



Ngendo (Suing as the Next Friend and Guardian Ad Litem of MNW) (Family Miscellaneous Civil Case E016 of 2024) [2024] KEHC 16164 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY MISCELLANEOUS CIVIL CASE E016 OF 2024**

**FN MUCHEMI, J
DECEMBER 19, 2024**

**IN THE MATTER OF
SERA WAIRIMU NGENDO APPLICANT
SUING AS THE NEXT FRIEND AND GUARDIAN AD LITEM OF MNW**

RULING

Brief Facts

1. This application dated 11th September 2024 seeks for orders of appointment as guardian ad litem of the applicant to take care of the subject Margaret Ngendo Wambaki for she is mentally incapacitated. The applicant also seeks for orders of injunction against individuals restraining them either by themselves, their employees, relatives, servants, agents, proxies and or persons exercising authority under them from continuing with their unlawful acts against the properties of the family in a succession case where she is a co-administrator inhibiting, sub dividing or in any other manner interfering with the applicant's quiet and peaceful use, occupation and possession of the entire estate of the deceased bequeathed to the subject on behalf of her family.
2. The applicant avers that she is the daughter of the subject M.N.W. who is mentally incapacitated. She further states that she has six (6) siblings who have consented to her being appointed guardian ad litem of the subject.
3. The applicant further states that the subject suffers from memory loss and has a high blood pressure. Following her illness, the subject has since lost cognitive ability and thus requires to be managed in way of personal hygiene clothing, feeding, and treatment.
4. The applicant avers that via a certificate of confirmation of grant dated 3rd February 2006, the subject and one Teresia Wanjiku Wambaki were confirmed as the co-administratrix of the Estate of the late Philisilah Wambaki Kiguru. Upon distribution of the estate, the subject and others, the family discovered that there have been attempts to fraudulently transfer the properties bequeathed to the subject in names of strangers while ownership documents of other land parcels have gone missing.



5. The applicant avers that the subject cannot defend herself in a court of law and neither can she take care of the properties of the family held by her as a co-administrator due to her poor physical and mental health. Thus the family is apprehensive that they may lose their family properties if they do not get an order to protect the family estate.
6. The applicant states that the subject, being of unsound mind could not have executed an agreement for the sale of any of the estate properties to the 1st respondent as is purported to be. As such, the respondents could not have acquired a good title to the suit properties. The applicant further deposes that she is apprehensive that the respondents who are the co-administrators with the subject in the succession cause. There is a risk of the family properties being transferred to third parties, which will complicate the matter causing the subject's family to suffer loss. The applicant is apprehensive that her siblings and herself run the risk of being dispossessed of their right to own property as enshrined under Article 40 of *the Constitution* of Kenya.
7. The applicant argues that there is need to issue a temporary injunction or the maintenance of the status quo of the suit properties

Issues for determination

8. The main issues for determination are as follows:-
 - a. Whether the subject should be declared as suffering from mental disorder pursuant to the *Mental Health Act*, Cap 248.
 - b. Whether the applicant should be appointed as guardian to the subject as well as manager of the Estate of the subject.

The Law

Whether the subject should be declared as suffering from mental disorder pursuant to the *Mental Health Act*, Cap 248.

9. 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.
10. Section 2 of the Act defines "person suffering from mental disorder" as follows:-

"person suffering from mental disorder" means a person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse."
11. Section 26 provides for custody, management and guardianship
 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 of the guardian of any such person.



3. Where upon 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.
12. According to the medical report by Dr. Gerald Ng'ang'a, a psychiatrist practicing at Gatundu Level 5 Hospital, dated 1st February 2023, the patient is suffering from dementia. The medical report indicated that the subject is unable to make rational and sound decisions, is disoriented and has poor judgment.
13. It is apparent from the medical report that the subject is suffering from a mental disorder as per Section 2 of the Mental Act and further a medical condition contemplated under Section 26 of the Act and is thus incapable of managing her own affairs.

Whether the applicant should be appointed as guardian to the subject as well as a manager of the Estate of the subject.

14. Section 26 of the Act empowers the court to make orders regarding management of the estate of any person suffering from mental disorder to any relative or any other suitable person giving preference to a relative over any other person.
15. The applicant has stated that she is a daughter of the subject and has annexed the consent of her siblings supporting her to the application for appointment as a guardian. The applicant annexed the confirmed grant where the subject Margaret Ngendo Wambaki is one of the administrators of the estate of Philisilah Wambaki Kiguru together with a number of her siblings. In the grant confirmed on 3/2/2006 the subject is listed as a beneficiary with over 15 assets from the estate of the deceased therein Philisilah Wambaki Kiguru. It is deposed that the properties are at risk of being grabbed by 3rd parties since the subject is unable to follow them up for transmission to her name due to her deteriorating mental condition. The application is supported by the consent of the applicant's seven siblings.
16. The application is brought under Orders 32 and 40 of the Civil Procedure Rules. Order 32 which provides for appointment of a guardian ad litem for minors and mentally unsound adults for representation in suits pending in court while Order 40 provides for remedies of injunctions.
17. The applicant has annexed the grant in Nairobi succession Cause No.989 of 1994 said to be pending execution and whereas the subject is a co-administrator.
18. There being no objection from the siblings of the petitioner and the course of the petition being well supported as required under the law, I find the prayer for appointment of guardian well-grounded and merited.
19. The applicant's second prayer is for an injunction under Order 40 of the Civil Procedure Rules in relation to the confirmed grant in Thika HC Succession Cause No.989 of 1994. In my view, this prayer is misplaced in that this court is dealing with a petition under the *Mental Health Act* and Order 32 Rule 3 of the Civil procedure Rules. This is not a succession court and has no mandate to issue the order sought herein. The applicant has to be appointed guardian ad litem of the subject first and then apply for orders of injunction in the Nairobi succession cause. This court is therefore not in a position to grant the said prayer as sought in this application.



20. Having found this petition partly successful I hereby allow it in the following terms: -

- a. That the subject is hereby declared mentally incapable of managing her affairs under the *Mental Health Act*.
- b. That the petitioner Serah Wairimu Ngendo is hereby appointed as guardian ad litem of the subject to take over the role of a co-administrator in place of the subject and to do what is lawfully possible to protect the assets bequeathed to the subject in the grant confirmed on 3/02/2006 in High Court Succession Cause No.289 of 1994 on behalf of the subject's family as well as on her own behalf.

PARA 20.

That this being a family and ex-parte petition, there shall be no orders as to costs.

PARA 21.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE

