



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

PETITION NO.E561 OF 2021

IN THE MATTER OF : SECTIONS 26(1)(a) AND (b), 28(1) AND (2)

OF THE MENTAL HEALTH ACT, CAP 248 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: MEM (SUBJECT) A PERSON SUFFERING

FROM MENTAL HEALTH DISORDER

AND

IN THE MATTER OF: AN APPLICATION FOR LEGAL GUARDIANSHIP

AND

FEM, AND

JJJ.....PETITIONERS

R U L I N G

1. Vide a **Chamber Summons** application herein is dated **16th November, 2021** and seeking for orders that;

a) This Petition be certified very urgent and at the same time be heard on priority basis for reasons shown in the Supporting Affidavit;

b) In view of the urgency, the prayers in the petition be granted in interest of justice to wit:

a) The subject be and is hereby adjudged to be suffering from mental disorder as defined in the mental health Act, Cap 248 of the Laws of Kenya.

b) That FEM AND JJJ be and are hereby appointed as legal guardians to the subject.

c) That FEM AND JJJ are granted management orders and authorized to undertake all legal functions with regards to the financial affairs, interests and welfare of the Subject.

d) That the Honorable Court be pleased to make any further orders as it may deem just and fit to grant.

The Application is exparte.

2. The application is premised on the grounds on the face of it and reiterated in the **Supporting Affidavit** in support of the Petition.

3. The Applicants have described themselves as sister and brother in law to the subject herein. **FEM**, the 1st Petition deposes that she is married to **JJJ** who is the 2nd Petitioner herein. (See a **Certificate of Marriage No.xxxxxx** and marked as '**FEM & JJJ1**' confirming this). It is further stated that since he was born, the subject has suffered a mental condition called TUBEROUS SCLEROSIS, a result of which he has suffered from epileptic feats and his mental state has deteriorated as his age advances. That owing to this condition, the subject has been acknowledged as a Person with Permanent Disability by the National Council for Persons with Disabilities, as per the Persons with Disabilities Card annexed and marked as annexure '**FEM & JJJ2**' where the disability has been indicated as EPILEPSY.

4. Further, that **Dr. Juzar Hooker**, a consulting Neurologist who has been caring for the subject since the year 2021 confirmed the diagnosis of the subject and that he has been fully dependent on his parents.

5. It is further deposed that the father of the subject died on **23rd April, 2021** and is survived by his wife **KEM** who is aged 79 years old and is the next of kin and mother to the subject and the 1st Petitioner. Further that due to her advanced age, the next of kin is no longer able to manage, maintain and take care of the personal, medical and financial needs of the subject. It is further stated that the next of kin and the mother to the subject has consented to the orders sought being issued to the Petitioners (See an Affidavit marked as '**FEM & JJJ5**' and annexed to this effect). The Petitioners pray that this court grants the orders sought for the interest of justice.

6. Having listened to the Petitioner's counsel in advancing the prayers being sought by the Petitioners, I have also read through the application, the Petition and Supporting Affidavit sworn by the two Petitioners. I have also read through the **Mental Health Act**. I find two issues arising for determination being:-

a) Whether the Subject should be declared as suffering from mental disorder pursuant to the Mental Health Act, Cap 248.

b) Whether the Petitioners should be appointed as guardians to the Subject as well as manager of the estate of the Subject.

7. 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;

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.

8. I have gone through a **card** issued to the subject by the **National Council for Persons with Disability** and marked a annexure '**FEM & JJJ**' indicating that the subject's disability is Epilepsy. I have also gone through a **Persons with Disability Medical Assessment Report** issued on **11th June, 2015** and marked as annexure '**FEM&JJJ2**' indicating that the subject is mentally impaired. I am satisfied that the Subject's mental status has been fully substantiated and hereby declare the subject **MEM** as a person suffering from a Mental Health Disorder.

9. On the 2nd issue, **Section 26** of the same **Act** provides;

26(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.

(2) The Minister, the Public Trustee or a manager may take out, as a matter of course, an application in chambers for the determination of any question arising out of the management of any estate in respect of which an order has been made under this Part.

10. Having found and declared the subject to be suffering from a Mental Health Disorder, it is incumbent upon this court to appoint a manager of the estate of the subject as provided for by law according to **Section 26** above.

11. The Petitioners have shown that the father of the subject is now deceased and is survived by his wife who is old and frail. The mother to the subject has also consented to the Petitioners being appointed guardians to the Subject vide an undated affidavit. This court has not been told of any other siblings or relatives to the subject. I have perused the **Certificate of Death** issued on **10th of May, 2021** indicating that one

ETM, who has been referred to as the late father of the subject, died on the 23rd April, 2021 aged 84 years. I have also perused the ID Card of KEM, who is the mother of the subject, indicating that she was born on 23rd December, 1941 and confirms that she is now about 80 years old. At 80 years old, I believe she also needs assistance due to her advanced age which comes with a mirage of difficulties. As such, I do agree with the petitioners that she can no longer cater for the needs of the subject adequately.

12. I thus find the Application and the Petition both dated 16th November, 2021 merited and both are allowed as follows;

a) The Subject herein be and is declared as a person suffering from a Mental Health Disorder.

b) The Petitioners herein FEM and JJJ are hereby appointed as Legal Guardians of the subject to manage and administer his estate in accordance with the Mental Health Act.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF APRIL, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Menek counsel holding brief for Mr. Metto counsel for the

Petitioners/Appellants

Court Assistant - Adika