



REPUBLIC OF KENYA



KENYA LAW

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**In re ENK (A Person Suffering from Mental Incapacity) (Miscellaneous
Petition E012 of 2022) [2022] KEHC 11670 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS PETITION E012 OF 2022**

RB NGETICH, J

MAY 31, 2022

IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248

LAWS OF KENYA

**IN THE MATTER OF EUNICE NJAMBI KIMAICHIA (A PERSON
SUFFERING FROM MENTAL INCAPACITY)**

**IN THE MATTER OF AN APPLICATION BY GRACE WATIRI
NJAMBI AND CHARLES KIRENYE MUROKI TO BE APPOINTED
AS GUARDIANS OVER THE AFFAIRS OF THE ESTATE OF
EUNICE NJAMBI KIMACHIA**

IN THE MATTER OF

GWN 1ST PETITIONER

CKM 2ND PETITIONER

RULING

1. The petitioners herein approached this court by way of petition dated April 13, 2022 filed on April 14, 2022 under sections 26 and 28 (1) (2) of the [Mental Health Act](#), cap 248 Laws of Kenya seeking the following orders:-
 - a. That this honorable court be pleased to issue a declaration that the subject, E N K is a person suffering from a mental disorder under section 26 of the [Mental Health Act](#).
 - b. The court to appoint G W N and C K M as guardians of the affairs of E N K in accordance with the [Mental Health Act](#) with powers to sign, access, withdraw, execute and/or carry out any acts incidental to the affairs of the subject.



- c. The court to appoint G W N and C K M as managers of the estate of the subject, E N K, with special permission pursuant to section 27 (1) of the [Mental Health Act](#) to charge, sell gift, surrender, transfer exchange or otherwise deal with any movable or immovable property comprised in the subject's estate.
 - d. That the officer commanding Station King'eero Police Station to enforce/ ensure compliance of these orders.
 - e. The costs of the petition be provided for.
2. The application is supported by the annexed affidavits dated April 13, 2022 sworn by the applicants who are the daughter and the son in law of the subject respectively.
 3. They aver that the subject is 98 years of age and has been experiencing physiological changes causing her inability to independently carry out normal activities and experiencing occasional memory lapses. That on February 14, 2022, the subject was diagnosed with senile dementia with significant loss of mobility.
 4. The grounds in support of the application is that the subject has been diagnosed with a mental disorder and is unable to make sound decisions or act reasonably. They averred that the subject has been confined to 24 hours' home nursing care and the applicants are in dire need to take care of the subject, cater for her medical expenses but have limited or lack resources.
 5. On April 24, 2022, the subject attended court and the court noted that she is unable/was unable to understand what the court was asking her. The court directed that the applicants do file a letter from the area chief to confirm the status of the subject.
 6. The chief Gitaru location wrote a letter dated May 20, 2022 confirming that the deceased is a resident of Gitaru and has three daughters G W N, C W K and N W K. The reference on the letter indicate that subject is presumed to be of mental incapacity.
 7. At the hearing counsel for the applicants submitted that the applicants are persons fit to be appointed as guardians and managers of the subject. He submitted that they have satisfied the requirements of sections 26 and 27 of the Health Act the subject having been diagnosed to be suffering from a mental health disorder. He urged court to allow the petition as prayed.
 8. I have perused the doctor's report dated February 14, 2022, and the doctor's opinion is as hereunder: -

“Eunice was diagnosed with senile dementia with significant loss of mobility and sphincter control. Her short term and working memory is impaired whereas her long term memory is spared but fragmented. She was disoriented in time and place, only able to recognize her daughter Watiri named after her mother. Her sleep is getting more and more distorted. She cannot hold a coherent conversation. She is incapacitated both physically and mentally hence unable to manage herself.”
 9. Section 26 of the [Mental Health Act](#) cap 248 provides as follows: -
 26. 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) Where upon 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.

10. From the medical report dated February 14, 2022, it is clear the subject is suffering from a mental disorder, and is thus incapable of managing her own affairs. I however note that the applicants herein are daughter and son in-law respectively. Advocate for the applicants has indicated that the subject's daughter by the name C is uncooperative and is wasting assets of the subject. No explanation has been given as to why the third daughter Nancy Wanjiru Kuria has not been involved in this process/why she is not being appointed as Co-Administrator or Manager.

11. I also note that the applicants seek permission to charge, sell, gift, surrender, transfer and or deal with movable and immovable property. Section 27 (1) deals with the power of a manager, it provides that: -

Where a manager is appointed under this part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper regard being had to the nature of the property whether movable or immovable, of which the estate may consist:

Provided that—

(i) No manager may invest any funds belonging to the estate of which he is manager in any company or undertaking in which he himself has an interest, nor on the purchase of immovable property under the authority of paragraph (d) of section 4(1) of the Trustee Act without the prior consent of the court.

12. The applicants averred that they are in dire need to take care of the subject, cater for her medical expenses but have limited or lack resources. They have however prayed for wider powers which go beyond taking care of the subject and meeting medical expenses. In my view allowing wide powers that extend to charge, sell or transfer of the subject property may prejudice the interest of the other two daughters of the subject. The 2nd petitioner indicated that he is the son in-law to the subject. His relationship with the subject is not clearly explained. It is not clear from the affidavit whether he is the subject's son in-law by being a husband to the daughter who is the 1st petitioner herein or what makes him son in law.

13. I also note that the 1st petitioner filed affidavits all dated January 26, 2022 stating the subject's 3 title deeds got burnt in the house between 2015-2018 and her sister C W K's title deed also got burnt in the house between 2015-2018. She averred that her sister C is sick and cannot sign affidavit. She requested in the affidavits to be issued with new title deeds. The Advocate never talked of the 1st petitioner's sister being sick but instead said she is not cooperative.



14. It is not clear whether the 1st petitioner is co-petitioning with her husband as relationship between 2nd petitioner and the subject is not clearly explained. The averments by the petitioners raise more doubts than answers. It will be unsafe to issue the wide orders sought herein without involvement of the subject's surviving daughter C W K and a representative of the deceased daughter N W K. I find petitioner economical with information.
15. From the foregoing I find it unsafe to grant the orders sought.

Final Orders: -

16. Application dated April 13, 2022 is hereby dismissed

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU

THIS 31ST DAY OF MAY, 2022

RACHEL NGETICH

JUDGE

In the presence of:

Kinyua - Court Clerk

Mr Njoroge for petitioner

