



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. E039 OF 2022

IN THE MATTER OF AN APPLICATION/PETITION UNDER SECTIONS 2,26,27,28 OF THE MENTAL HEALTH ACT CAP 248

IN THE MATTER OF ORDER 32 RULE 15 OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA AND THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF CWM.... (A PERSON SUFFERING FROM MENTAL DISORDER)

AND

IN THE MATTER OF AN APPLICATION BY

RWG & WWG

TO BE APPOINTED GUARDIAN OVER THE AFFAIRS AND MANAGERS OF THE ESTATE OF THE SAID

CWM

RWG1ST PETITIONER

VERSUS

WWG.....2ND PETITIONER

RULING

1. Before this Court is a Petition dated 22nd February 2022 by which the Petitioners **RWG and WWG** seek the following orders:-

- “i. CWM be declared to be suffering from a mental disorder as defined in the Mental Health Act Cap 248 Laws of Kenya.**
- ii. That the Petitioners be appointed as the managers of the Estate and all the affairs of the said CWM**
- iii. That the Petitioners be appointed as Guardian of CWM**
- iv. That the Petitioners be granted access to funds in the estate of CWM to help offset the high costs incurred in the continued treatment and management of her estate.**
- v. That the cost of this application be borne by the estate of the said CWM**
- vi. Any other relief and order that the court may deem fit to give in the circumstances”.**

2. The Petition was supported by an Affidavit dated **22nd February 2022** sworn by the Petitioners. The matter was canvassed by way of *viva voce* evidence on the online platform. The Petitioners who testified as **PW1** and **PW2** told the Court that they are both daughters of the Subject Patient **CWM** who is aged **86** years.

3. The Petitioners stated that they are seeking to be appointed as Guardians of their mother's affairs and managers of her estate. They told the court that the patient has been unwell for the past **five (5) years** and that she was currently admitted at **AAR Hospital in Kiambu** and is therefore not in a position to manage her own affairs. That the patient suffers **Dementia** which has affected her memory and that she is not in a position to perform activities of daily living, bathing, grooming, toileting and even feeding herself. They have annexed to their Supporting Affidavit, a copy of medical diagnosis on the patient (Annexure "**RWG 3**").

4. The petitioners stated that the costs for the continued treatment and management of her illness are extremely high and as such they require to access funds from the rental properties owned by their mother. They seek to be made guardians and managers so as to be able to access funds to offset hospital bills and continue taking care of her.

5. **PW3** was **SMG** is a son to the Subject and brother to the Petitioners. **PW3** confirmed that he had no objection with the Petitioners being granted guardianship of their mother since the Petitioners live with her and have always taken care of her.

6. I have carefully considered this Petition, the Affidavit filed in Court as well as the evidence adduced in the matter. **Section 26 of the Mental Health Act, Cap 248, Laws of Kenya** provides for the circumstances under which a Court may make orders for the Guardianship of a Subject (Patient) and the management of their affairs as follows:-

"Order for custody, management and guardianship

(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." [own emphasis]

7. The Petitioners have sought to be declared as Guardians and Managers of the Patient. To merit the above orders the Petitioner must adduce evidence sufficient to satisfy the Court **firstly** that the Patient is a person suffering from a mental disorder under the **Mental Health Act** and **secondly** that the Patient is incapable of managing her own affairs. The Petitioners testified that the Patient was diagnosed with **Dementia**. They testified that the patient has been unable to remember things and she cannot perform activities of daily living, bathing, grooming, toileting and feeding herself.

8. A Medical Report dated **9th February 2022** prepared by **Prof. Erastus O. Amayo** of **The Neurology Centre** (Annexure '**RWG-1**') was **produced as an exhibit**. The Doctor diagnosed the subject with **Dementia**. The report stated *inter alia* that:-

"The above has been unwell for the last 5 years. She had a progressive cognitive decline in terms of memory of events and even people. Initially she would loose things.

She is not capable of remembering things. Furthermore she cannot be able to perform activities of daily living, bathing, grooming, toileting and feeding herself.

She has also visual and auditory hallucination, keep on talking without sleep and is consistently agitated.

There is no useful conversation that can be carried out with her.

Current state: she was found to be agitated. Has a poor attention span. Formal memory assessment is not possible.

Opinion: it is my opinion that she has features consistent with dementia. At the moment she is not capable of taking care of her affairs."

9. The Court was able to see the Subject online. She was lying in a hospital bed with a nurse in attendance. The subject is an elderly lady and is very frail and appeared confused. She was not able to respond when spoken to.

10. The Subject's children are all in agreement with this Petition for Guardianship. The Subject's other child has signed consent to the Petition and confirmed his consent to the Court. The Subject currently lives with one of the Petitioners in her home and the Petitioners have always cared for her. I note that currently the Subject is in hospital, thus necessitating urgent access to funds in order to cater for her medical treatment.

11. Based on the material availed to this Court I am satisfied that the Subject suffers from a mental illness under the terms of the **Mental Health Act**. I am satisfied of the merit of this Petition and I hereby allow prayers **(a) (b) (c) (d) and (e)** of the Petition dated **22nd February 2022**. The Petitioners **RWG and WWG are** hereby appointed as Guardians and Managers for the Subject **CWM**.

Dated in **Nairobi** this **25th** day of **March 2022**.

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MAUREEN A. ODERO

JUDGE