



REPUBLIC OF KENYA



In re IIM (Petition E005 of 2022) [2023] KEHC 27063 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27063 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
PETITION E005 OF 2022
CM KARIUKI, J
DECEMBER 21, 2023
IN THE MATTER OF MENTAL HEALTH ACT CAP 248 LAWS OF KENYA
AND
IN THE MATTER OF ISAIAH IRUNGU MBURU

BETWEEN

CMI PETITIONER

AND

FNN RESPONDENT

JUDGMENT

1. The petitioner herein vide the petition dated 30th May 2022 sought the following orders: -
 - I. That the petitioner be appointed legal guardian of Isaiah Irungu Mburu of Identification Card Number 06XXX34.
 - II. That the petitioner be appointed the manager of the estate of Isaiah Irungu Mburu and any proceeds and/or income thereof be used for his upkeep and maintenance.
 - III. Such further relief be granted as will meet the ends of justice in this course.
2. The petition was supported by grounds on the face of it and the affidavit of Catherine Mugure Irungu of even date. The petitioner deponed that she had been cohabiting with Isaiah Irungu Mburu, the patient herein as husband and wife in the year 1990 and thereafter married under Kikuyu Customary Law. The petitioner even adopted the patients name in her official documents including the national identity card.
3. It was deponed that sometime in the year 2015, the patient suffered a stroke that affected the normal functionality of his brain. That he was later diagnosed with various health complications including diabetes that further complicated his brain functionality including leading to memory loss and even his



- mobility became very restricted- that he could only move with the support of the petitioner. Further, the patient had been relying on the petitioner's support during his treatment and even nursing as he could not even take a bath on his own.
4. The petitioner averred that on November 25, 2021, the respondent who is the patient's sitter and some two young men came to the patient's matrimonial home with the patient in Rumuruti and alleged that they wanted to carry him to Thika where he would stay a short time so that family members who planned to gather there would have an opportunity to see him and promised to return him later.
 5. That the petitioner went to pick him up with some neighbours from her church but the respondent and her sisters resisted and promised to escort him later. It has now turned out that the respondent has no intention of returning the patient to his matrimonial home to be taken care of by the petitioner who is his wife. That the patient's health has really deteriorated in the hands of the respondent's whose intention with him is not clear.
 6. The petitioner deponed that the patient is a person who is incapable of taking care of his affairs and clearly needs a guardian. That it is in the interest of the patient that the court does appoint the petitioner as his guardian and order that the petitioner manage him and his estate.
 7. On the other hand, the respondent filed a replying affidavit dated 1st August 2022 sworn by Felister Njeri Ngure. It was stated that Isaiah Irungu, the subject had been cohabiting with the petitioner but the relationship started being shaky as she started mistreating the subject with an intention of controlling his property especially after he suffered from stroke. That to further demonstrate her maliciousness, the petitioner took control of the subject's properties and retirement benefits and she does not contribute to his medication and welfare.
 8. The respondent deponed that the petitioner and the subject do not have children together and that she has never taken care of the subject's children with his late wife as she alleged. That though the subject suffered a stroke, the same did not affect his brain and that the petitioner's annexure "CM1-3" clearly indicates that the subject's brain is normal.
 9. It was averred that the subject was suffering from diabetes long before he suffered the stroke and he has never had any memory loss and the mobility was due to the stroke and lack of proper care and mistreatment from the petitioner. The respondent stated that on 25th November 2021 with the assistance of her siblings, she took the subject after receiving a call from one Mr. Maina who was his neighbour and tenant indicating that the subject's health was deteriorating due to the petitioner's mistreatment.
 10. It was deponed that by the point of picking the subject, he had been locked up in a store room outside the main house. The subject's health has deteriorated and he had wounds on his body and she had to take him to hospital. That the subject is above the age of majority i.e. 71 years old and he willingly chose to stay with the respondent and the decision was approved by his 5 children.
 11. The respondent deponed that the subject's health has improved since he started living with her and he has been receiving treatment paid for by her siblings, his children and herself. Further, that the subject is capable of taking care of his affairs and he does not need a guardian appointed by the court. The subject underwent a medical examination and the medical report demonstrated that he is mentally fit.
 12. It was averred that the petitioner is not suited to be appointed as a guardian as the subject is mentally fit and that it is in the interest of justice that she is denied guardianship. That the petitioner has come to court with unclean hands but misleading this court that the subject is mentally incapacitated and that it is in the interest of justice to dismiss the petition.



13. Further, in response the petitioner filed a supplementary affidavit dated 6th October 2022. Witnesses statements of Joseph Tororei dated 9th November 2022, Lucy Waithera Mathenge, Evans Muchangi Nderitu both dated 21st October 2022, Patrick Kangethe Waweru and Elizabeth Akieli Romero both dated 17th October 2022.
14. In support of the respondent's case, the witness statements of Simon Leseipan, Felister Njeri Nguni, Edward Mburu Irungu all dated 15th December 2022 and John Mburu dated 13th January 2021 were filed.
15. The matter then proceeded by way of viva voce evidence.
16. Parties were directed to file submissions but court did not have respondents submissions on record at the time of writing the instant judgement.

