



**In re Guardianship of Subject (JT) (Miscellaneous Application E036 of 2022)
[2023] KEHC 17403 (KLR) (Family) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

MISCELLANEOUS APPLICATION E036 OF 2022

MA ODERO, J

APRIL 28, 2023

**IN THE MATTER OF SECTION 26, 27, 28, 29, 32, 33,
& 38 OF THE MENTAL HEALTH ACT (CAP 248) LAWS**

OF KENYA

AND

IN THE MATTER OF JT (A

PERSON SUFFERING FROM MENTAL DISORDER)

AND

**IN THE MATTER OF AN APPLICATION BY ANM TO BE APPOINTED AS THE
GUARDIAN OVER THE AFFAIRS AND MANAGER OF**

THE ESTATE OF JT

AND

IN THE MATTER OF GUARDIANSHIP OF SUBJECT

(JT)

BETWEEN

ANM PETITIONER

AND

GM 1ST RESPONDENT

AN 2ND RESPONDENT



JUDGMENT

1. Before this court is the petition dated February 22, 2022 by which the petitioner ANM seeks the following orders:-
 1. That the subject be adjudged as suffering from mental incapacity.
 2. That this honourable court to be pleased to appoint the petitioner as guardian of the affairs of JT in accordance with the *Mental Health Act* with power to sign and file court documents, enter into a deed for family settlement and release on behalf of JT and carry out other incidental and general functions of JT
 3. That this honourable court be pleased to appoint the petitioner as manager of the estate of JT in accordance with the *Mental Health Act* with special permission pursuant to section 27(1) (a) of the *Mental Health Act* to mortgage, charge, or transfer by sale, gift, surrender, exchange or otherwise any immoveable or moveable property of which the estate may consist; and
 4. The costs of this petition be in the cause.
2. The petition was supported by the affidavit of even date sworn by the petitioner.
3. The respondents GM and AN opposed the petition through the replying affidavit dated March 30, 2022 sworn by the 2nd respondent.
4. The matter was canvassed by way of vice voce evidence. On the hearing date of March 3, 2023 the respondents despite having been properly served with a hearing notice *vide* the affidavit of service dated February 24, 2023 did not appear in court to testify. The matter therefore proceeded for hearing in the absence of the respondents.
5. The petitioner told the court that she is the wife of the subject, the two having gotten married under Luhya Customary Law in the year 2008. That their union is blessed with one child, a son ZNG who is aged fourteen (14) years old.
6. The petitioner testified that the subject suffers from a mental disorder having been diagnosed with cognitive impairment. That the subject also suffers various physical ailments rendering him immobile. That he is bedridden and cannot do anything for himself and requires 24 hour care. The petitioner prays to be appointed as the guardian of her husband and the manager of his affairs.
7. The 2nd respondent who is a brother to the subject opposed the petition and denied that the petitioner was a wife to the subject. He avers that the two were never married and states that the subject has children in Uganda.
8. The 2nd respondent categorically refutes the allegation that the subject suffers from any mental impairment. He further states that the petitioner who herself is unemployed is not in a position to take care of the needs of the subject. That infact it is the subjects siblings who have been paying his rent and taking care of all the subjects medical needs. The respondents urge the court to dismiss this petition entirely.

Analysis and Determination

9. I have carefully considered the petition filed in court, the reply filed thereto as well as the evidence adduced in the matter.



10. Section 26 of the *Mental Health Act*, cap 248 provides for the circumstances in which a court may make orders for the management and maintenance of a patient (subject) as follows:-

“Order 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 and 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.” [own emphasis]
11. The petitioner told the court that the subject suffers from various physical ailments and that he is also mentally impaired. I have perused the medical report dated January 31, 2022 prepared by Dr Stanley Ngare a Consultant Physician. The report indicated that the subject was unable to answer questions and had to be prompted by his wife who had accompanied him for the medical examination. The doctor concluded that the subject has “cognitive impairment” and relies on his wife for all activities of daily living.
12. I have also carefully perused the medical report dated March 20, 2023 prepared by Dr David Bukusi a Consultant Psychiatrist Counsellor. The report indicated that the subject is suffering the effects of a stroke which he has suffered in the year 2020. That the subject suffers hallucinations and has poor memory. The doctor further noted that the subject had suffered “severe traumatic brain injury – following severe stroke, hypertension HIV infection and diabetes”. In conclusion the report indicated that the subject “will require full time care both for his physical health and state as well as mental health condition. He will definitely require a full time guardian for all his affairs.”
13. This second medical report was prepared by a psychiatrist who is a doctor qualified to diagnose and treat mental health conditions. As stated earlier despite having proper notice of the hearing date none of the respondents appeared in court to testify. Therefore the evidence adduced by the petitioner remains uncontroverted.
14. I was able to see the subject online. He was an elderly gentleman who appeared frail. He did not comprehend the proceedings and kept demanding to be given tea. It was clear to the court that the subject suffers mental impairment.



15. I have considered the replying affidavit filed in opposition to this petition. It is averred that the petitioner is not the wife of the subject. The question of whether the petitioner and the subject are married is neither here nor there. That is not what this court is being asked to determine. It is also important to point out that one does not have to be married to a patient in order to qualify as a guardian under the *Mental Health Act*. Any person whom the court find qualified to take care of the interests of the patient may be appointed as a guardian.
16. Secondly the respondents claim that the subject has children living in Uganda. The fact that the subject has children in Uganda does not disqualify him from marrying the petitioner in Kenya. The respondents aver that it is the subject's siblings who have been paying his rent and taking care of all her needs. No evidence has been availed to prove this claim. None of the subject siblings has filed a cross-petition seeking to be appointed as guardian.
17. Finally the respondents deny that the subject suffers any mental disorder. They have not countered the evidence of the petitioner in any way. Based on the two medical reports filed in court and based on my own observations, I find that the subject is clearly suffering from a mental disorder. The subject is definitely unable to manage his own affairs and therefore requires that a guardian be appointed.
18. The petitioner who claims to be the wife of the subject is the person who is currently living with the subject and is taking care of him. Indeed the subject recognizes the petitioner and refers to her as "A". I find that the petitioner is best placed to be appointed as guardian and manager of the subject affairs.
19. Finally I find merit in this petition. The same is hereby allowed and the court makes the following orders:-
 - (1) The subject herein JT is declared to be a person suffering from a mental disorder as defined by the *Mental Health Act*, cap 248 laws of Kenya.
 - (2) The petitioner ANM be and is hereby appointed as guardian of the petitioner and manager of his affairs.
 - (3) No orders on costs.

DATED IN NAIROBI THIS 28TH DAY OF APRIL 2023.

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MAUREEN A. ODERO
JUDGE

