



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**MISCELLANEOUS APPLICATION NO. E001 OF 2021**

**IN THE MATTER OF SWM.....PATIENT**

**RNW.....APPLICANT**

**VERSUS**

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

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

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

**SWW.....4<sup>TH</sup> RESPONDENT**

**MKW.....5<sup>TH</sup> RESPONDENT**

**SMW.....6<sup>TH</sup> RESPONDENT**

**SMW.....7<sup>TH</sup> RESPONDENT**

**NMW.....8<sup>TH</sup> RESPONDENT**

**MWW.....9<sup>TH</sup> RESPONDENT**

**FNW.....10<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant namely RNW approached the court vide a Notice of Motion dated 18<sup>th</sup> January 2021 under the Mental Health Act CAP 248 Laws of Kenya for the following orders:

*i. Spent.*

*ii. That the honorable court be pleased to appoint RNW as the guardian manager of SWM, the patient herein suffering mental disorder.*

*iii. That the honorable court be pleased to appoint RNW as the manager of the estate of SWM suffering from mental disorder.*

*iv. That the honorable court be pleased to revoke any nomination, appointment, ordination and/or investiture bestowed upon the 1<sup>st</sup> Respondent herein if at all by the patient herein at any time when he was of sober mind in relation to the administration of the now patient's estate.*

*v. That each party bears its own costs.*

2. The application was premised on the grounds on the face of the application and supported by the affidavit sworn by the by the Applicant dated 18<sup>th</sup> January 2021.

3. In a nutshell, the Applicant deponed that he was the patient's wife and they had two children together. That the patient herein started experiencing a state of forgetting things, events and persons around 2016 and he has since been diagnosed with senile dementia. That the 1<sup>st</sup> Respondent herein, his grandson took control of every aspect of management of the patient's estate since 2015. That the patient herein needs the Applicant's care at this time that he can't with proper comprehension manage himself and his estate needs a manager in the name of the Applicant. That the Respondents herein have not made such an application and could not cooperate in the making of the instant application either due to conspiracy to irregularly take advantage of the situation or by sheer ignorance of the law.

4. On the other hand, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents filed Grounds of Opposition dated 1<sup>st</sup> February 2021 stating that the application was fatally defective as the patient has never been confirmed to be a person suffering from a mental disorder under **Section 2 as read together with Section 10 of the Mental Health Act**.

5. Further, they contended that the application is brought before the court through concealment of material facts that the patient is legally married under African Christian marriage to the 3<sup>rd</sup> Respondent which is monogamous Christian marriage and therefore the Applicant lack locus standi to approach the court to seek or the orders sought. That the application is supported by fabricated documents and is frivolous, vexatious and a gross abuse of the court process and should be dismissed with costs.

6. In response to the Respondents' grounds of opposition, the Applicant filed a further affidavit dated 18<sup>th</sup> February 2021 detailing her marriage to the patient through the Kikuyu traditional rites of marriage and a supplementary affidavit dated 5<sup>th</sup> March 2021.

7. The 3<sup>rd</sup> Respondent, also filed a replying affidavit dated 29<sup>th</sup> January 2021 asserting that she was the patient's lawfully wedded wife and that they were in a monogamous marriage and hence the 'patient' did not at any time contract a second marriage to the Applicant. She deponed that the patient has never been treated and diagnosed with senile dementia despite his advanced age and that he has been and continues to be well taken care of and managed by mostly the 1<sup>st</sup> Respondent with the support of herself, the 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondent. The 3<sup>rd</sup> Respondent stated that the Applicant is only a partner whom the patient had out good will purchased for property and assisted and to acquire several properties.

8. The 4<sup>th</sup> and 5<sup>th</sup> Respondent filed a replying affidavit dated 17<sup>th</sup> February 2021 associating themselves with the Applicant's application. The 5<sup>th</sup> Respondent also filed a replying affidavit dated 24<sup>th</sup> February 2021.

9. Further, the 10<sup>th</sup> Respondent filed a replying affidavit dated 17<sup>th</sup> February 2021 associating herself with the Applicant's application.

#### **APPLICANT'S WRITTEN SUBMISSIONS**

10. The Applicant submitted that she was the patient's wife and thus had been demonstrated with clarity vide her further affidavit dated 18<sup>th</sup> February 2021. The Applicant also annexed the sworn affidavits of James Gacheru Kariuki, Peter Karime Kuria and Gerald Nderitu Njuguna which were present during the dowry negotiation processes.

11. The Applicant argued that for purpose and intents of **Section 26 of the Mental Health Act** she qualified as a near relative to the patient.

