



**In re PKN (Miscellaneous Application E067 of 2022)
[2025] KEHC 5501 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E067 OF 2022**

PN GICHOHI, J

APRIL 30, 2025

**IN THE MATTER OF SECTION 26(1)(A), 28(1), 29 (1) AND 34(1)(2) (3) OF
PART 12 OF THE MENTAL HEALTH ACT, CAP 248 LAWS OF KENYA
IN THE MATTER OF PKN (PERSON SUFFERING WITH MENTAL DISORDER)**

BETWEEN

**ERK 1ST PETITIONER
JNK 2ND PETITIONER
EMK 3RD PETITIONER
MWK 4TH PETITIONER
SW 5TH PETITIONER**

AND

**CWK 1ST RESPONDENT
EWK 2ND RESPONDENT
DNK 3RD RESPONDENT
MIK 4TH RESPONDENT
TGK 5TH RESPONDENT
PW 6TH RESPONDENT**

RULING

1. What is for determination before this Court is the Petitioners’ application titled ‘Writ of Habeas corpus’ brought under Article 25 (a) (b) & (d) of *the Constitution*, Order 1 Rule 1 and Order 16 Rule 7 of the Civil Procedure Rules, seeking for Orders that; -



1. The subject herein be produced before this court within 48 hours.
 2. The subject be reinstated and kept in his own home with immediate effect.
 3. Mediation be done by the Kenya National Commission for Human Rights and Equality.
 4. The family elders listed in annexure 'PK1' and the subjects 17 grandchildren listed in annexure 'PK2' be joined in this suit with leave of Court as interested parties.
2. The Application is based on the grounds on the face of the application and supported by the Affidavit sworn by JNK (the 2nd Petitioner).
 3. He deposes that the Petitioner, their children and the subject herein have a fundamental right to relate as a God formed institution as provided for under Chapter 4 of *the Constitution* and more specifically Article 19 (2) & (3) (a).
 4. That in disregard of that right, the Respondents have denied them, together with the extended family access to the subject and thus they are unable to interact and enjoy the warmth and joy of their father.
 5. He contends that the Respondents have violated the subject's fundamental rights under Article 59 (a) & (c) of *the Constitution* by forcefully removing him from his homes and shutting him away from his other family members.
 6. Further that they are concerned whether the subject is alive or dead in the way in which the Respondents are handling his whereabouts. That their acts are against the dictates of Article 25 (a) & (d) of *the Constitution*. He added that the subject has never been brought to any of the meetings held by the family over his wellbeing and his whereabouts remain unknown to the Petitioners and majority of the family members.
 7. The deponent stated that being a father and an elder in the community, the subject should be allowed to participate in his family's affairs including birthdays, weddings, burials, rites of passage among other family gathering and festivities.
 8. He maintained that the Respondents have adversely usurped the family duties of the subject to the detriment of the other members of the family, by illegally subjugating other members of the family, casting aspersions and derogatory sentiments.
 9. In his affidavit, he stated that the Kenya National Commission for Human Rights, should be allowed to arbitrate over the issues raised in this matter as they relate to human rights violations.
 10. It is his case that this matter will be settled if each party and the subject herein is allowed to explore his rights and freedoms in all spheres of life.
 11. He stated that Alternative Justice System(AJS) process which they were subjected to, did not bear any fruits and the subsequent referral to elders was thwarted by the Respondents who failed to attend to the meeting convened by the village elders. Further that the Respondents have always blocked their visit to the subject.
 12. In conclusion, he reiterated that all efforts to reach their father and know how he is doing has been met with serious blocks from the Respondents, and therefore they resulted to seeking the orders in this Court to access their father.
 13. The Respondents opposed the Application and filed grounds of opposition dated 24th February, 2025 on the following basis; -



1. The Petitioners' Application is misconceived, frivolous and an abuse of Court process.
 2. The Petitioner's Application is fatally defective.
 3. The petitioners' Application is supported by an affidavit not attested to by the maker.
 4. The Petitioners' Application is supported by an Affidavit by minors who are not in law of the capacity to do so.
 5. The Petitioner's Application is supported by an affidavit of persons who are not parties to this suit.
 6. The subject herein is married and currently stays with and under the care of his spouse.
14. Based on the above grounds of opposition, the Respondents urged this Court to dismiss the Application with costs.

