



**In re Estate of JM (Miscellaneous Application E008 of 2024)
[2024] KEHC 13517 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION E008 OF 2024**

**TA ODERA, J
OCTOBER 29, 2024**

RULING

**IN THE MATTER OF AN APPLICATION/PETITION FOR APPOINTMENT
AS NEXT FRIEND GUARDIAN & MANAGER OF THE AFFAIRS OF
THE ESTATE OF JAMES MOTARI (A PERSON OF UNSOUND MIND)**

AND

**IN THE MATTER OF APPLICATION /PETITION UNDER SECTIONS
26, 27, 28 OF THE MENTAL HEALTH ACT CAP 248 LAWS OF KENYA
AND ORDERS 32 RULES 1 TO 15 OF THE CIVIL PROCEDURE RULES 2010**

AND IN THE MATTER OF APPLICATION BY:

ELMELDA KERUBO MOTARI..... PETITIONER/APPLICANT

IN THE MATTER OF

EKM PETITIONER

RULING

Introduction

1. Elmelda Kemunto Motari the applicant herein vide a notice motion dated 18th June, 024 filed under sections, 26 and 27 and 28 of the *Mental Health Act* Cap 248 as read together with Section 3A of the *Civil Procedure Act*, Order 32 rule 15 of the Civil Procedure rules approached this court seeking the following orders;
 - a.spent
 - b. That J.M.O be declared as suffering from a mental disorder as defined under the *Mental Health Act* Cap 248 Laws of Kenya and hence requiring guardianship and management of his estate by a guardian.



- c. That Elmelda Kemunto Motari be appointed as the guardian and next friend of J.M. O.
 - d. That the cost of this application be borne by the estate of the said J. M.O.
 - e. Any other relief that the court may deem fit to grant.
2. The motion is supported on the grounds that the applicant is the wife of the subject, that the subject suffers from mental health and needs to be cared of and managed, the applicant is capable of managing the patient's affairs. The patient is a beneficiary in the estate of Okeyo Magoro deceased i.e Succession Cause No. 471 of 2008 which has stalled to the condition of the subject. Further that the patient is undergoing traditional and medical healing. Finally, that the orders sought are in the best interest of the patient.
 3. The motion is premised on the annexed affidavit of Elmelda Kemunto Motari the Applicant herein in which she said that the subject is suffering from mental health i.e poor cognition and insight and thus is unable to manage his affairs for the past 8 years and is on treatment. That the cognition as per medical report from Kisii County Referral hospital "ELM". Also that this has stalled administration of the estate of Okeyo Magoro deceased) i.e Succession Cause No. 471 of 2008 in which he is a beneficiary. Also that the area Chief also confirmed the position as per his letter dated 16.5.24 "ELM". Further that the estate of the victim is in need of protection.
 4. The family of the deceased were identified by the Area Chief vide the letter dated 27.6.24 and they all appeared in court on 1.10.24 and supported the application.
 5. Section 2 of the [Mental Health Act](#) defines a person suffering mental to be a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse. Section 26 of the [Mental Health Act](#), Cap 248, Laws of Kenya provides for the circumstances under which a Court may make orders for the Guardianship of a Subject (Patient) and the management of their affairs as follows:-
 - (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) Whereupon inquiry 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 fit 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.
 6. I have seen the medical report dated, medical report prepared by Frida Otao a clinical psychiatrist, who said that the patient was examined and found to have poor cognition, auditory hallucination, lack of insight coherent speech and Euthymic mood. He concluded that the patient was mentally unfit.



7. Section 26 (6) (b) of the *Mental Health Act* provides that: -

“The court may, in order to have a report of the mental capacity and condition of such person in relation to whom the application is made, require the person to present themselves at a place and time appointed by the court, for the—

- (a) court to examine the person; or
- (b) person to be examined by a qualified registered mental health practitioner.

