



**In re PW w/o G (Miscellaneous Application E243 of 2021)  
[2023] KEHC 18361 (KLR) (Family) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18361 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E243 OF 2021  
PM NYAUNDI, J  
MAY 29, 2023  
IN THE MATTER OF THE MENTAL HEALTH ACT  
AND  
IN THE MATTER OF PW W/O G**

**BETWEEN**

**MNG ..... PETITIONER**

**AND**

**CMWM ..... 1<sup>ST</sup> RESPONDENT**

**JWG ..... 2<sup>ND</sup> RESPONDENT**

**JKG ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant herein has presented Petition 15<sup>th</sup> December 2021 under Sections 26 and 28 of the [Mental Health Act](#), Cap 248 seeking orders that she be appointed the Guardian of PW w/o G
2. The Petitioner avers that she is the daughter of the Subject who was born in 1926 and who has been under her care since 2019 at her residence in [Particulars Withheld], Kiambu County.
3. She submits that the Petitioner's mental capabilities began to deteriorate in 2017 and that at the time of filing the Petition she is unable to make any logical decisions or effectively discharge any daily activities.
4. The Application is motivated by the desire to protect the properties/ estate of the subject. The Petitioner for instance cites that on account of the subject's diminished capacities, the following persons have taken advantage of her and fraudulently transferred the property referred to Dagoretti/waithaka/xx. That is CMW, JWG, JKG, SGK, KJGK and PW.



5. The Petitioners state that the order of Guardianship will enable them restore the property to the Subject.
6. The Application is supported by the Affidavit of the Petitioner sworn on the 15<sup>th</sup> December 2021. The Petitioner has availed Medical Report by Dr. R P Lubanga, consultant Neurosurgeon dated 15<sup>th</sup> February 2021, in which the Doctor found that;
 

The patients cognitive mental ability started deteriorating in the year 2017. The nature of the illness and the resulting intellectual impairment mean that the patient cannot be in the right frame of mind to make logical decisions in activities of daily living. Diagnosis: Senile Dementia
7. The Petitioner has also submitted her birth certificate serial No. xxxxx that shows she is the daughter of the Subject.
8. Two of her siblings MWM and JWM have signed a consent to the Appointment of the Petitioner as Guardian in respect of the Subject.
9. The Petitioner has also filed title documents in respect of the Dagoretti/waithaka/xx showing that separate title issues have been issues namely; Dagoretti/ Waithaka/ xxxx/, Dagoretti/ Waithaka/xxxx, Dagoretti/ Waithaka/ xxxx and Dagoretti/ Waithaka/xxxx. It is the contention of the Petitioner that these transfers were fraudulent and upon obtaining the grant she will challenge them
10. There is also a letter from the Chief of Waithaka Location dated 18<sup>th</sup> January 2022, enumerating the Children of the Subject to include,
  1. LKG (Deceased)
  2. CMWM
  3. MANG
  4. J (sic) WM
  5. M (sic) KG
  6. JKG and
  7. JWK
11. The Respondents filed Answer to Petition and Cross Petition and avers that at the time the Subject disposed of parcel Dagoretti/ Waithaka/xx she was compos mentis.
12. The Respondent's aver that the Petitioner has access to the Subjects bank account and it is those resources she is using to meet the needs of the Subject.
13. The Respondents challenge the medical history of the Subject as documented by the Petitioner and contend that the Petitioners condition only deteriorated to what they refer as debilitating in 2021.
14. The Petitioners also challenge the competency of Dr. Lubanga who is a Neurosurgeon to prepare a report on the mental health status of the Subject.
15. In the Cross Petition they ask that the Subject be examined by Dr. Pius A Kigamwa- a qualified and duly licensed Consultant psychiatrist.
16. The Respondents further seek that they be appointed as joint guardians over the Subject.



