



REPUBLIC OF KENYA



**In re Estate of GWW (Petition E230 of 2021)
[2022] KEHC 355 (KLR) (Family) (22 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

PETITION E230 OF 2021

MA ODERO, J

APRIL 22, 2022

**IN THE MATTER OF AN APPLICATION BY AMW TO BE APPOINTED
GUARDIAN OVER THE AFFAIRS AND MANAGER OF THE ESTATE OF GWW**

IN THE MATTER OF

AMW PETITIONER

JUDGMENT

JUDGMENT

1. The Petitioner AMW has filed this Petition dated 9th December 2021 seeking for orders That:-
 - a. The subject, GWW be adjudged to be a person suffering from a mental disorder.
 - b. An order that the Petitioner be appointed the Guardian of GWW.
 - c. An order that the Petitioner be appointed the manager of the estate of GWW with general powers to deal with the estate
 - d. A special permission be hereby granted to the Petitioner to activate, access and transact on the subject account number being Barclays Account 067-xxxx for the benefit and interests of GWW.
 - e. The Petitioner to have the care, control and custody of the said GWW.
 - f. Such other and further orders as this Honourable court may deem just to grant.”
2. The Petition which was premised upon section 26 of the *Mental Health Act*, Cap 248 Laws of Kenya was supported by an Affidavit of even date sworn by the Petitioner.



3. The Petition was opposed by GWW (the Interested Party) who filed a cross-Petition dated 16th March 2022, in which he sought for orders That:-
 - a) An order that both the petitioner and the interested party herein be jointly appointed the Guardians of GWW
 - b) An order that both the petitioner and the interested party herein be jointly appointed the managers of the Estate of GWW with general powers to deal with the estate.
 - c) A special permission be hereby granted to the Petitioner and the Interested Party to jointly activate, access and transact on the subject account number being Barclays Account 067-xxxx for the benefit and interests of GWW.
 - d) The Petitioner and the Interested Party to jointly have the care, control and custody of GWW.
4. The matter was canvassed by way of oral evidence on the online platform.
5. The Petitioner told the court that the Interested Party is her brother and that they are both the children of GWW (the subject herein). The Petitioner stated that the subject was diagnosed with Alzheimer's disease in 2017 and that as a result she is incapable of managing her own affairs.
6. The Petitioner stated that though she resides in Australia she has been taking care of the Subject by employing two full time nurses and hiring a driver to ensure that the subject attends all her medical appointments. That previously she was working together with her brother AWK to manage their mother's affairs but following the demise of said brother in the year 2019 she has been taking care of the Subject on her own.
7. The Petitioner told the court that the Subject owns a residential property being Plot Number 147, Kariobangi South which generates a monthly rental income of Kshs 320,000. That said rental income is used to meet some of the Subject costs. However since the Subjects costs total approximately Kshs 401, 459/- per month the Petitioner has to meet the difference from her own resources.
8. The Petitioner now seeks to be appointed as legal Guardian and Manager of her mother's affairs.
9. With respect to the cross-Petition filed by her brother the Petitioner urged the court to dismiss the same. She stated categorically that it was not possible for her to work harmoniously with the cross-Petitioner.
10. The Petitioner accuses her brother of coming to their mothers home drunk and harassing both the Subject and the nurses hired to care for her. That the cross-petitioner has forced the Subject to sign financial documents and has also diverted the income of the Subject to his own use.
11. The Cross-Petitioner, GWWA testified on his own behalf. He confirmed to the court that the Petitioner is his sister and further confirmed that the Subject who is their mother suffers from 'Dementia' and is not capable of managing her own affairs. The Cross-Petitioner told the court that he resides in The Netherlands but comes home every year. He complains that though he travelled to Kenya in March 2021 he was prevented from seeing his mother by the Petitioner.
12. The Cross-Petitioner stated that prior to the death of his brother AWK all was well as their late brother who had power of Attorney was effectively managing the property in Kariobangi South owned by the Subject and was utilizing the rental income derived therefrom in caring for the needs of the Subject.



13. The Cross-Petitioner states that following the death of AWK the Petitioner took over the affairs and accounts of the Subject which she has been mismanaging. He states that he seeks to be appointed a joint Guardian with the Petitioner.
14. PW2 MAJOR (RTD) WG is a younger brother to the Subject. He confirms that the Subject suffers from dementia and is not able to manage her own affairs. He told the court that he supports the Petition as the Petitioner has been single handedly providing for all the needs of the Subject.
15. PW2 expressed severe reservations about the conduct and motives of the Cross-Petitioner. He told the court that there is extreme animosity between the two siblings and that his efforts to mediate between them has borne no fruit. He stated that the cross-Petitioner has not in any way been involved in caring for his mother and urged the court to grant guardianship to the Petitioner.

Analysis and Determination

16. I have carefully considered the Petition before the court, the Cross-Petition filed in response thereto as well as the evidence adduced before the court. This Petition has been brought under the *Mental Health Act*, Cap 248, Laws of Kenya. The Petitioner, the Interested party and PW2 all stated that the Subject suffers from mental illness which renders her incapable of managing her own affairs.
17. Section 26 of the *Mental Health Act* provides for the circumstances under which a court may make orders for the Guardianship of a Subject (patient) 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)
18. In order to merit the orders being sought it must be shown that the Subject suffers from a mental disorder under the *Mental Health Act* and secondly it must be proved that the Subject is incapable of managing her own affairs.
19. The witnesses all testified that the Subject suffers from Dementia and that as a result her memory is impaired. That she has poor concentration and is disoriented.
20. Annexed to the Petition are two medical reports. The first is a medical report dated 14th January 2019 prepared by Dr Marx Okonji, Consultant Psychiatrist (Annexure AMW-‘1’). The report indicated



that the Subject presented with progressive memory impairment as well as episodes of confusion. The Doctor ended his report as follows:

GWW aged 64 years suffers from Alzheimer’s disease. Both her short term and long term memory are grossly impaired. She is prone to be exploited. She is not able to look after herself or her estate. I would like to recommend an appointment of suitable people to manage her affairs and her estate.”

