



REPUBLIC OF KENYA



**In re BMM (Patient) (Petition E009 of 2021)  
[2023] KEHC 22960 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22960 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E009 OF 2021  
SM MOHOCHI, J  
SEPTEMBER 29, 2023  
IN THE MATTER OF SECTION 26 AND 28 OF THE MENTAL HEALTH ACT  
AND  
IN THE MATTER OF BMM (PATIENT)  
JOHN MACHARIA MUGANE.....APPLICANT**

**RULING**

1. The Applicant who is the father of the patient BM Macharia moved this Court vide Petition dated 2<sup>nd</sup> March 2021 where the Petitioner JMM, sought to be appointed as a guardian under Sections 26 and 28 of the *Mental Health Act*.
2. The Applicant filed an application dated 18<sup>th</sup> August, 2022 seeking the following orders.
  - i. That the Honourable Court do grant orders that the funds held in three accounts of the patient namely 01XXX00, 01XXX60 and USD account No. 01XXXXX15 in Equity bank be released to the Petitioner for the Patient's upkeep.
  - ii. That an order do issue to restrain Equity bank from forwarding the funds held in the three account numbers 01XXXXX00, 01XXXXX60 and USD account No. 01XXXXX15 to the unclaimed Assets Authority.
  - iii. That costs be in the cause
3. In the Petition the order issued by Justice Matheka on 7<sup>th</sup> March, 2021 was limited to what is sought in the petition specifically to manage the patient's account to wit
  - i. The Petition is allowed and the Petitioner is appointed the guardian to the subject Benjamin Mugane Specifically to manage his accounts to enable him pay of the credit facility secured using the property LR Nyahururu Municipality Block/6/521.
  - ii. ....



- iii. ....
- iv. ....
4. In considering this Application and what is on record, Section 2 of the *Mental Health Act* “The Act” defines a person suffering from a 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 a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.”
5. Section 26 of the *Act* provides for the orders a Court may make regarding a person with mental disorder and appointment of a guardian for the subject. It 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.
  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. Whereupon 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.
6. Further, Section 28 (1) of the *Act* confers discretion to the Court to issue orders that it thinks fit in a matter relating to a person with a mental disorder. It provides as follows:
  1. The Court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or with his estate, make such order, subject to this Part, regarding such application as, in the circumstances of the case, the Court may think fit.
7. The take home from the above provisions is that, for a person to be said to be suffering from a mental disorder and for the Court to issue orders of management of the affairs of the patient, the patient has to be found to be suffering under this act and the Court has to be fully satisfied that the person is not able to handle his affairs due to mental incapacity.
8. In the instant case, the patient was involved in a tragic accident and he sustained cervical spinal cord transaction and posterior circulation brain infarcts. According to the medical report dated 24<sup>th</sup> October 2022 by Dr, Njau J. W, consultant psychiatrist.

“.....The patient is currently a quadriplegic (paralyzed all limbs and body from the neck downwards). Has a tracheostomy and continuous ventilator support (cannot breathe on his



own). He also has gastrostomy tube for feeding (cannot swallow on his own). The condition is life long because of spinal cord transection at C5 cervical.

9. *NWM v JMM & another* [2017] eKLR the Court stated that it is very serious to allege that a person is of unsound mind or suffers from mental disorder and cited the case of *Patrick Machira -v- Patrick Kabiaru*, HCCC NO. 113/1999 [2000] eKLR.

Even then, the disease of mental disorder varies quite widely, and

“incompetence to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady from which a person must be suffering.....”

10. It is not enough to allege one suffers from a mental disorder without a certified psychiatrist certifying them to be suffering from a mental disorder. The question therefore, is whether the patient can be regarded a person with mental disorder?
11. The letters dated 11<sup>th</sup> February, 2021 and the one dated 24<sup>th</sup> October, 2022 by Dr. Njau only state that the condition is life long but do not certify the patient as one suffering from a mental disorder. According to the definition under this Act this Court is not fully satisfied that the patient is one who suffers a mental disorder
12. In *Re HM* [2002] eKLR the Court held:

“It is trite that a medical report is not conclusive evidence but serves as a guideline to make an appropriate and just decision. Mere physical inability out of injuries sustained during a road traffic accident does not translate to mental infirmity or impairment. Accordingly, I am satisfied that the applicant has not met the threshold for grant of the orders sought under the *mental health Act*. To that extent, the order sought cannot issue and the application is thus dismissed.”