17. In the Supplementary Affidavit sworn on the 17<sup>th</sup> May 2022, the Petitioner reiterates her earlier submissions and asserts that the assets of the Subject are at risk. She further contends that all the Children of the Subject have made financial contributions towards her medical treatment and support.
18. It is further contended that Dr. R. P. Lubanga is competent to prepare a medical report on the mental health of the Subject. It is submitted that in the absence of medical evidence to challenge that of the report prepared by Dr. R.P. Lubanga, the Court should rely on it.
19. The Petitioner submits that the orders sought are in the interest of the subject and not malafides as stated by the respondents.
20. The parties consented to canvass the Application by way of written submissions. The Petitioner's submissions are dated 1<sup>st</sup> September 2022 and those of the Respondent on 26<sup>th</sup> October 2022.

### **Petitioners Submissions**

21. The Petitioner frames the following as the issues for determination
  - a. Whether this Honourable Court is clothed with sufficient jurisdiction to hear and determine this matter
  - b. Whether the Petitioner has established that the subject suffers from mental disorder pursuant to the *Mental Health Act*, Cap 248
  - c. Whether the reasons fronted by the Petitioner herein warrant her appointment as guardian to the subject.
  - d. Whether the 1<sup>st</sup> Respondent should be granted joint Guardianship of the Subject PW w/o G herein?
22. On the 1<sup>st</sup> Issue, the Petitioner submits that since the Substantial orders sought are the appointment of the Petitioner as the Guardian, the court is clothed with jurisdiction. The Petitioner submits that contrary to the assertion of the Respondent the issue of the contested transfer of the property is not to be determined by this court but has been raised to demonstrate the estate of the Subject is at risk of alienation.
23. On the 2<sup>nd</sup> Issue, it is submitted that the report of Dr. Lubanga satisfies the requirements of the *Mental Health Act* as it confirms that the Subject does have a mental illness. It is further submitted that the Respondents also agree that the Subject does have a debilitating condition.
24. The Petitioner submits that the attack on the report of Dr. Lubanga is unfounded as he is a qualified neurosurgeon with considerable medical expertise. The Petitioner relies on the decision in Re of an Application for custody Management of Guardians and Estate Managers over DMK [2021] eKLR, where the Court relied on the testimony of Dr. Lubanga to establish the mental health of the subject in that case.
25. The Petitioners are opposed to subjecting the Petitioner to a psychiatric examination terming it as self-defeating and a clear time wasting exercise and further that the consent of all the siblings has not been secured for the re-examination of the Subject. In the event that the Court finds that the Subject ought to be re-examined then the same should be done by a Neutral professional appointed by the Court.
26. On the 3<sup>rd</sup> Issue, the Petitioner submits that she has demonstrated by challenging the transfer and subdivision of Dagoretti/ Waithaka/ xx she has demonstrated that she will act to protect the estate of the Subject. Further she has shown that she is the daughter of the Subject. She has also secured the



Consent of 2 siblings, that she did not seek the consent of the Respondents as they are the intended defendants in the claim for restitution of the subject parcel of land.

27. It is submitted that currently the relationship between the Petitioners and respondents is strained and their consent was unlikely to have been given in the circumstances. The Petitioner further avers that she is currently taking care of the Subject who lives with her and all the siblings have access to her.
28. It is further submitted that given the fact that persons appointed as guardians do so under the supervision of the Court, the interests of the subject are safeguarded. The Petitioner specifically refers to Section 27(1) (i) and (ii).
29. On the 4<sup>th</sup> Issue, the Petitioner avers that the 1<sup>st</sup> respondent's bid to be appointed as joint guardian has been actuated by the intention to delay and/ or frustrate any attempt of the Petitioner herein to institute proceedings against her and the co- respondents herein.
30. In conclusion it is submitted that the Petitioner has satisfied the legal requirements for the grant of the orders sought.