Section 2 of the *mental health Act* defines a mental health practitioner as: -

- (a) psychiatrist under the *Medical Practitioners and Dentists Act* (Cap. 253);
- (b) medical practitioner under the *Medical Practitioners and Dentists Act*;
- (c) psychologist under the *Counsellors and Psychologists Act* (No. 14 of 2014);
- (d) clinical officer under the *Clinical Officers (Training, Registration and Licensing) Act* (Cap. 260);
- (e) counsellor under the *Counsellors and Psychologists Act*; and
- (f) psychiatric nurse under the *Nurses Act* (Cap. 257);

8. Though the report was made by a psychiatry clinical officer, it is Clear to me that she falls within the definition of mental health practitioners under section 2 (d) of the *Mental Health Act* and was thus competent to make the report.

9. From the medical report, the views of the family and the letter from area chief, I have no doubt that the patient is suffering from under Section 2 of the *Mental Health Act*.

10. On whether the subject is able to manage his affairs, Hon. Justice Riechi In re KN (Subject) (Miscellaneous Application E103 of 2023) [2024] KEHC 3321 (KLR) (Civ) (9 April 2024) (Judgment) faced with similar circumstances as in this case observed as follows:

From the medical evidence of Dr. Ndege and Dr. Wabwire, the Subject is suffering from a condition called Dementia but mild in nature. The Respondent who stays with the Subject confirms that the condition which is exhibited by forgetfulness is deteriorating with time.

Mental Illness are health conditions which is reflected by changing emotions, thinking or behavior. Mental illness takes many forms. Some are mild and only interfere in limited ways with daily life. Other Mental conditions are so severe that they may need care in hospital or assistance of a care-giver. In relation to the subject, it is evident that though he suffers from dementia which is a mental illness, the same is mild and limited to forgetfulness. It has not prevented him from taking care of his daily actions. He is capable of managing himself with daily activities. He is not dangerous to himself or to others or likely to act in a manner offensive to Public decency. His dementia however affects his ability to manage complex activities including complex business decisions and activities.

Where a court during its enquiry finds that the Subject suffers from mental illness which is mild as to enable him take care of his daily activities, but is unable due to the illness to manage efficiently the activities of his estate, the court can make orders for management of the estate. This is necessary to prevent waste and mismanagement and safeguard the assets. This is from the realization that not all mental illnesses reach the statutory threshold of impairing one’s



ability to take care of himself. Where it is shown that the said person needs a guardian or manager to help manage the estate, the Court will make the orders.” (Emphasis mine)

11. It is clear to me that the condition does affect the ability of the patient to manage himself ability to manage himself and he may be a danger to himself and the community. Can a person with delusions, lack of insight, poor cognition and auditory hallucinations effectively manage his affairs? The applicant said that the subject is not able to manage his affair and that his estate is in need of protection by way of appointment of a manager or guardians. I thus find that the subject is not able to make decisions on management of his estate due to the said mental disorder. The estate of the subject is thus in need of protection from losses and wastage at this point this court must invoke the provisions of section 27 (2) of the *Mental Health Act*.
12. On who is fit to manage the estate of the subject, there is consensus from the family that the applicant be appointed as the guardian of the subject. In this case the best interest of the subject and his estate are paramount
13. In the best interest of the subject and his estate, I the make the following orders:
 - a. J.M. O the subject herein is hereby is declared to be suffering from a mental disorder under Section 2 of the *mental Health Act*.
 - b. The estate of the subject herein is in need of protection to avoid losses and wastage.
 - c. Elmelda Kerubo Motari is hereby appointed as the guardian and manager of the subject and his estate managers of the estate.
 - d. She shall administer the estate faithfully and in the best interest of the subject.
 - e. The said guardian shall ensure that the subject gets the best treatment for his medical conditions.
 - f. The subject be maintained from the proceeds of his estate.
 - g. This being a family matter I will not make any orders as to costs
 - h. This file is closed.

30 days right of appeal

TA ODERA

JUDGE

29.10.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Court Assistant - Oigo

Applicant - Present