Petitioner's Written Submissions

17. The petitioner submitted that the issues for determination herein include: -
 - I. What is the relationship between the petitioner and the patient?
 - II. Whether the patient herein is a patient under the *Mental Health Act* in need of a guardian?
 - III. Who is best suited to be appointed guardian of the patient between the parties herein?
 - IV. What orders commend the outcome of the petition?

Issue one

18. The petitioner testified that the patient and her visited her father's home where the patient paid dowry for her marriage to him and she produced dowry notes taken during the two events both in Kikuyu and English. The same was corroborated by PW2 who was a witness in the dowry payment of 3/07/2012. Further corroborations came from all the petitioner's witnesses who have known the petitioner and the patient as husband and wife for the longest time as neighbours.
19. Reliance was placed on section 43 of the *Marriage Act*, No. 4 of 2014, *Hortensia Wanjiku Yawe v The Public Trustees* as cited with approval in *ASA v NA & another* [2020] eKLR

Issue two

20. It was submitted that the petitioner produced a radiology report "CM13" created on 6/12/2018 and a discharge summary medical report from Nakuru War Memorial Hospital showing that the patient suffers from brain volume loss-dementia.
21. It was argued that in an attempt to controvert the said reports, the respondent filed and produced 3 reports indicating that the patient suffers from extensive brain volume loss and noting that these are the most recent reports, the patient now suffers from extensive brain volume loss.
22. It is therefore clear from both parties that the patient suffers from extensive dementia and that both parties and their witnesses also testified as to the observable character and nature as well as age of the patient as one who is incapable of handling his own affairs and hence the need for a caretaker which is the reason why the respondent wishes to keep the patient under her watch and care.
23. Further, it was contended that the court on 21/9/2022 ordered that the patient be presented before it on 4/10/2022 and when he was presented the court did examine him and they left it to the court to make its own finding but from their assessment the patient could hardly talk, could not follow any



proceedings in court and required an aid for the whole time he was before the court causing them to conclude that he is incapable of protecting his own interest as well as taking care of himself.

24. The petitioner stated that dementia also known as senility is a broad category of brain diseases that cause a long-term and often gradual decrease in the ability to think and or remember that is great enough to affect a person's daily functioning. That the mental health legislation is therefore aimed at social control of feared behaviour as protecting the ill/incompetent such as the patient herein. The petitioner urged the court to find that for the purposes of the *Mental Health Act*, the patient is one suffering from mental disorders.
25. Reliance was placed on section 2 of the *Mental Health Act*.

Issue three

26. On the issue of near relative, the petitioner asserted that the question that we must grapple with is the effect of appointing one of the parties over the other. They averred that the petitioner chose the patient as her lifetime partner over 30 years ago and has lived with him up to 25th November 20021 and one can only imagine the kind of affinity developed by the two over the said 30-year period.
27. It was stated that taking the patient away from the petitioner who is his sole surviving wife and the one they have lived together with for the past over 30 years would be sorry to say tantamount to causing her experience of the death of her spouse which would greatly affect her head, heart and spirit. That the same would be aggravated by an order of this court denying her the opportunity to complete life with her life partner.
28. The petitioner stated that the respondent's case for the denial of the prayer for appointment of the petitioner as the guardian of the patient is solely based on unsubstantiated testimony of RW4 one Simon Leseipan who testified that he was the patient's friend in Rumuruti. That he stated that the patient was living in very bad conditions and in a store.
29. The respondent asserted that all the other witnesses who are neighbours testified that the so-called store was a very well-kept provisional room for use by the patient during the day where neighbours and friends could visit, sit and talk to the patient. The room was also for the patient's convenience purposes to enable the patient walk out and back with ease especially for purposes of easing himself.
30. It was argued that one Maina who was said to have full knowledge of the patient's suffering was never brought to court to testify on the same yet it his phone call to the respondent that brought about this petition. That the evidence of RW4 weighed against that of PW1 to PW6 leaves it with no ground to stand on and is therefore one for total disregard. That he stood out as a stranger, imposter and for lack of a better word a coached witness with a view to subvert the course of justice.
31. Reliance was placed on section 26 (1) of the *Mental Health Act*

Issue four

32. On the fourth issue, the petitioner submitted that the orders as issued *In re estate of HMK* [2021] eKLR and *JWN v MWK* [2020] eKLR are the exact orders that commended the outcome of this petition in favour of the petitioner.

Respondent's Written Submissions; same was Not in the file at the time of drafting this decision.