12. On whether SWM is patient, it was argued that the same was demonstrated by the doctor's report "**RNW4**" that Simon is a patient suffering from Senile Dementia. Further, vide the courts orders on 27<sup>th</sup> September 2021, S was examined at Nakuru PGH Hospital and determined to be suffering from Alzheimer's Dementia. The Applicant asserted that from the professional reports that SWM was an old man suffering from mental disorder and urged the court to find as so.

13. It was stated that none of the Respondents has shown interest to the patient's guardian and none had indicated any desire to be the manager of the estate of the patient under the confines of the law in any case it is clear that he 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondent would wish to continue business as usual under the guise of a healthy SWM.

14. The Applicant averred that the issue beforehand is about a patient and not child care issue and that the chamber summons dated 2<sup>nd</sup> June 2021 has no nexus with the application herein and if at all necessary, it should be filed in the appropriate children's court. She urged the court to find her application meritorious as the family of the patient if left alone cannot agree on the interest of the patient and his estate and must be supervised by the honorable court as the law provides.

#### **ANALYSIS AND DETERMINATION**

15. Before delving into the core issues before the court ie guardianship of the patient and the management of the estate, I briefly allude to application on conduct of DNA of 4<sup>th</sup> and 5<sup>th</sup> Respondents. The Applicant averred that the issue beforehand is about a patient and not child care issue and that the chamber summons dated 2<sup>nd</sup> June 2021 has no nexus with the application herein and if at all necessary, it should be filed in the appropriate children's court.

16. This court agrees as much and will leave it at that but strike out same application.

17. She urged the court to find her application meritorious as the family of the patient if left alone cannot agree on the interest of the patient and his estate and must be supervised by the honorable court as the law provides.

18. The court has exhaustively considered all the material placed before it, the main issue for determination is whether the court should grant the guardianship and management orders as sought in the application herein. **Section 2 of the Mental Health Act Cap 248** provides that:

**“A person suffering from mental disorder” means a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse.”**

19. The court is empowered to grant orders sought by the application in relation to custody, management and guardianship under **Section 26 of the Mental Health Act Cap 248** which 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**

**c) 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.**

**d) Where upon inquiries 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 just 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.”**

20. Moreover, the authority to manage affairs of an estate of a patient is donated under **Section 27 of the Mental Health Act** whereas **Section 28 of the same Act** provides for management of the subject's estate.

21. The court in **in Re N M K [2017] eKLR** considered what should guide the court when applying **Section 26 and 27 of Cap 248**. The held as follows:

**“In considering an application brought under sections 26 and 27 of the Mental Health Act, the Court is guided by three main factors:**

**There must be medical evidence warranting the determination by the Court that the Subject suffers from mental disorder;**

**The person to be appointed to be either a Guardian or Manager must be fit to be so appointed;**

**The Court must be satisfied that a proposed Manager will utilize her powers for the benefit and welfare of the Subject.”**

22. Similarly, **in re Estate VFM (Patient) [2020] eKLR**, the court held that:

**a) For the court to grant the application for appointment of a manager of the estate and guardian to the patient, the Petitioner/Applicant is duty bound to prove that:**

**b) There exists medical proof by show of evidence confirming that the subject suffers from mental disorder.**

**c) The petitioner/Applicant seeking to be appointed as manager or guardian must be legally fit to be so appointed.**

**d) That due to the subject’s mental disorder, he or she is incapable of managing his/her own affairs independently and responsibly.**

**e) That the proposed manager/guardian will manage the subject’s property effectively and efficiently for the benefit of the estate and welfare of the subject.**

23. The court in **in Re N M K [supra]** stated that the overall guiding principle in applying all these factors must be the welfare and best interests of the subject.

24. Based on the affidavits evidence tendered before this court by the Applicant and the psychiatric report dated 5<sup>th</sup> November 2021 from Dr. J.W. Njau, Consultant Psychiatrist at Nakuru Provincial General Hospital as per the court order dated 27<sup>th</sup> September 2021, I am that convinced that SWM lacks the mental capacity which my view falls within the definition of **Section 2 Cap 248**. The same has adversely affected his cognition and the ability to take care of his affairs or of himself. The doctor aptly stated in the report (“**SWM-1**”) that the patient suffers from Alzheimer’s Dementia, a progressive age related degenerative neurological disorder which has caused significant decline from his obvious level of functioning and currently he doesn’t know the nature and extent of his properties in details or number or names of his children and he needs assistance in running of his daily activities, managing his finances and properties. This court had also an opportunity to interview him and observe in at length in chambers in presence of the parties before ordering for his mental assessment.

