Health Patient [1973] All ER ChD 273, cited with approval in K v K, [2009] eKLR. They further submit that the appellant should have adduced evidence to prove her allegations that the donor had mental illness at the time of donating the power.
16. The respondents countered the appellant's position that the learned Judge erred in law by granting the orders in the Petition dated 4th April 2016, by stating that parties were heard, and that they made oral and written submissions in the application dated 11th April 2016. They assert that the learned Judge was right in the exercise of judicial discretion, as both the application and petition were capable of disposal simultaneously.
17. The 1st Respondent submits that in any case the appeal is overtaken by events, lacks merit, and should be dismissed with costs to the 1st Respondent.



18. We have considered the record and grounds of appeal, the rival submissions, and the law. This being the first appeal, the duty of this Court is as provided in Rule 31 (1) (a) of the *Court of Appeal Rules, 2022* as follows:

“On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact.”

19. This Court adverted to the duty of the court on first appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, as follows:

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

20. We find that the main issue for determination before us is the manner in which the superior court handled the matter to arrive at the impugned decision. The question that should be answered first however, is whether this appeal is moot due to the death of the donor.

21. The appellant urges that her right to fair hearing in accordance with Article 50 of the *Constitution* was violated as she was not accorded an opportunity to prosecute the petition. Her singular prayer is that the offending judgement be set aside so that she can have a chance to present her case. The respondents, on the other hand, urge that the appeal lacks merit on the grounds that it has been overtaken by events, the subject matter of the appeal, which is the Power of Attorney, having ceased to be operational following the death of the donor. The donee ceases to have such power as was donated under the Power of Attorney. (See the case of *Shah v The Chief Land Registrar, Nairobi Lands Registry & 2 others* (Environment & Land Petition E011 of 2022) [2022] KEELC 14970 (KLR) (21 November 2022).

22. The Power of Attorney in question in the appeal before us was therefore, automatically revoked upon the death of the donor in May 2017. Without the Power of Attorney, which is the subject matter of this appeal, it follows that this appeal has been overtaken by events and is moot. Even if we allowed this appeal it would not be enforceable; a court of law will not act in vain. Upon the demise of the subject, his estate has been removed from the purview of the *Mental Health Act* and can only be administered under the *Law of Succession Act*.

23. Whereas our foregoing finding should be determinative of the appeal, we have nonetheless gone ahead to evaluate the record to determine whether the manner in which the superior court handled the matter amounted to a miscarriage of justice, or caused the appellant prejudice.

24. It is trite that a Power of Attorney can only be put in place when the donor still has the mental capacity to make their own decisions. Once that capacity is lost the donor cannot put in place a Power of Attorney. When the subject was cross-examined in court, the learned Judge observed that he was lucid, coherent, and aware of the decision he made in appointing the respondent to manage his affairs under his supervision. He recognized and acknowledged his signature in the Power of Attorney and was aware that by it, he handed over his property to his son the 1st respondent, to manage it because he was sick.

25. The subject clarified that although he was in the hospital when he signed the Power of Attorney, his advocate explained its implication to him before he signed it. In the end, the learned Judge held that the subject was not mentally incapacitated when he gave the power of Attorney, and the court could not, therefore, grant orders against him under the *Mental Health Act*. The court dismissed the petition.



- 26. It is notable that the subject was not taken through any mental status examination by a psychiatrist. A judge can only rely on medical evidence to find that a subject is incapable, by reason of mental disorder, as was stated in *Re S (FG) (Mental Health Patient)* supra. Dr Wangai who examined him was not stated to be a psychiatrist, nor did he evaluate the subject mentally. We are cognizant of the fact that degrees of unsound mind vary so that, whereas some patients may be able to make competent decisions, others may not fare so well and may need help. Only a medical professional in the relevant field can make such a distinction for the court.
- 27. Lastly, the proceedings on record indicate that it was the appellant’s advocate who requested for a hearing and all the parties were present in court when the subject, whose mental capacity was in question was brought to court. He did testify and was cross-examined. We are therefore satisfied that no party was condemned unheard and the superior court rendered substantial justice to the parties through the judgment.
- 28. It is for the foregoing reasons that we find the appeal to be unmeritorious and dismissed it in entirety, with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