### **Respondents Submissions**

31. The Respondents frame the following as the issues for determination;
  - i. Whether the Subject was non compos mentis at the time the sub division of the parcel Dagoretti Waithaka/xx
  - ii. Whether the Court has jurisdiction to adjudicate on and determine this matter
32. The Respondents aver that at the times material to the transaction the Subject was *compos mentis* and rely on the decision in the case of *John Patrick Machira v Patrick Kabiaru Muturi* [2002] eKLR.
33. On the 2<sup>nd</sup> Issue the Respondents submit that to the extent that the orders are sought to challenge the validity of the transactions relating to Dagoretti/ Waithaka/88 the court has no jurisdiction. It is contended that the dispute raises no known cause of action that can be determined within the jurisdictional purview of the Court. The Respondent therefore prays that Petition be dismissed as it was instituted not to safeguard the welfare of the subject but to pursue to challenge the written agreements in relation to the transfer of the subject land.

### **Analysis And Determination**

Upon reviewing the Pleadings herein and the rival submissions of the parties I frame the following as the issues for determination-

- a. Whether this Court has jurisdiction to hear the matter
  - b. Whether it is in the interests of the Subject to make an order of guardianship under the *Mental Health Act, 2022*
  - c. Who should be appointed Guardian and Manager of the Estate of the Subject?
34. Whether this Court has jurisdiction to hear the matter  
It is the Respondents' assertion that the Court does not have jurisdiction as the Petitioner in essence is seeking to nullify transactions executed by the Subject with respect to the transfer and sub division of Dagoretti/ Waithaka/xx on the ground that she was not compos mentis at the material time.
  35. I find that this assertion is not borne out by the pleadings, as the orders sought are that



- a. The Petitioner be appointed the Guardian of PW w/o G.
36. Like wise in the Cross Petition the orders sought are that
- a. That this honourable Court does appoint Dr. Pius A Kigamwa of Nairobi Hospital who is a qualified and duly licensed Consultant Psychiatrist of the Subject's children election to accord a comprehensive psychiatric evaluation on the subject for purposes of establishing and determining her mental state and the said psychiatrist to submit to this Court a comprehensive professional medical report within a period of two (2) weeks from the actual examination
- b. The Respondents herein be granted joint guardianship of the subject herein PWG
37. The Respondents are correct in submitting that this court cannot embark on an inquiry to determine the validity of the challenged land transactions, even with that acknowledgment I would hasten to add that the Court has not been invited to make that decision.
38. Section 26 (1) of the [Mental Health Act](#), 2022 confers on the Court the power to make orders for the management and administration of the estate of a person with mental illness.
39. On account of the foregoing I find that this Court does have jurisdiction to hear and determine this matter.
40. Whether it is in the interests of the Subject to make an order of guardianship under the [Mental Health Act](#)
- The question for determination is whether sufficient basis has been laid for the Court to find that the Subject is a person with mental illness and appoint a guardian and manager over her estate.
41. Section 26(2) provides that an Application made under subsection (1) shall be submitted together with an affidavit setting out-
- a. The grounds upon which the application is made
- b. The full particulars as to property and relatives of the person to whom it relates; and
- c. A certified true copy of the admission or treatment and particulars in respect of person duly admitted as a person with mental illness.
- Subsection (6) 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.
42. This court is invited to determine whether as at 15<sup>th</sup> December 2021 when the Petition was presented the Subject was a person with mental illness requiring the appointment of a Guardian. In support of the Petition the Petitioner attached medical report by Dr. Lubanga dated 15<sup>th</sup> February 2021. The report by the Doctor finds that the Subject has Senile Dementia and that her cognitive mental ability started deteriorating in 2017. The nature of the illness and the resulting intellectual impairment mean that the patient cannot be in the right frame of mind to make logical decision in activities of daily living.
43. The Respondents' challenge that Dr. Lubanga is qualified to assess the mental health status of the subject as he is not a psychiatrist.



