



REPUBLIC OF KENYA



KENYA LAW
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**In re YSKD (Miscellaneous Civil Application E018 of 2024)
[2024] KEHC 15790 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E018 OF 2024**

G MUTAI, J

NOVEMBER 22, 2024

IN THE MATTER OF

MSSK APPLICANT

RULING

1. The application before me is a Notice of Motion dated 14th May 2024. Vide the said application, the Applicant, MSSK, seeks the following orders:-
 1. That this honourable court be pleased to appoint the Applicant, MSSK, as the guardian of the affairs of YSKD, in accordance with the *Mental Health Act*, with powers to manage her affairs and estate; and
 2. The costs of this application be borne by the applicant.
2. The Applicant is the brother of YSKD. I shall hereafter refer to Y as “the Ward” or as “Y”. In the grounds in support of the application, the Applicant averred that Y was diagnosed with epilepsy after having a febrile concussion at the age of 6 months and that as a result of her illness, she developed a delay in motor and speech function, which in turn led to mild to moderate mental handicap of a permanent nature. The Applicant averred that due to the handicap, Y cannot make rational decisions nor lead an independent life and as a result, she depends on him for due care, attention, and medication.
3. The Applicant averred that their deceased father left behind an estate, a portion of which he bequeathed to Y. The said property, Title Number Mombasa/Block XV/xxx, is owned in the following ratios: Y, 25.64%, the Applicant, 61.60%, while their Aunt KA owns 13.35%.
4. As the Ward is unable to lead an independent life and since she will require due attention and medication for the rest of her life, it was urged that there was a need to appoint the Applicant as her guardian. He averred that he was ready to render a true and proper account of the Ward's estate whenever required by the Court to do so.



5. The Applicant further averred that their mother, with whom he and his wife had been taking care of the Ward, died on 30th November 2023 and that since then, he had been Y's primary caregiver.
6. In his affidavit, the Applicant averred that the ward was seen by several psychiatrists, among whom were Dr Mahero and Dr Mwangome, and his wife, Dr Mumtaz Mohamed Shafi, who is a clinical psychologist and Ms Winnie Nandwa, an occupational Therapist.
7. The Applicant attached copies of the reports of Dr Mahero, Dr Mwangome, and Ms Winnie Nandwa, as well as other supporting documents copies whereof I have seen.
8. This matter proceeded via viva voce evidence on 16th October and 6th November 2024. A total of 3 Witnesses testified and were cross-examined.
9. The first witness was the Applicant. Mr. MSSK testified that he is a businessman. He resides in Nyali with his family and the Ward. He testified that he and his wife take care of Y. It was his evidence that Y was on medication to reduce seizures. The Applicant testified that the Ward has assets that he was managing.
10. The second witness was Ms SSK. Ms S testified that she is the Applicant's sister. The Ward, Y, is her sister. She testified that Y had been living with the Applicant since 2001. She stated that she was aware that Mohamed had applied for guardianship. Saida said that she wasn't opposed to the Application.
11. The last Witness was Dr. Charles Mwangome. Dr. Mwangome is a psychiatrist. He has a Masters degree in Medicine. He testified that Y cannot lead an independent life due to her chronic mental disability and requires relatives to support her. It was also his evidence that the ailment was permanent and that she could not recover from it.
12. Dr. Mwangome produced his medical report, which this Court has been perused and considered while writing this judgment.

Observations Made by the Court During the Hearing

13. The Court observed the Ward's conduct during the trial. When the Court addressed her, she refused to respond. The Court is thus convinced that she has severe mental illness.
14. I have considered the pleadings, the documentary evidence, and the oral testimonies of the witnesses. In my view, the issues I need to determine are:-
 1. Does the patient suffer from mental illness? and
 2. If so, what order should be issued?
15. Appointment of a manager of the estate of a person with mental illness is made under section 27 of the [Mental Health Act](#), as amended in 2022. A manager's duty is to safeguard the property of the Patient. The appointment of a Manager must be published in the Kenya Gazette (section 27(4) of the said Act). Any person with probable cause may object to the appointment within 14 days of the publication of the notice. Section 28 (4) of the said Act provides that:-

“a manager shall perform the manager's duty under this Act responsibly, taking into account the best interests of the estate of the person suffering from mental illness.”
16. Under the [Mental Health Act](#), the application for administration may be made by a “supporter” or a “representative” of the person with mental illness, in that order. Although MSSK is not a “supporter” of the patient, as he wasn't appointed in writing, it is my finding that being her brother, he is



her “representative” within the meaning of the Act and, therefore, has the locus to file the instant Miscellaneous Cause.

17. In *re CWN(a person suffering from mental disorders)* [2022]eKLR the Court stated that:-
- “The Petitioners have sought to be declared as guardians and managers of the patient. To merit the above orders the petitioners must adduce evidence sufficient to satisfy the Court, firstly that the patient is a person suffering from a mental disorder under the *Mental Health Act* and secondly that the patient is incapable of managing her own affairs.”
18. I would add that the third test is whether the application is in the patient's best interest. People with mental illnesses have diminished capacities to manage their affairs, analogous to that of children. Therefore, the court must ensure the application was filed in the patient's interest. In addition, the orders issued by the Court must aim to achieve the said goal.
19. The evidence adduced shows that Y has mild to moderate mental handicap of a permanent nature. Her condition is incurable. Given the findings of Drs Mahero and Mwangome, both of whom are well-regarded psychiatrists, it is my view that Y suffers from an incurable mental illness and that she cannot make independent decisions.
20. M and S averred that Y requires help in her daily functions. Y cannot engage in any meaningful economic activity and requires the services of a minder. Since M and Y share a property, that is to say, Title Number Mombasa/Block XV/xxx, with their aunt, it makes sense to appoint the Applicant as the manager and guardian as litem of the Ward. Therefore, the applicant's appointment as Yasmin's guardian ad litem and manager of her estate will be in her best interest.
21. The manager/guardian ad litem will ensure that she receives the most appropriate care possible, that her estate is not wasted or lost, and that her interests are protected.
22. I am satisfied, based on the evidence adduced, that YSKD suffers from a mental illness. There is, therefore, a case for the appointment of MSSK as the guardian ad litem of the patient, YSKD, and the manager of her estate. In the circumstances, I order as follows:-
1. The applicant, MSSK is hereby appointed as the guardian ad litem of the patient Fatuma Roza Ali and also the manager of her estate;
 2. MSSK is hereby authorised to manage the patient's estate but shall not have the power to sell, charge or otherwise alienate her immovable property without the leave of the Court;
 3. Pursuant to section 27(4) of the *Mental Health Act*, the appointment of the manager and the guardian ad litem shall be published in the Kenya Gazette;
 4. The manager/guardian ad litem shall file the inventory and statement of account of the estate of the patient within six months from the date of his appointment; and
 5. I make no orders as to costs.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE



In the presence of:

Ms Nafula, for the Applicant; and

Arthur - Court Assistant.

