



REPUBLIC OF KENYA



KENYA LAW
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In re CWN (A Person Suffering from Mental Disorder) (Miscellaneous Application 7 of 2022) [2023] KEHC 22148 (KLR) (13 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS APPLICATION 7 OF 2022**

CM KARIUKI, J

SEPTEMBER 13, 2023

**IN THE OF SECTIONS 26, 28(1) AND 28 (2) OF THE
MENTAL HEALTH ACT, CAP 248 LAWS OF KENYA**

AND

IN THE MATTER OF CWN (A PERSON SUFFERING MENTAL DISORDER)

AND

**IN THE MATTER OF AN APPLICATION BY BTN TO BE APPOINTED
GUARDIAN OVER THE AFFAIRS AND MANAGER OF THE ESTATE OF CWN**

AND

IN THE MATTER OF GUARDIANSHIP OF THE SUBJECT - CWN

RULING

1. By a Notice of Motion dated October 28, 2022. The Applicant seeks the orders.
 - i. That this application be and is hereby certified as of utmost urgency and the same be heard at the very first priority without the requirement of service at the very first instance.
 - ii. That Pending the hearing and determination of this application inter-partes, an order temporary injunction do issue restraining the Land Registrar Rumuruti Lands Registry, either by himself or through his servants, employees, workers, assigns and/or any other person whatsoever from causing any transaction whatsoever in the form of sub-division, transfer and/or charge to be registered on parcels No Laikipia/xxxx xxx1/xxxx, Laikipia/xxxxx4/xxx (PESI).
 - iii. That pending the appointment of a legal guardian over the affairs of CWN, an order of temporary injunction do issue restraining the Land Registrar, Rumuruti Lands Registry, either by himself or through his servants, employees workers assigns and/or any other person whatsoever from causing any transaction whatsoever in the form of sub-division, transfer and/or charge to be registered on parcels No Laikipia/xxxxx1/xxxx, Laikipia/ xxxxx1/535 (Muruku) and Laikipia /xxxxx4/xxx(PESI)



2. The same is supported by the grounds on the face of the motion and reiterated in the Supporting Affidavit of the Applicant sworn on October 28, 2022.
 - a. The subject was at all material times relevant hereto is legally married to one JNK, who has since changed his name to JNM. The two celebrated their marriage under the *African Christian Marriage and Divorce Act*, Cap 151 Laws of Kenya, way back in 1974 but have lived together as husband and wife for over 60 years.
 - b. During the subsistence of the said marriage, the subject and the said JNM have jointly acquired several properties that form part of their matrimonial properties, including Laikipia/ xxxxx1/xxxx Laikipia xxxxx1/535 (Muruku) and Laikipia /salma Muruku Block4/xxx (PESI).
 - c. The subject has, however, recently suffered from mental incapacity whereby she has been diagnosed with hypertension, Dementia, and Psychosis and is therefore not in a position to manage her affairs.
 - d. The said JNM is, however, taking advantage of the Subject vulnerable condition and is now on a spree to dispose of their joint matrimonial properties without the subject's consent and/or authority and in gross violation of her proprietary rights thereon.
 - e. The said JNM has, to this end, introduced an impostor by the name of Rose Wairuri Michirato purport to be his spouse and sign affidavits to that effect to enable him to dispose of their matrimonial properties with ease.
 - f. The said JNM has also been using corrupt means in collusion with the land registrar, Laikipia West, to remove all the cautions registered against the titles above as his sole intentions to use dubious means to enrich himself from the properties of the marriage at the expense of the subject herein.
 - g. There is, therefore, a need to appoint a legal guardian to manage the subject's affairs and to protect her interests, including by way of instituting civil proceedings, inhibiting the sale and/or disposal of her properties, and/or undertaking any other legal steps to safeguard her rights under the *Mental Health Act*.
 - h. Therefore, The Applicant seeks to be appointed the legal guardian of the subject herein and has obtained the consent and authority of the other siblings to bring these proceedings.
3. The Respondent opposes the Application vide his Affidavit sworn on 5/12/2022.
4. The Applicant further put an Affidavit sworn and filed on 9/3/2023.
5. The Applicant is a son of the Subject of Instant guardianship proceedings and the Respondent.
6. His Averment is that the Subject and Respondent jointly acquired the Subject properties Laikipia/ xxxxx 1/xxxx, Block 1/535, and Block 4/xxx(Pesi).
7. However, the subject suffers from mental illness (Dementia and Psychosis) and can thus not manage her affairs.
8. The Applicant claims that the Respondent is disposing of the Subject Properties, without the subject's consent. Thus, he seeks to preserve the Subject matters (lands) pending the appointment of the guardian of this matter. The Respondent has opposed the Application and raised the issue of jurisdiction as the order sought touches on the right to land, which is a preserve and, in the Environment, and Land Court domain.



