



**In re FMMJ (Subject) (Miscellaneous Application E235 of 2024)
[2024] KEHC 15979 (KLR) (Civ) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
MISCELLANEOUS APPLICATION E235 OF 2024
SN RIECHI, J
DECEMBER 19, 2024
IN THE MATTER OF FMMJ (SUBJECT)**

**IN THE MATTER OF
SEM PETITIONER**

JUDGMENT

1. The Petitioner SEM is biological daughter of the subject . The petitioner in his petition dated 15th October 2024 is seeking orders that;
 1. This Honourable Court be pleased to appoint the Petitioner as the guardian of her mother FMM in accordance with the [Mental Health Act](#) with powers to make personal decisions for and on her behalf.
 2. This Honourable Court be pleased to appoint the Petitioner as the manager of the estate of FMM in accordance with the [Mental Health Act](#) with general and special permission, pursuant to Section 27 (I) of the Act, to:
 - a. Operate and withdraw funds held in the Patient's bank account held at the patient's cooperative bank account no. 0111160912xxx and Pension saving scheme under Laptrust as Member no. 3855 for the purposes of catering to the patient bills, any debts and for her general maintenance.
 - b. That the Petitioner be authorized to manage the bank account and the Pension scheme Fund held by FMM by collecting, maintaining and doing all that appertains to the preservation of the same.
 - c. To manage, preserve, protect and obtain Title Deeds of the Patient's immovable properties, being, A Residential house at [Particulars Withheld], Kilifi county (Title



is yet to be issued) and Land at [Particulars Withheld], Kwale county (Title is yet to be issued).

3. Such further Orders as this Honourable Court deems just and fit.
 4. There be no orders as to costs as it is a family matter.
2. The application is premised on the following grounds that;
- i. The Patient herein is a female adult aged 65 years and currently a resident of Nairobi County.
 - ii. The Patient is a widow who has five (5) children to wit; SEM (the Petitioner), ENM, EMM, BBM and IKM.
 - iii. The Patient has a long history of hypertension and type 2 diabetes mellitus. As a direct result of her condition, the Patient has been admitted in hospital on many occasions under numerous conditions as follows:-
 - a. On or about the 05/05/2012, the Patient was admitted to the ICU (Intensive Care Unit) at the Aga Khan Hospital Mombasa, due to right basal ganglia hypertensive hemorrhage with complaints of headache followed by loss of consciousness. She was transferred to HDU (high dependency unit) and then to a general ward and was finally discharged on 25/05/2012.
 - b. On 23/06/2012, she was admitted to Mewa Hospital, Mombasa due to anemia, urinary tract infection, sepsis, and septic facial wound, and was discharged on 06/07/2012 with left hemiplegia and diabetes mellitus.
 - c. On the 25/10/2019 the Patient was admitted to Athi River Shalom Community Hospital with a cough, and convulsion for 1 day. She had a low oxygen saturation of SPO2 of 86 % and an inability to feed. She was diagnosed with pneumonia with widespread lung crepitation. Was treated and discharged on 30/10/2019.
 - d. Thereafter, on 21/01/2021 she was taken to Sanel Hospital at Jempark complex Miolongo with LT hand tremors and cough for 1 day. She was noted to have tonic-clonic convulsion and orthostatic pneumonia. She was then admitted to Athi River Shalom Community Hospital on 21/01/2021 and discharged on 23/01/2021.
 - iv. Due to her long medical history, the Patient has been left with a permanent left-sided paralysis (hemiplegia), has bilateral crepitations and is unable to fend for herself at all. She also has aphasia (inability to talk) and has since been under the care of her daughter SEM (the petitioner) at home.
 - v. As a result of her medical condition, the Patient lacks capacity to manage her estate, person and lacks capacity to make any reasonable decisions over her estate including those concerning her treatments, checkups and follow ups which she frequently requires.
3. The Petition is further supported by petitioner's affidavit sworn on even date. The petitioner reiterated the averments in her grounds of the application. She further briefly deponed that the subject is a widow with 7 children namely SEM (the Petitioner), NN(Deceased), JC(Deceased) ENM, EMM, BBM and IKM as evidenced by copies of their birth certificates attached to the application.
4. The petitioner deponed that her mother has had a long history of hypertension and type 2 diabetes mellitus as a direct result of her condition, she has been admitted in hospital on many occasions as evidenced by annexed copies of medical reports.