Analysis and Determination

15. The issues for determination herein are; -
1. Whether the subject should be produced in Court.
 2. Whether the subject should be reinstated to his home.
 3. Whether the joinder of the elders and grandchildren Application is merited.
 4. Whether Kenya National Commission of Human Rights should be order to mediate over the issues herein.
 5. Who bears costs of this Application.
16. On the first issue, the Applicants urged this Court to order for the production of the subject before this Court within 48 hours under the principle of Habeas corpus, for the reason that the Respondent have taken hostage of him and have denied all the other family members access to visit the subject.
17. The right to habeas corpus is enshrined in *the Constitution* of Kenya, 2010, under Article 25, as one of the fundamental rights and freedoms that cannot be limited. It is a safeguard of personal freedom against arbitrary State action. Article 51 further underlines the rights of persons detained, including the entitlement to challenge the lawfulness of their detention through the habeas corpus process.
18. Both the application and procedure for habeas corpus are primarily governed by the *Criminal Procedure Code* (CPC), which provides the statutory mechanism for individuals unlawfully detained to seek immediate release. Habeas corpus proceedings compel the State or detaining authority to bring the detainee before a court to justify the detention.
19. Generally, habeas corpus ensures that individuals cannot be imprisoned without legal justification. It protects against arbitrary detention by requiring a court to review the legality of a person's confinement and order their release if the detention is found unlawful. Essentially, it ensures that any person held in custody is brought before a court to determine the legality of their detention.
20. Conversely, in this case, the Applicant is seeking production of his father, the Subject herein, who is in alleged custody of the Respondents, who, as described above, are the wife and children of the Subject.
21. The Applicant has not tendered any evidence or alleged whatsoever, that the subject herein has been detained illegally to warrant the production of body Application sought. Since the subject's place of



- aboard is known and without any evidence that he has been detained illegally and compounded by the fact that this is a civil matter and the Order of Habeas Corpus is not applicable in the circumstances and thus cannot be granted.
22. On the prayer for reinstatement of the subject to his homes, the Applicant argued that the Subject has two homes , one in Nakuru and the other in Nairobi and that it is only when the subject is reinstated to either of his homes that they will be able to access him. The Respondents on the other hand argued that the house in Nakuru is in dilapidated condition and not habitable.
 23. A perusal of the record herein reveals that this issue had been raised earlier and Matheka J, in her Ruling of 20th December, 2022 had directed both the Petitioners and the Respondents to repair the subject's house to make it habitable and comfortable for him before the subject is reinstated back to his home.
 24. Though aware of the directions of the Court issued earlier, the Applicant has not tendered any evidence to confirm to this Court that said Orders have been complied with. Unless the Orders of 20th December, 2022 are complied with and the Subject's house is repaired to make it habitable and a nurse employed for him as directed, this Court cannot make further Orders on reinstatement of the Subject to a dilapidated house. His safety and interest are paramount to this Court, considering that he is a vulnerable member of the community pursuant to alleged mental health illness.
 25. With regard to the prayer seeking to have KNCHR mediate over the issues around this matter. The Applicants argued that the Respondents persistent act to deny them access to their father is a violation of their rights and their father's right. That they explored out of Court settlement through AJS but the Respondents refused to participate in the proceedings leaving them with no other option but ask for the matter be subjected to mediation by KNCHR and for their subsequent joinder to these proceedings.
 26. However, this Court notes that KNCHR is not a party to these proceedings and there is nothing on record to show that the said Commission is willing to undertake mediation for the parties.
 27. Further, this Court can only refer such a matter for mediation either by consent of the parties and if suo moto, after screening process is done and therefore, without consent of the parties, this Court cannot refer this matter to Mediators outside the Court annexed mediators.
 28. On the Application of joinder of elders and grandchildren, listed in annexure PK1 and PK2, to this matter, the Applicant argued that since the Subject's whereabouts are unknown, his grandchildren's rights have been violated. Further, that the Elders being brothers and cousins of the Subject, who handled this matter following referral made by AJS Nakuru, should be joined to these proceedings.
 29. Joinder of parties is governed by Order 1 Rule 1 of the Civil Procedure Rules. In law, joinder should be permitted to all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise.
 30. The court may, suo moto, add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.
 31. Joinder of parties may, however, may be denied where such joinder; will lead into practical problems of handling the existing cause of action together with the one of the parties being joined, is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. The determining factor in



joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.

32. Juxtaposing with the above in the instant case, the main reliefs sought by the Petitioners in the main Petition are; Orders for them to access the subject herein; restraining Orders against the Respondents from dealing with the subject's properties and the appointment of guardians to manage the Subject's affairs.
33. From the prayers sought, the presence of grandchildren and elders in this case will not serve any useful purpose other than delaying this matter, considering that this Court's attempt to have the parties resolve the dispute through Alternative Dispute Resolution mechanism has failed. In the circumstances, the prayer for joinder is disallowed.
34. Further, none of the parties have demonstrated to this Court compliance with the Orders issued by Mumbua Matheka J in her Ruling delivered on 20th December 2022.
35. What they have engaged in are numerous interlocutory applications devoid of capacity to dispose of the main issues in question which, as stated above, are more than just access to the Subject. The only way to have this matter concluded is through urgent hearing of the main Petition.
36. In conclusion:-
 1. The application of 4th October, 2024 is found to be without any merit and dismissed in its entirety.
 2. Each party to bear his own costs of that application.
 3. Parties to take deliberate steps to prepare for hearing of the main Petition.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF APRIL, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

JK -Applicant

SW -Applicant

Mr. Mwangangi for the Respondents

Ruto, Court Assistant