9. The Respondent avers that he is the husband of the subject of the guardianship and, thus, the proper person to seek guardianship. Respondent claims to own the properties sought to be injuncted and reiterates that any claim to the lands in issue should be lodged in Environment and Land Court.

10. Jurisdiction

11. On the issue of jurisdiction, the same flows from either the Constitution, legislation, or both or by principles laid out in judicial precedent. See the Supreme Court In the matter of the Interim Independent Electoral Commission, Constitutional Application No 2 of 2011 (unreported). The classic decision in Kenya on jurisdiction is the celebrated case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR it was held by the Court that it has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. The interest sought to be protected is alleged to be the subject of the guardianship proceedings.
12. The parcels of land are not Subject to the proceedings but only the Application canvassed.
13. Article 162 of the Constitution
- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court, and the courts referred to in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--
 - (a) employment and labour relations, and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
14. 1. Article 162(2)(b) of the Constitution confers ELC with jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. In addition, Section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:
- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In the exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have the power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to the compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private, and community land and contracts, choses in action, or other instruments granting any enforceable interests in land; and



(e) any other dispute relating to environment and land."

15. Section 2, read together with Section 6 of the - *Matrimonial Property Act* (MPA), defines matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property; matrimonial property, on the other hand, means the matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned or acquired jointly during the subsistence of the marriage.
16. In the case of *Sophy Njiri v National Bank of Kenya & another* (2015) eKLR, the Court held as follows:
- "A spouse has a right to the matrimonial home, and if that right is threatened or is being affected by some action by another person, the spouse may apply to Court for relief."
14. Where there is a dispute with respect to matrimonial property, Section 17 provides the procedure to be followed in agitating those rights. It says;
- "(1) A person may apply to a Court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
- (2) An application under Sub-section (1)—
- (a) shall be made in accordance with such procedure as may be prescribed;
- (b) may be made as part of a petition in a matrimonial cause and
- (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes."
17. From the above provisions of the MPA, it follows that the current legal position is that concurrent jurisdiction has been given to many Courts to hear disputes relating to matrimonial property. The *Marriage Act* of 2014 also provides that the Courts that will hear matrimonial causes arising under the Act are resident magistrate's Courts and within the limits provided under the law as to their jurisdiction. The High Court is, in this regard, granted original and unlimited jurisdiction in civil matters by the *Constitution* under Article 165(3). Equally, this Court (ELC) enjoys jurisdiction over matrimonial properties except where it involves matrimonial causes, which is in the province of the High Court and the Magistrates' Court in line with their respective jurisdictions.
18. In this case, the Applicant's Application revolves around the rights of property that he claims to be matrimonial properties. For the Court to determine the case, it must inquire as to the parties' marital status. In this case, the parties are still married but separated. The other issue is determining which of the properties listed are matrimonial. Distribution of matrimonial property in an undissolved marriage is best left to the Family Court. This Court is not sitting on the instant matter as matrimonial Court.
19. The parties have not been divorced but separated; thus, the Court's finding is that the right forum for the parties to litigate the dispute in accordance with Section 17 (b) of the *Matrimonial Property Act* is in the Family Court. There is no claim over the parcels of land sought to be preserved, which can only be heard by the Environment and Land Court or this Court if claimed as Matrimonial properties



under the relevant provisions of the law. In any case, the Applicant cannot claim the parcels of land on behalf of the subject before he has been appointed to be the subject's guardian.

20. Thus, in sum, I find that this court has no jurisdiction to entertain the Application in its form and content.

21. Thus, the court rejects the application and strikes out the same with no orders as to costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 13TH DAY OF SEPTEMBER 2023.

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CHARLES KARIUKI

JUDGE