5. The petitioner averred that as a result of the subject illness, her mother has been left with a permanent left-sided paralysis (hemiplegia), bilateral crepitations and is unable to fend for herself at all. She also suffers aphasia (inability to talk) and has since been under constant care at home. The petitioner stated that due to the mental impairment her mother lacks capacity to manage her estate, her medical costs for the continued treatment and management of her illness. The petitioner stated that it is of necessity that custody, guardianship and management orders be made grant her access to subject's bank account in order to obtain money for medical expenses and maintenance. The petitioner averred further that on 12th December 2022 and on the 20th August 2024, she presented her mother for medical evaluation by Dr. W.N, Ngombe and Dr. Stanley Ngare respectively who examined her and prepared medical reports. which copies are annexed to the application.
6. This petition was canvassed by way of viva voce evidence. The Petitioner testified that the subject is her mother and she is married to Ezekiel Mweru who is deceased. She testified that they have seven children. The subject is 64 years old. The subject suffered multiple strokes in April 2012. She is bed ridden. She also has a growth in the brain. She relies on a caregiver. She has been taken to Aga Khan Mombasa. They have filed a medical report. They stay at Mulolongo. The petitioner stays with the subject.
7. The petitioners siblings namely BBM,ENM,EMM and IM testified in court and support the petition.
8. This court also observed the subject virtually and the court tried to engage the subject. The subject is unable to speak
9. 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.
10. 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.”
11. The 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
 - c. 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.
 - d. 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.”

12. The authority to manage affairs of an estate of a subject 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.
13. 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 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:

 - i. There must be medical evidence warranting the determination by the Court that the Subject suffers from mental disorder;
 - ii. The person to be appointed to be either a Guardian or Manager must be fit to be so appointed;
 - iii. The Court must be satisfied that a proposed Manager will utilize her powers for the benefit and welfare of the Subject.”
14. Before this court there is a medical report dated 20th August,2024 prepared by Dr.Stanley Ngare, Consultant Physician and Endocrinologist from Kenyatta National Hospital and stated as follows;

“Conclusion- FMM has severe debilitating consequences of stroke. She needs constant care from her daughter.”
15. From the evidence and medical report, I am satisfied that the subject suffers from mental illness under section 2 of the Mental Act, the same has adversely affected her cognitive ability and the ability to take care of her affairs. The Subject lacks the mental capacity to manage her affairs which my view falls within the definition of Section 2 of the *Mental Health Act* Cap 248.
16. Having settled the issue of whether the subject should be declared as a person suffering from mental disorder pursuant to the *Mental Health Act*, Cap 248, and that, the subject is suffering from mental disorder to such an extent as to be incapable of managing his affairs,the court is tasked with determining whether the petitioner should be appointed as guardians/ managers to the subject .
17. Section 26 of the Act gives 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. This court thereof under section 26 of the *Mental Health Act* appoints the petitioner SEM as guardian to the subject FMM. The Petitioner is also appointed to manage the subject’s estate.
18. The duties of the managers are as stipulated in Section 27 of the Act as:-

27.

 - (1). The court may make such an order as it considers necessary for the administration and management of the estate of any person with mental illness including—
 - (a) an order making provision for the maintenance of the person;



- (b) an order making provision for the maintenance of members of the person's immediate family who are dependent upon the person; and
 - (c) an order making provision for the payment of the person's debts.
- (2) The court may appoint a manager of the estate of a person with mental illness for the purposes of safeguarding the property of that person.
 - (3) The court may for the purposes of section (1), appoint the supporter or the representative of the person with mental illness as the manager of the estate of the person under subsection (2).
 - (4) The court shall, by notice in the Gazette, inform the public of the appointment of a person as the manager of the estate of a person who is suffering from mental illness.
 - (5) Within fourteen days of the Gazette Notice under subsection (4), any person may lodge an objection to the person appointed as manager.

19. In their duties they must comply with Section 28 and 29 of the Act.

- (1) Where a manager is appointed under this Part, the court may, upon considering the nature of the property whether movable or immovable, and subject to subsection (2), make such orders as the court may consider necessary for the management of the estate by the manager.
- (2) The manager shall not, without the approval of the court—
 - (a) mortgage, charge or transfer by sale, gift, surrender or exchange any immovable property of which the estate may consist;
 - (b) lease any such property for a term exceeding five years; or
 - (c) invest in any securities other than those authorized under the *Trustee Act*.
- (3) A manager shall not invest any funds or property belonging to the estate managed under this section—
 - (a) in any company or undertaking in which the manager has an interest; or
 - (b) in the purchase of immovable property under the authority of section 4 (1) (d) of the *Trustee Act* without prior consent of the court.
- (4) A manager shall perform the manager's duty under this Act responsibly taking into account the best interests of the estate of the person who is suffering from mental illness.
- (5) Every conveyance or other instrument made pursuant to an order of the court under this Part shall be valid.

“29. Inventory of property

1. A person appointed to be a manager of the estate of a person with mental illness under this Part shall, in the prescribed form, within six months of the date of appointment, deliver to the court and to the Public Trustee an inventory of—
 - a. the property belonging to the person in respect of whose estate the manager has been appointed;



- (b) all sums of money, goods and effects the manager receives on account of the estate; and
- (c) a statement of debts owed by or due to such person with mental illness.

20. In accordance with the provisions of Section 33 of the *Mental Health Act*, the petitioner will furnish an inventory and annual statement to this court and the Public Trustee as required by the law.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF DECEMBER, 2024

S N RIECHI

JUDGE