25. Having settled on the issue of whether the subject should be declared as suffering from mental disorder pursuant to the **Mental Health Act, Cap 248**, and that, he is suffering from mental disorder to such an extent as to be incapable of managing his affairs, and is incapable of managing himself the court is tasked with determining whether the Applicant should be appointed as guardian/ manager to the patient. Or who is suitable to take role of his guardianship and management of his estate.

26. **Section 26 of the Act** as mentioned above, gives court the power to make an order regarding management of the estate of any person suffering from mental disorder to any relative or any person suitable but giving preference to a relative.

27. In the instant case, the Applicant submitted that she is suitable to be named as the manager and guardian of the patient under **Section 26 Cap 248** because she was the patient's second wife. She averred that they had been married through Kikuyu Customary Law and the same was demonstrated with clarity vide her further affidavit dated 18th February 2021. The Applicant also annexed the sworn affidavits of James Gacheru Kariuki, Peter Karime Kuria and Gerald Nderitu Njuguna who were present during the dowry negotiation processes.

28. However, nowhere has applicant deponed nor proved to have cohabited with the patient in the recent past nor visited him and spent with him in Nairobi where patient ordinarily resides. The 3<sup>rd</sup> respondent G who is the 1<sup>st</sup> wife has deponed that she visits and resides with patient in Nairobi in the hotel where he resides and same has not been controverted by the applicant.

29. The court notes that, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents claimed that the patient was not mentally impaired, allegations that have already been disproved by this court and that he is well taken care of by the mostly the 1<sup>st</sup> Respondent with the help of the other aforementioned Respondent. They reiterated that the patient was in a monogamous marriage with the 3<sup>rd</sup> Respondent and that the Applicant is not the patient's second wife and therefore cannot be granted the orders sought.

30. Following the finding of the court in **in Re NMK (supra)**, the Applicant has presented medical evidence that the subject is suffering mental impairment which has been confirmed by the psychiatric report authored by Dr. J.W. Njau. Looking at the available evidence, thus am not satisfied that the Applicant has met the threshold of granting the orders sought to the extent of legal guardianship specifically in regards to taking care of the patient's personal affairs, health and general well-being. It is my considered view that granting the same to GWW is in the interest of the patient as it is evident that he needs to be properly taken care of and receive medical and personal care.

31. However, on appointment of the managers of the patient's estate, I find that there is prima facie evidence that the applicant is 2<sup>nd</sup> wife as 1<sup>st</sup> wife (3<sup>rd</sup> respondent) acknowledges in her affidavit sworn on 29/1/021 that vide para 23 and 25 that the patient bought applicant 27 acres piece of land in Olkalau in 2010 and settled her with 4<sup>th</sup> and 5<sup>th</sup> respondents and also bought applicant commercial property in Njabini which she ,4<sup>th</sup> and 5<sup>th</sup> respondents exclusively enjoy proceeds therefrom. No explanation why patient did such a gracious act being not a relative of her and her children.

32. Applicant has demonstrated on a balance of probability to have under gone a process of kikuyu customary marriage though same contestable on its validity in the face of monogamous marriage of the 3<sup>rd</sup> Respondent and the patient.

33. The above said, it is clear that the application herein is contested and the Applicant has not received the full consent of the rest of the patient's family. For the court to intervene in the management and control of the patient's properties and estate the court has to put into consideration the provisions of **Section 28 through to Section 39 of the Mental Health Act**. In particular, **Section 33** requires a manager(s) so appointed by the court to furnish an inventory and annual accounts to the court and the Public Trustee.

34. In the end, the court finds it apt, for both applicant and the respondent no 3 to be the managers of the estate of the patient as G becomes guardian of the patient as prescribed herein below.

35. Thus the makes the following orders:

***i. That GWW is hereby appointed as the guardian of SWM, the patient herein suffering mental disorder in as far as the patient's personal and medical care and maintenance is concerned.***

***ii. That GWW and RNW are jointly appointed managers of estate of SWM and to do furnish the court with an inventory of the estate of SWM of all his assets and liabilities within 30 days from today's date for purposes of determination of the management of the patient's estate.***

***iii. That the Court revokes any nomination, appointment, ordination and/or investiture bestowed upon the 1<sup>st</sup> Respondent herein if at all by the patient herein at any time when he was of sober mind in relation to the administration of the now patient's estate.***

***iv. That each party bears its own costs.***

***v. There be liberty to apply.***

**DATED AND SIGNED AT NYAHURURU THIS 17TH DAY OF FEBRUARY, 2022.**

.....  
**CHARLES KARIUKI**

JUDGE