



REPUBLIC OF KENYA



KENYA LAW
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In re EKK alias EK (A Person Suffering from Mental Disorder) (Petition E003 of 2023) [2025] KEHC 338 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEHC 338 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E003 OF 2023

JRA WANANDA, J

JANUARY 24, 2025

IN THE MATTER OF A PETITION UNDER SECTION 2, 26, 27 AND 28 OF THE MENTAL HEALTH ACT, CAP 248, LAWS OF KENYA

AND

IN THE MATTER OF EKK ALIAS EK (A PERSON SUFFERING FROM MENTAL DISORDER)

AND

IN THE MATTER OF THE PETITION BY MJK TO BE APPOINTED GUARDIAN OVER THE AFFAIRS OF AND MANAGER OF THE ESTATE OF THE SAID EKCK ALIAS EK

BETWEEN

MJK PETITIONER

AND

JJR RESPONDENT

JUDGMENT

1. The Petition herein is dated 28/02/2023, filed through Messrs D.K. Korir & Associates Advocates and seeks orders as follows:
 - a. The subject be and is hereby declared to be suffering from a mental disorder as defined under the *Mental Health Act*, Cap. 248, Laws of Kenya.
 - b. The Petitioner be appointed as the manager of the estate and all the affairs of the subject.
 - c. The Petitioner be appointed as the Guardian of the subject.
 - d. The costs of this Petition be borne by the Respondent.



- e. Such other orders as this Honourable Court shall deem just to grant.
2. The Petition is supported by the Affidavit sworn by the Petitioner who deponed that she has brought the Petition in her capacity as the wife to the subject, EKK having celebrated marriage with him on 18/12/1971 under the African Christian and Divorce Act. She deponed further that after celebration of the marriage, they established their matrimonial home within Uasin Gishu County where they have been living happily together until 12/02/2023 when the subject was abducted by the Respondent. She deponed further that the subject is 78 years old, that they are blessed with 5 children who have all given their consent to the Petition, and that the subject has been diagnosed as suffering from stroke and memory loss which condition, the subject's doctor has advised, has occasioned the diminution of the subject's mental capacity and adversely affected his cognition and ability to manage his affairs or take care of himself.
 3. She urged further that the subject has been seriously ill for a long time and was undergoing treatment after being also diagnosed as suffering from neuroendocrine tumor, diabetes melitus, hypertension and gouty arthritis, that due to the said ailments, the subject has not been in a position to perform day to day normal activities on his own including bathing, grooming, visiting the toilet or feeding himself and that as a result, the Petitioner has been taking care of the subject at their home and that the subject has also been under medical care and treatment of his doctor who is based in Eldoret. She deponed that on 12/02/2023, she took the subject to church and after the service, the Respondent, in the company of other persons, abducted the subject, forced him into a motor vehicle and drove off, and that she reported the incident at Ainabitch Police Station but the police are yet to take any action prompting her to seek the intervention of the Court. According to her, all efforts to reach the subject have proved futile, that she believes that the subject was taken to Nakuru where the Respondent lives, and that she is apprehensive that the life of the subject is in grave danger since his medical needs might not be addressed considering that he is away from his doctor and herself as caregiver.

Proceedings during the intervening period

4. Together with the Petition, the Petitioner also filed an Application seeking interlocutory orders that in the interim, the subject be restored to her custody. However, on 24/05/2023 when the matter up for directions, the Petitioner's Counsel, Mr. Lagat, informed the Court that there were new developments in that the subject was returned to the custody of the Petitioner and that the Application had therefore been overtaken by events. He therefore prayed that the Application be marked as withdrawn. Ms. Bosibori, who held brief for Mr. Ndubi for the Respondent, responded that the subject is with the Petitioner because he was abducted and that it was therefore not voluntary. After hearing the parties, I allowed the withdrawal of the interlocutory Application and fixed the matter for directions on 6/07/2023.
5. On 6/07/2023, Mr. Ndubi informed the Court that the Respondent would be filing her own separate Petition. Upon the parties' request, I granted them time to brainstorm over the matter and decide on the way forward. Thereafter, on 26/10/2023, again upon the parties' request, since there were conflicting accounts on the mental status of the subject, I allowed a request for referral of the subject for a psychiatric examination and gave directions on how the same was to be carried out and also gave timelines. Despite being a request from the parties themselves, this directive was never complied with by the parties, and further, they began skipping Court attendances. In the meantime, the Respondent had through Messrs Robert Ndubi & Co. Advocates filed the Response to Petition & Cross-Petition dated 24/10/2023. Mr. Ndubi therefore seems to have gone back on his intention to file a fresh Petition vide a separate action. When for 3 successive occasions, the Petitioner's Counsel missed Court sessions, and the Respondent's missed 2, I set down the matter for dismissal for 16/07/2024. On that date, only



Mr. Ndubi appeared and I would have straight away dismissed the matter for want of prosecution, save that Mr. Ndubi informed the Court that he intended to prosecute the Cross-Petition. In the circumstances, I gave directions on the hearing of both the Petition and the Cross-Petition.