21. The second Medical Report dated 16th May 2019 was prepared by Dr Josphe Jumba a Consultant Psychiatrist based at the Mathare National Teaching and Referral Hospital (Annexure ‘AMW-2’). The report indicated that the patient GWW had been on treatment at the facility for Alzheimer’s Disease since 2017. The doctor ended his report as follow:-

OPINION: The assessment revealed a kempt elderly lady, apprehensive with perceptual disorders and gross memory impairment. She has features of Alzheimer’s Disease. She needs help to transact any legal business and also assistance to carry out most activities of daily living.”

22. These two (2) reports prepared by Psychiatrists – Doctors who are specialized in the identification and treatment of mental illness. Both professionals opine that the Subject is not able to manage her own affairs.
23. This court was able to see the Subject online. She was a frail elderly lady who did not appear to comprehend the court proceedings.
24. Based on the material availed to the court, the evidence of the witnesses who testified and from my own observation, I have no doubt that the Subject suffers from a mental illness under the terms of section 26 of the *Mental Health Act*. She is not capable of managing her own affairs and requires that someone be appointed to manage her estate.
25. The Petitioner has asked to be appointed as sole Guardian and Manager of the Subject’s Affairs. The Co-Petitioner indicated that he had no objection to the Petitioner being appointed as Guardian but insisted that he be appointed as joint manager of the Affairs of the Subjects estate.
26. The Petitioners and Cross-Petitioner are siblings. It was very obvious to the court that there is bad blood between the two. They were hardly able to address a civil word to each other and each accused the other of mismanaging their mothers estate. The bone of contention between the two was the property in Kariobangi South owned by the Subject and the rental income derived therefrom.
27. The Petitioner has a litany of complaints against her brother. She accuses him of forcing the Subject to sign legal documents, of harassing the staff hired to care for the Subject, causing some to leave and of failing to make any financial contribution towards the care of their mother.
28. The evidence of the Petitioner is supported by PW2 who was a brother to the Subject. PW2 stated that the Cross-Petitioner has not been directly involved in caring for his mother. That he is abusive and by his conduct has caused some of the nurses hired by the Petitioner to care for their mother to leave. On the other hand, PW2 testified that the Petitioner has been very responsible in handling the care of the Subject.
29. From the evidence it is clear that the Petitioner is the one who has been providing for the care of the Subject and managing her estate. She has hired full time nurses for the Subject and has also hired a driver to take the Subject to her medical appointments. The Petitioner has annexed to her Supporting Affidavit a record of the rental income collected from the Subjects property in Kariobangi



South (Annexure 'AMW-3') as well as a breakdown of the expenses incurred in caring for the Subject (Annexure 'ANW-4'). It is clear that the Petitioner has had to dip into her own pocket to provide for the Subject.

30. On the other hand it appears that the cross-Petitioner has not been as involved in the care of his mother. The major gripe of the cross-Petitioner is that his sister has access to their mother's accounts. He however concedes that the rental income derived from the said property has been used to hire nurses to care for the Subject, and to provide for the Subjects general upkeep.
31. Although the cross-Petitioner claims that he had been denied access to his mother, he admits under cross-examination that he did visit his mother in August 2021. The cross-petitioner concedes under cross-examination that he is not involved and has no knowledge of how the Subject's care is provided for. He further admits that he has no problem with the standard of care being provided to the Subject – this amounts to an admission that the manner in which his sister has been caring for the Subject is adequate and satisfactory.
32. The cross-Petitioner wants the court to grant him joint guardianship over the Subject. However, the Petitioner opposes this saying that they would not be able to work together. The acrimony between the siblings was obvious even to the court. It is unlikely that they would be able to work in harmony regarding the management of the estate of the Subject. In my view, it would be counterproductive and may in fact be detrimental to the Subject to appoint the two as joint legal guardians for the Subject.
33. Based on the circumstances of this case, I deem it best to award Guardianship to the Petitioner, who has in any event been catering for the needs of the Subject on her own, to date.
34. In conclusion I dismiss the cross-Petition dated 14th March 2022. The Petitioner is hereby appointed as Guardian and Manager of the Affairs of the Subject GWW. Finally the court makes the following orders:-
 - (i) The subject Grace Wambui Wamai is adjudged to be a person suffering from a Mental Disorder in terms of the *Mental Health Act* Cap 248, Laws of Kenya.
 - (ii) The Petitioner is to have care, control and custody of the Subject.
 - (iii). The Petitioner AMW is hereby appointed as Manager of the Estate of the subject with general powers to deal with the estate.**
 - (iv) Special permission is hereby granted to the Petitioner Anne Margaret Wachira to activate, access and transact on the Subjects Account NO. 067-xxxx, held at Barclays Bank for the benefit and interest of the said Grace Wambui Wamau.
 - (v) This being a family matter each side to meet its own costs.

DATED IN NAIROBI THIS 22ND DAY OF APRIL, 2022.

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MAUREEN A. ODERO

JUDGE

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