



BWC (Suing as the guardian, wife and next of Kin of JMM) v Kenya Commercial Bank & another (Miscellaneous Application E035 of 2023) [2024] KEHC 9423 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS APPLICATION E035 OF 2023**

JK SERGON, J

JULY 25, 2024

**IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248 LAWS OF KENYA
AND
IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP**

BETWEEN

BWC (SUING AS THE GUARDIAN, WIFE AND NEXT OF KIN OF JMM) APPLICANT

AND

KENYA COMMERCIAL BANK 1ST RESPONDENT

FAMILY BANK OF KENYA 2ND RESPONDENT

RULING

1. The application coming up for this court's determination is a notice of motion dated 12th July, 2023 seeking the following orders;
 - (i) Spent
 - (ii) That the Applicant, B.W.C, be appointed as the personal representative/guardian of J.M.M, hereinafter referred to as ' the patient'.
 - (iii) That this Honorable Court be pleased to grant leave to the Applicant to enable her access the patient's Bank Account No. XXXXXXXXXXXX held at Kenya Commercial Bank, Kericho Branch and Bank Account Number XXXXXXXXXXXX held at Family Bank, Kericho Branch.
 - (iv) Costs of the application be provided for.
 - (v) Any other orders that the Court deems fit and just to grant.



2. The application is supported by grounds on the face of it and the supporting affidavit sworn by B.W.C the Applicant herein.
3. The Applicant avers that she and the patient, J.M.M are lawfully married with spousal obligations over each other and that their union was blessed with 3 issues namely E.W aged 20 years, S.M aged 16 years and P.C.M aged 3 years at the time of the instant application. The Applicant attached copies of their birth certificates.
4. The Applicant avers that on 12th September, 2020 at 12:42 pm or thereabouts, the patient was involved in a road traffic accident. The Applicant further avers that he was thereafter admitted to the Moi Teaching and Referral Hospital having sustained serious head and bodily injuries, specifically a spinal injury. The Applicant attached a copy of the police abstract form and the radiologist report both detailing the extent of the injuries sustained.
5. The Applicant avers that the patient was thereafter discharged from the hospital but owing to the extent of his injuries, remains bedridden in a comatose state. Therefore, his cognitive and motor abilities have been severely impaired. The Applicant attached a copy of the hospital discharge form.
6. The Applicant avers that following this unfortunate event, she had to step in to manage the family's needs, including having to settle arising financial obligations and to facilitate this she had requested her husband's Bank, Kenya Commercial Bank of Kenya, Kericho Branch to access his account and collect the funds necessary to settle his financial obligations. The Applicant attached a copy of the assistant's chief letter addressed to the bank requesting the same.
7. The Applicant avers that her requests of access to her husband's bank were rejected by the bank on the basis of absence of written authority and/or court orders sanctioning access. The Applicant avers that without access to financial resources, she cannot settle the family's financial obligations including school fees, housing and further medical expenses incurred.
8. The Applicant reiterated that she requires a guardianship order in order to facilitate, inter alia, access to her husband's account in order to settle the aforementioned obligations and manage other aspects of his estate.
9. The Applicant avers that she is a suitable candidate to be granted guardianship over her husband's affairs, given that she was his spouse and that all other dependants had consented to her appointment.
10. At the insistence of this Court, the Applicant filed a further supporting affidavit.
11. The Applicant reiterated that her husband got involved in a road traffic accident and suffered acute intracerebral hemorrhage and surrounding edema. The Applicant further avers that her husband's neurocognitive function was severely damaged and he was therefore not fit to make any judgment or decision. The Applicant attached a copy of the medical report prepared by Nancy Wendot, a medical officer at the Kericho District Hospital.
12. The Applicant specified the amounts needed and attached receipts and fees structures as follows;
 - (i) Family upkeep and maintenance (food, rent, water & electricity, house maid, diapers for the minor aged 3 years - Kshs. 102, 400/=
 - (ii) Medical expenses to include doctors visits, nurse and, nutritionist house calls, sanitation and dressing material - Kshs. 64, 000/=
 - (iii) School fees school materials transport and pocket money for the minor aged 20 years at Kenya Medical Training School Sigowet - Kshs. 120, 300/=