44. Section 3 of the *Mental Health Act* defines mental health practitioner to mean a qualified and duly registered
- a. Psychiatrist under the *Medical Practitioners and Dentists Act*;
  - b. Medical practitioner under the Medical Practitioners and Dentist Act
  - c. ....
  - d. ....
  - e. ....
  - f. ....
45. The import of this definition is that for purposes of medical evidence on the mental health status of a subject the Court may receive reports from the different professionals enumerated above.
46. For this reason, I hold that the Court can rely on the report of Dr. Lubanga as he falls under category (b).
47. The Respondents seek an order that the Subject under go a 2<sup>nd</sup> examination by a psychiatrist. It is not in dispute that the mental health of the Subject is compromised.
48. At paragraph of the Cross Petition the Respondents state; ‘In the whereabouts of the year 2021, the subject herein developed a mentally debilitating condition whose main symptoms were disorientation and forgetfulness in the absence of a credible medical report from a qualified psychiatrist, the condition has been exacerbated by her old age.’
49. At paragraph 22 of the Cross Petition the Respondents plead as follows; ‘It is necessary and proper that the Subject be placed under the care of dependable and trustworthy kin for the proper attendance to and the looking after of her mental and physical well-being.’
50. I suppose that it is for this reason that the Respondents pray that they be granted joint guardianship of the Subject.
51. The Respondent’s challenge the report of Dr. Lubanga on two fronts; first that he is not qualified to prepare a report and secondly the material factual discrepancies.
52. As stated above Section 3 qualifies persons in the category of Dr. Lubanga. I have had opportunity to consider the discrepancies pointed out and in my view, they do not go to the root of the medical diagnosis as to the condition of the Subject, especially given that the Respondents confirm that the Subject is not well.
53. Section 2B of the *Mental Health Act* requires that ‘All persons under this Act shall, in the performance of their functions under this Act, be guided by the following principles-
- a. ....
  - b. Preservation of the freedom and dignity of every human being
54. Article 28 of *the Constitution* of Kenya provides that every person has inherent dignity and the right to have that dignity respected and protected. The right to human dignity is particularly important for individuals such as the Subject who on account of illness cannot make independent decisions. I find that requiring that the Subject be subjected to a second examination when it is not in dispute that she is suffering from a debilitating illness is an affront to her dignity as a human being.



55. Accordingly, I decline the request that the Subject be examined by Dr. Kigamwa and admit the report of Dr. Lubanga's as uncontroverted evidence of the mental health status of the Subject.
56. In the circumstances I find that sufficient evidence has been placed before this court that the Subject is a person suffering from mental illness in respect of whom a guardian and manager should be appointed to protect her interests and those of her estate.
57. Who should be appointed Guardian and Manager of the Estate of the Subject?  
Both the Petitioner and the Respondents pray that they be appointed as Guardian of the subject. I note that the Petitioner currently has the physical custody of the Applicant, a fact that is acknowledged by the 1<sup>st</sup> Respondent at paragraph 15-17 in Affidavit sworn on 15<sup>th</sup> March 2022.
58. I also note that the Petitioner and the Respondents are pitched in an acrimonious property dispute. This dispute however must be separated from the orders that this court may grant under the Mental Health Act.
59. Having regard to the best interests of the Subject, I appoint the Petitioner as guardian and manager of the estate of the Subject herein
60. Accordingly, the Petition is allowed and the Answer to Petition and Cross Petition dismissed and order that
- a. The Petitioner, MNG is appointed as Guardian and Manager of the Estate of PWG aka PW w/o G aka PW w/o G
  - b. As manager the Petitioner is granted access to the Subject's Bank Accounts
  - c. Pursuant to this appointment the Petitioner shall deliver to court and the public Trustee, within 6 months, an inventory of the property belonging PWG aka PW w/o G aka PW w/o G
  - d. In accordance with Section 27(4) of the Mental Health Act,2022 the Petitioners shall cause within 30 days the publication of notice in the Gazette, informing the public of her appointment as the manager of the estate of PWG aka PW w/o G aka PW w/o G
  - e. As Manager of the Estate of PWG aka PW w/o G aka PW w/o G the Petitioner may dispose of the property only with the sanction of the court.
  - f. The matter will be mentioned before court on 6th December 2023 to confirm compliance
61. No order as to costs  
It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY, 2023.**

**P M NYAUNDI**

**JUDGE**

In the presence of:

.....Advocates for the Petitioners

Karani Court Assistant