Response to Petition & Cross Petition

6. In the Cross-Petition, the Respondent prayed for orders as follows:
 - i. That this Court be pleased to order the Petitioner (now Respondent) to bring the subject [.....] EKK to Court and identify his family members and or in the alternative the subject be ordered to provide DNA samples.
 - ii. An order of a permanent injunction restraining the Petitioner (now Respondent) whether by herself, her servants, agents, employees and/or anyone acting on her authority from denying access of the Applicant and her children to their father [.....] EKK.
 - iii. The Petitioner (now Respondent) be ordered to allow family members unlimited access and interaction with the subject [.....] EKK.
 - iv. The Petitioner and her children be involved and allowed to directly participate in the affairs of the subject [.....] EKK.
 - v. Such orders that this Honourable Court shall deem just and fit to grant.
7. In the Replying Affidavit sworn by the Respondent, both in response to the Petition and in support of her Cross-Petition, she deponed that the Petitioner is her co-wife, being the 1st wife of the subject and the Respondent the 2nd, that they are both elderly people with grandchildren, and that the Petitioner's matrimonial home is in Eldoret while the Respondent's is in Nakuru. She denied that the subject has previously suffered a stroke or that he suffers from memory loss and submitted that for several years, the subject has been suffering from diabetes and hypertension which he has managed very well taking into account his advanced age. She also denied that the subject has been suffering from mental disorder hence would need the appointment of a Guardian to manage his assets. She submitted further that for several years, the subject had been staying with her in Nakuru until August 2021 when he was taken ill and admitted in hospital in Nakuru where both the families of the Petitioner and the Respondent attended to him without any problem, and that when the subject was discharged, he stated, in the presence of the Petitioner, that he wanted to return to Nakuru.
8. According to her, after a few days, the Petitioner and her children went to the Respondent's residence in Nakuru and insisted that they wanted to take the subject to Nairobi for specialized treatment, a request that the Respondent acceded to, that however a few days after the subject was taken to Nairobi, he was flown directly to Eldoret to the Petitioner's residence, that subsequently, the Petitioner blocked the Respondent and her children from accessing the subject including even through his phones, and that even the subject's siblings were also denied access. She deponed that in the meantime, the Petitioner and her children started unwarranted violence against the Respondent's family that culminated with an attack at the Respondent's residence during the Easter holidays of 2022 when the residence was broken into and everything taken away, and that after this incident, she filed Nakuru Chief Magistrate's Court ELC E067 of 2022 seeking for injunctive orders. She deponed that apart from this Petition, there are several matters in various Courts all touching on the Petitioner and her children as the 1st house against and the Respondent's house as the 2nd, including the said Nakuru Chief Magistrate's Court Case No. E067 of 2022, Nakuru High Court Petition No. 11 of 2022, and Eldoret Criminal Case No. 1780 of 2023, amongst other cases that are wasting valuable judicial time.



9. She deponed further that the subject asked to return to Nakuru and in the course of their journey from Eldoret to Nakuru, a false report of abduction was circulated and their motor vehicle was blocked at a road-block that had been mounted by the police following the report but the subject insisted that he was free to go to his residence at Nakuru and the police officers allowed them to proceed. She deponed further that later in March 2023, the Petitioner abducted the subject from Nakuru and has since then denied the Respondent access to the subject, that these proceedings have nothing to do with the mental health of the subject but has everything to do with the assets of the subject that the Petitioner wants to acquire to the exclusion of all other family members. She pointed out that the subject has sworn an Affidavit in these proceedings expressing his desire to be interviewed by the Court and cross-examined by Counsel for the Petitioner to enable this Court determine whether he is suffering from mental disorder.
10. There were also additional Affidavits filed by one Peris Kipkebut and James C.R. Komen, respectively, who both deponed that the subject is their elder brother, and acknowledged the Respondent as the subject's 2nd wife. They both denied that the subject suffers from mental disorder. There is also the additional Affidavit sworn by one Cyrus Kipkulei Komen who deponed that he is the 1st born child of the subject and who basically reiterated the matters deponed by the Respondent.

Hearing of the Petition and the Cross-Petition

11. No response was filed to the Cross-Petition. Further, as aforesaid, the Petitioner and/or her Advocates stopped attending Court sessions and at some point, there was even indication that Counsel intended to cease acting. All indications are that the Petitioner is no longer interested in pursuing the matter. As aforesaid, I would have long dismissed the matter for want of prosecution had it not been that the Respondent filed a Cross-Petitioner which she insisted on prosecuting.
12. Subsequently, I gave directions that the parties file written Submissions. Pursuant thereto, only the Respondent filed such Submissions, which she did on 23/09/2023.

Respondent's Submissions

13. In respect to the prayer in the Cross-Petition that the subject be presented in Court to identify his family members and/or be directed to provide DNA samples, Counsel submitted that due to old age and poor health status of the subject which remains unknown, it is in the best interest that the subject and his family that the subject be presented in Court since it is apparent that the subject is unaware of the Court proceedings that affect his welfare, his affairs and his family at large. On the prayer that the family members, children and the Respondent, should be granted access to the subject, he submitted that the subject has not been allowed to interact with other family members for close to 1 year due to the selfish interests of the Petitioner who abducted the subject and that the family members are apprehensive that the subject's life and health are in danger.
14. He then cited Section 26(1)(b) of the [Mental Health Act](#) and submitted that in the absence of any medical records proving the subject is suffering from a mental disorder, it is in the best interest of the subject that he be allowed to interact with his children and family, that by removing the subject from his family, the Petitioner is also denying him the warmth of his immediate family, that there is no evidence that the subject was consulted about his being removed from his own home and that the Petitioner is clearly motivated by factors other than the well being of the subject. According to him therefore, it is in the best interest of the subject that he be allowed to choose where to stay since he is clearly mentally stable. On the prayer that the Respondent and her children be allowed to participate in the affairs of the subject, he cited Section 80 of the [Civil Procedure Act](#) and Order 45(1) of the Civil Procedure



Rules. These provisions relate to the remedy of Review of Court orders but it is not clear why they have been cited since no specific order sought to be reviewed has been pointed out. He however went on to submit that the Petitioner defied the consent Court orders directing her to present the subject for mental assessment.

Determination

15. The broad issue for determination in this matter is, in my view, “whether the material placed before this Court brings this matter under the *Mental Health Act*, Cap. 248 and if so, what orders should be made regarding management of the estate of or affairs of the subject”.
16. The foundation for this Petition is the *Mental Health Act*, Cap. 248. By amendments made to the law, the Mental Health (Amendment) Act was passed on 21/06/2022 and which introduced significant changes to the legislation governing matters of mental health in Kenya. One of these changes was the dropping of the phrase “mental disorder” and replacement thereof with the term “mental illness”.
17. Under the previous regime, the phrase used was “mental disorder” which was then defined under Section 2 thereof as follows”

“A person suffering from mental disorder” means a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse”.
18. However, under the amendments cited, the phrase now used is “mental illness” and the definition now adopted is as follows:

“A person with mental illness” means a person diagnosed by a qualified mental health practitioner to be suffering from mental illness, and includes:

 - a) a person diagnosed with alcohol or substance use disorder; and
 - b) a person with suicidal ideation or behaviour;
19. In respect to the Court’s powers, Section 27 of the Act provides as follows
 - “(1). The court may make such an order as it considers necessary for the administration and management of the estate of any person with mental illness including—
 - a) an order making provision for the maintenance of the person;
 - b) an order making provision for the maintenance of members of the person’s immediate family who are dependent upon the person; and
 - c) an order making provision for the payment of the person’s debts
 - (2) The court may appoint a manager of the estate of a person with mental illness for the purposes of safeguarding the property of that person.
 - (3) The court may for the purposes of section (1), appoint the supporter or the representative of the person with mental illness as the manager of the estate of the person under subsection (2).



- (4) The court shall, by notice in the Gazette, inform the public of the appointment of a person as the manager of the estate of a person who is suffering from mental illness.
- (5) Within fourteen days of the Gazette Notice under subsection (4), any person may lodge an objection to the person appointed as manager.”

20. Section 2 then defines the term "representative", and gives the hierarchy of eligibility for appointment as such "representative", to mean:

- (a) a spouse of that person, or if unable or unwilling;
- (b) the child of that person, where such child has attained the age of eighteen years, or if unable or unwilling;
- (c) a parent of that person, or if unable or unwilling;
- (d) a relative of that person, or if unable or unwilling; or
- (e) a person under whose care or charge the person with mental illness is;

21. Further, the Supreme Court, in the case of MMG v Tribunal Appointed to Investigate the Conduct of Hon. Lady Justice MMG, Judge of the Environment and Lands Court of Kenya (Petition 10 (E013) of 2022) [2023] KESC 73 (KLR) (12 September 2023) (Judgment), although dealing with an employer-employee scenario, made the following statements which would still be relevant to the matter at hand:

“73. This court, guided by prevailing social needs as well as relevant case law as developed in comparative jurisdictions, is well aware of the necessity to strike a balance, on the one hand, of the rights of an individual in a free society and, on the other hand, the need to protect the individual, employment environment, and society at large, from the adverse effects of mental illnesses and disorders. Therefore, in determining cases of mental incapacity, and bearing in mind that conclusions cannot be transposed from one case to another, we establish the following guidelines for courts to follow in matters which involve an assessment of mental incapacity:

- 1. Mental incapacity includes but is not limited to a person’s inability to make a decision, understand information about a decision, remember information, use the information to make a decision, or communicate a decision.
- 2. Mental incapacity can result from mental illness but it does not necessarily follow that mental illness equals mental incapacity.
- 3. Mental incapacity must be diagnosed by a qualified professional.
- 4.
- 5.
- 6. A court must consider the diagnosis by a qualified professional, and medical expert evidence and assess whether, on a balance of probabilities, the employee’s mental illness affects their work duties.



7. Where a person is deemed to lack mental capacity, any interference with his or her fundamental rights and freedoms must be the least restrictive possible.”
22. From the above, it is clear that this Court can only assume jurisdiction over an action brought under the *Mental Health Act* upon it being demonstrated that the subject is suffering from a “mental illness” in accordance with the definition set out under Section 2 of that Act.
23. In this case, the medical evidence relied upon by the Petitioner is the handwritten Report dated 16/02/2023 made by one Prof. S.N. Kimaiyo MB. ChB., M. Med., (Int. Medicine). In regard to the subject’s medical condition, the Report only captures the following:

“The above named is under our medical care for diabetes, mellitus, hypertension, mild stroke and memory loss

”
24. Nowhere does the Report mention, state, allude to or even suggest that the subject is suffering from any “mental illness”. In fact, the Report does not mention anything regarding the subject’s mental status or capacity at all or any diagnosis in regard thereto. The closest it mentions is “memory loss”, which condition cannot by itself, by any stretch of imagination, be interpreted to have mean the meaning “mental illness”. Without disclosing any mental illness on the part of the subject, the Petition therefore fails at the very first hurdle.
25. In any case, the Petitioner having failed to file any Submissions as agreed by consent, the only opportunity available to her to persuade and/or convince this Court on the matter aforesaid, was lost.
26. In light thereof, the second consideration, namely, whether the alleged “mental illness” suffered by the subject impairs him or is to such an extent as to render him incapable of managing his affairs, would not even arise, the Petition having failed at the first hurdle.
27. Unfortunately for the Respondent, this Court having found that the existence of a “mental illness” as defined under the Act has not been demonstrated, and that by reason thereof, this Court’s jurisdiction has not been established, it also follows that her Cross-Petition, too, has no legs to stand on, and likewise, cannot be sustained. In any case, it will be recalled that the Respondent strenuously challenged the narrative that the subject was mentally impaired and went to great lengths to demonstrate that the subject was fully in charge of his mental faculties and did not at all require the appointment of anyone or any third party to manage his affairs on his behalf.
28. If therefore the Respondent still wishes to move the Court to determine the grievances that she has put forward, including the prayers made in her Cross-Petition, then unless “mental illness” on the part of the subject is demonstrated, she would have to move the Court through a different regime of law, other than under the *Mental Health Act*.
29. Before I pen-off, I get the feeling that this action, being the latest among various others that the parties have filed against each other, was not motivated by good faith on the part of the parties or by a genuine desire to honestly assist the subject to manage his affairs. The same appears to be an attempt by the parties, said to be rival wives of the polygamous subject, to assume control of the subject’s wealth and also use the Court to position themselves at vantage points early enough in preparation for an anticipated Court Succession battle. I hope I am wrong but if I am right then it is a very sad state of affairs initiated while the subject is still very much alive. I will however say no more about this observation, other than leave it to the parties’ conscience and personal conviction.



Final Orders

30. In the premises, I rule and order as follows:

- i. Both the Petition and the Cross-Petition fail on the sole ground that the existence of “mental illness” on the part of the subject having not been established, the threshold for the Court to assume jurisdiction under the Mental Health Act, Cap. 248 of the Laws of Kenya has also not been met, demonstrated or established.
- ii. Both the Petition and the Cross-Petition are therefore dismissed.
- iii. Each party shall bear his or her own costs of the matter.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY 2025

.....

WANANDA J. R. ANURO

JUDGE

DELIVERED IN THE PRESENCE OF:

Ms. Bosibori h/b for Mr. Ndubi for the Respondent-Cross Petitioner

N/A for Petitioner

Court Assistant: Mr. Kuto