- (iv) School fees, school materials transport and pocket money for the minor aged 16 years at Kericho High School - Kshs. - Kshs. 68, 035/=
 - (v) Miscellaneous and leisure - Kshs. 30, 000/=
- Grand Total Kshs 384, 735/=
13. The Applicant avers that the family urgently needs a total of Kshs. 384, 735/= to settle immediate needs and a further Kshs. 166,400/= for expenses drawn on a monthly basis.
 14. The Applicant therefore urged this court to grant her access to the bank accounts held by her husband at the Kenya Commercial Bank, Kericho Branch and Family Bank, Kericho Branch failure to which the education, upkeep of the children and her ailing husband would grossly be affected.
 15. The Application is not opposed.
 16. I have considered the instant application and the sole issue for this court's determination is whether the applicant should be granted guardianship over her husband's affairs, in order to settle the aforementioned financial obligations and manage other aspects of his estate.
 17. The court has exhaustively considered all the material placed before it, the main issue for determination is whether the court should grant the guardianship and management orders as sought in the application herein. The answer is in the affirmative. The [Mental Health Act](#) provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons. Section 2 of the [Mental Health Act](#) Cap 248 provides that:

“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. This court is empowered to grant orders sought by the application in relation to custody, management and guardianship under Section 26 of the [Mental Health Act](#) Cap 248 which provides:
 - “(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 inquiries 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 just 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.”

19. Moreover, the authority to manage affairs of an estate of a patient is donated under Section 27 of the *Mental Health Act* whereas Section 28 of the same Act provides for management of the subject's estate.

20. The court *in Re N.M.K* [2017] eKLR considered what should guide the court when applying Section 26 and 27 of *Cap 248*. The Court held as follows:

“In considering an application brought under sections 26 and 27 of the *Mental Health Act*, the Court is guided by three main factors:

There must be medical evidence warranting the determination by the Court that the Subject suffers from mental disorder;

The person to be appointed to be either a Guardian or Manager must be fit to be so appointed;

The Court must be satisfied that a proposed Manager will utilize her powers for the benefit and welfare of the Subject.”

21. Based on the findings of the medical report in respect of the subject prepared by Nancy Wendot a medical officer at Kericho District Hospital, it is apparent that the subject suffers from a mental disorder as per section 2 of the *Mental Act* and further a medical condition contemplated under Section 26 of the *Act*. It is my considered view that the subject is incapable of managing himself and to conduct his daily activities due to his mental and physical condition. *In the matter of Gerishon Kirima* [2009] eKLR where the Court considered the definition of a person suffering from a mental disorder and concluded that:

“the petitioner while bringing in a petition for orders under Section 26 of the *Act* has to show the court by providing medical reports to substantiate the averment 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 the ordinary demands of life and the orders sought is for the welfare of the person concerned.”

22. As noted above, section 26 of the *Mental Health Act* gives this Court the power to make an order regarding management of the estate of any person suffering from mental disorder to any relative or any person suitable but giving preference to a relative. I am satisfied that the applicant has established that the subject is unable to manage his affairs both physically and mentally as a result of the injuries suffered from the road traffic accident to wit acute intracerebral hemorrhage and surrounding edema. The Applicant further attached a medical report which indicated avers that her husband's neurocognitive function was severely damaged and he was therefore not fit to make any judgment or decision. Being a wife to the subject, the applicant is a person suitable to manage the subject's estate thus satisfying the requirement of the *Mental Health Act*.

23. Consequently, I find the application merited and I hereby grant the orders sought in terms of prayer 3 of the notice of motion dated 12th July, 2023.

24. There shall be no order as to costs.

25. It is hereby so ordered.



DATED, SIGNED AND DELIVERED AT KERICHO THIS 25TH DAY OF JULY, 2024.

J.K. SERGON

JUDGE

In the presence of:-

C/Assistant – Rutoh

Munyari holding brief for Biko for the Applicant

