



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONST. PETITION NO. E018 OF 2021

IN THE MATTER OF: THE MENTAL HEALTH ACT CAP 248

AND

IN THE MATTER OF: SA

BETWEEN

BA.....PETITIONER/APPLICANT

AND

SA.....RESPONDENT

JUDGMENT

The Petition before me is premised upon the provisions of **Section 26** of the **Mental Health Act, Cap 248** of the **Laws of Kenya**.

1. The Petitioner, **BA**, is a son of the Respondent, **SA**.
2. It was the Petitioner's case that the Respondent was suffering from mental disorder, and was therefore incapable of caring for herself or of making accurate decisions which appertain to her care and wellbeing.
3. According to the Petitioner, **DR. PHILIP KILIMO** had diagnosed the Respondent as a person who was suffering from **AFFECTIVE DISORDER**. In the circumstances, the Petitioner asked the Court to adjudge the Respondent to be a person suffering from a mental disorder.
4. Secondly, the Petitioner asked the Court to appoint him as the Respondent's Legal Guardian.
5. Thirdly, the Petitioner asked the Court to appoint him, either by himself or by an appointed Agent, as the Manager of the estate of **SA**.
6. The Applicant wishes to be appointed as the Manager of all the moveable or immovable property; money; debts; legacies; power to execute or sign all deeds and instruments relating to or evidencing the title or right of any property.
7. He also seeks authority to be able to give a right to receive any money or goods; proceed to take over or initiate any litigation or claims.
8. The Applicant informed the Court that the Respondent had depleted her liquid resources. Therefore, in order to be able to raise funds for use in maintaining the Respondent, there was a need to sell one of the Respondent's properties.
9. I have given due consideration to the application. I note that the Respondent has been diagnosed with "*Affective Disorder*." The medical records show that she was agitated, and had poor concentration, coupled with loss of memory.
10. Dr. Philip Kilimo, the Medical Superintendent at the Kisumu County Referral Hospital wrote a medical report for the Respondent on 27th October 2021. He said that the Respondent had been attending the Psychiatric Outpatient Clinic from December 2014.
11. The report indicated that the Patient's condition included;

“..... sleep, mood disturbance and occasionally aggressive behavior and poor concentration and loss of memory.”

12. The doctor also said that the Respondent had since developed wasting and idiopathic weakness.

13. The report stated that the Respondent’s condition was complicated to mental retardation resulting to *“severed judgement.”*

14. In the result, the doctor arrived at the following conclusion;

“The above cannot be allowed to transact any business due to the above conditions and disease complications.”

15. Pursuant to the provisions of **Section 26 (1)** of the **Mental Health Act**;

“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.”

16. Although the Petitioner has sought authority to do all manner of things, including power to execute, sign all deeds and instruments relating to or evidencing the title or the Respondent’s right to any property, I hold the considered opinion that it has not been demonstrated that such vast authority is required in this instance.

17. Pursuant to the proviso to **Section 27 (1)** of the **Mental Health Act**, the manager of the estate of any person suffering from mental disorder, may be granted general or special powers for the management of the estate, as the Court considers necessary and proper

“Provided that –

(i) A manager so appointed shall not, without the special permission of the court –

(a) mortgage, charge or transfer by sale, gift, surrender, exchange or otherwise any immoveable property of which the estate may consist

.....”

18. Therefore, in accordance with that statutory provision, if the Petitioner wishes to sell any particular property, he shall have to first seek specific authorization from the Court.

19. Although the Petitioner has also cited **Section 29** of the **Mental Health Act**, the said provision would only be applicable;

“..... instead of appointing a manager, or, notwithstanding such appointment,”

the Court is satisfied that it was expedient that the property of the Respondent should be made available for his or her maintenance.

20. In the result, I now appoint **BA** as the Respondent’s Legal Guardian.

21. However, the authority of the said **BA** shall be exercised in accordance with the proviso to **Section 27 (1)** of the **Mental Health Act**.

22. Leave is granted to the manager appointed herein to move the court, when it is deemed necessary and proper, to seek authority to undertake any particular action with regard to any specified property of the Respondent.

23. The costs of this Petition shall be borne out of the proceeds from the estate of the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF FEBRUARY 2022

FRED A. OCHIENG

JUDGE