13. From the medical evidence provided, the patient appears to have not made any recovery. However on the issue on whether the patient is able to make any administrative function or decision on his behalf has not been addressed in the two medical reports.
14. The Applicant through his counsel submit that the patient is undergoing treatment and requires 24 hour specialized care. It is the Applicant’s contention that the funds held in the subject accounts should be released to the Applicant in order to cater for the patient’s medical upkeep
15. Counsel for the Applicant submitted on the case of *RWG vs WWG* Nairobi Family Division in Miscellaneous Application No E039 of 2022
- .....having seen the patient online who was in hospital bed the Court allowed the petitioner to access the patients funds to facilitate her medical treatment.
16. Although the Applicant’s counsel submits that this case is similar to the above case, this Court disagrees. Before management orders can be issued, the Court has to be afforded the opportunity to see the condition of the patient. This Court is required to make an inquiry under Section 26(3) of the *act* to ascertain that the patient is indeed unable to take care of himself.



17. In *K. -v- K.* [2009] eKLR the Court cited with approval the case of *Re S (FG) (Mental Health Patient)* [1973]A11 ER Ch.D. 273 where at page 274 it was observed that:-

“The functions of the judge under this part of this Act shall be exercisable where, after considering medical evidence, he is satisfied that a person is incapable, by reasons of mental disorder, of managing and administering his property and affairs, and the person to whom the judge is so satisfied, is in this part of this Act referred to as a patient.”

18. Looking at Order 32 Rule 15 of the *Civil Procedure Rules* 2010 it provides that:

“The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.”

19. On inquiry, the Court had this to say in the case of *MMM vs AMK* (Misc Application No 51 Of 2015) [2016] KEHC 4741

“Accordingly, I find that since no inquiry has been conducted, the orders sought at this stage are premature and if granted at this stage, the same will offend the clear provisions of Order 32 Rule 15 of the Civil Procedure Rules 2010 and can in my view be challenged on that ground alone. I however find that the interests of justice will not be met if I dismiss the application. Accordingly in the interest of justice and to enable the Court to wholly and effectively determine the issue, and fully satisfy the requirements Order 32 Rule 15 of the Civil Procedure Rules 2010.”

20. In view of the above I feel that it would be important for this Court to conduct an inquiry before issuing any management orders.

21. This Court also notes that the patient has also not been declared as one suffering from a mental disorder. In *re GGSM (A person suffering from mental disorder)* [2021] eKLR: -

But I believe the one failure of the petitioners in presenting this petition is their failure to seek a declaration, under the *Mental Health Act*, for the subject to be declared to be suffering mental disorder. This is clear from the prayers of the petition reproduced above. No orders of guardianship or management can be made without that declaration. Petitioners are bound by their pleading which pleading is absent the prayer for such declaration.

22. In the absence of a declaration of the patient being one who suffers from a mental disorder, granting the orders as they are would be rash.

23. I am not satisfied that the Applicant has met the threshold to be appointed as manager of the patient's account and the patient has not been certified as one who suffers from a mental disorder under the *Act*.

24. However, in the interest of justice it would not be just to dismiss the Application. The Applicant has to prove to Court the patient's mental incapacity. This should however not be seen as a punishment or derailment it's a measure to protect the welfare of the patient's estate.

25. Therefore, in exercising my discretion I therefore direct that:

- a. That the patient be produced in Court virtually for an inquiry by the Court in order for this Court to establish that the patient truly lacks mental capacity.



- b. That an up to-date Medical Examination Report as to the mental condition of the patient be filed in Court before the date of inquiry.
- c. That the Restraining Order against Equity Bank Ltd issued on 27<sup>th</sup> October, 2022 shall remain in force.
- d. This Court shall fix a hearing date of the inquiry.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023**

.....

**MOHOCHI S.M.**

**JUDGE OF THE HIGH COURT**