Analysis and Determination

33. Having considered the petitioner's petition, the affidavits herein, the oral and written submissions, I find that the issues arising for determination include: -Whether the Isaiah Irungu Mburu, the subject hereinafter should be declared as suffering from mental disorder pursuant to the [Mental Health Act](#), cap 248. Whether the Petitioner should be appointed as the guardian of the Subject as well as manager of the estate of the Subject.
34. On the first issue as to whether the subject should be declared as suffering from a mental disorder, section 28 of the [Mental Health Act](#), cap 248 Laws of Kenya, gives powers to this court to make such orders as it may think fit regarding such a subject. It provides that: -
28. Power to make order concerning any matter with the person;
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.
35. The petitioner stated that the subject was suffering from dementia and she produced a radiology report "CM13" created on 6/12/2018 and a discharge summary medical report from Nakuru War Memorial Hospital showing that the patient suffers from brain volume loss-dementia. She contended that the patient suffers from extensive dementia and that both parties and their witnesses also testified as to the observable character and nature as well as age of the patient as one who is incapable of handling his own affairs and hence the need for a caretaker which is the reason why the respondent wishes to keep the patient under her watch and care.
36. On the other hand, the respondent contradicted the appellants' averments. She stated that although the subject suffered a stroke, the same did not affect his brain. It was averred that the subject was suffering from diabetes long before he suffered the stroke and he has never had any memory loss and the mobility was due to the stroke and lack of proper care and mistreatment from the petitioner.
37. The respondent deponed that the subject's health has improved since he started living with her and he has been receiving treatment paid for by her siblings, his children and herself. Further, that the subject is capable of taking care of his affairs and he does not need a guardian appointed by the court. The subject underwent a medical examination and the medical report demonstrated that he is mentally fit.
38. I have gone through the discharge summary dated 12/6/18 attached by the petitioner from Nakuru War Memorial Hospital and the same indicates that the subject's diagnosis is diabetes and brain volume loss – dementia. Further, the radiology report from the same hospital dated 6/12/2018 concludes that the subject has brain volume loss.
39. On the other hand, the respondent attached a report dated 10th March 2022 from Dr. Muriithi Nyamu revealing that the from several investigations done the subject was suffering from among many other things CT brain extensive brain volume loss,. That he remained weak with speech difficulties (due to the old stroke) and still experiences episodic chest pains. Further, from the MRI of the brain report dated 26/06/2022 from Sonar Imaging Centre the findings were that the subject has diffuse cerebral atrophy, ventriculomegaly with upward bowing of the corpus callosum, partial empty sella and normal pressure hydrocephalus.



40. Additionally, the medical report of Dr. Stanley M. Ngare dated 7 July 2022 indicated that the subject is independent and is able to take care of himself. That he was in good general condition and noted to have a hoarse voice. He was orientated in person and place and could follow commands. The MRI brain showed diffuse cerebral atrophy and ventriculomegaly. Further that he is able to understand and follow commands.
41. I am unable to make a conclusive legal opinion as to whether the subject should be declared as suffering from mental disorder pursuant to the *Mental Health Act*, Cap 248. The subject is said to be suffering from extensive brain volume loss which I am not able to equate to dementia. Further from my desktop research cerebral atrophy which he suffered as a result of the stroke is the loss of nerve cells (neurons) and the connections that help them communicate in the brain's tissues—occurs in many disorders that affect the brain, such as stroke, Alzheimer's, disease, traumatic brain injury, multiple sclerosis, or infections. Atrophy of the brain can affect different areas, depending on the disease involved Cerebral atrophy occurs naturally in all humans. But cell loss can be accelerated by a variety of causes, including injury, infection, and medical conditions such as dementia, stroke, and Huntington's disease. These latter cases sometimes culminate in more severe brain damage and are potentially life-threatening
42. The symptoms of cerebral atrophy vary depending on which area of the brain is affected. Depending on the disease or disorder causing the cerebral atrophy, symptoms can include: Dementia (the loss of the ability to think, reason, or remember to the extent that it interferes with a person's daily life and activities) Disorientation Seizures Difficulty communicating Memory loss Loss of coordination Localized weakness, loss of sensation, or paralysis Blurred or double vision Disturbances in speaking and understanding language (aphasia)
43. The parties' reports are from different hospitals and though they agree on the fact that he is suffering brain volume loss. The respondent's medical report from Dr. Stanley M. Ngare dated 7 July 2022 which is more recent indicated that the subject is independent and is able to take care of himself. That he was in good general condition and noted to have a hoarse voice. He was orientated in person and place and could follow commands. The MRI brain showed diffuse cerebral atrophy and ventriculomegaly. Further that he is able to understand and follow commands. This is disputed by the petitioner who contends that the subject is incapable of the same.
44. It was contended by the petitioner that the court on 21/9/2022 ordered that the patient be presented before it on 4/10/2022 and when he was presented the court did not examine him nor any of the parties and it was left it to the court to make its own finding. I could not trace any conclusions and/or findings from the same which would have been beneficial in determining the question at hand.
45. Having not observed or seen the subject address court, I am of the view that I may not be in the best position to determine the question at hand and the consequent question of whether the Petitioner should be appointed as the guardian of the Subject as well as manager of the estate of the Subject. Moreover, perhaps the court could have benefitted from the evidence of an independent expert witness to establish whether the subject is indeed mentally impaired and incapable of taking care of himself and his affairs.
46. The petitioner did not discharge her evidential burden on balance of probabilities, section 107 of *Evidence Act* places burden on he who asserts the existence of a fact. The same burden has not been discharged. Thus, the court finds no merit in petition and thus makes the orders;
- i. The petition is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 21ST DAY OF DECEMBER 2023



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C KARIUKI
JUDGE

