



**In re of MN alias EMN (A person suffering from Mental Incapacity)  
(Petition E035 of 2021) [2022] KEHC 10869 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10869 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
PETITION E035 OF 2021**

**RB NGETICH, J**

**JUNE 23, 2022**

**IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248 LAWS OF KENYA  
IN THE MATTER OF MN ALIAS EMN (A PERSON  
SUFFERING FROM MENTAL INCAPACITY)  
IN THE MATTER OF AN APPLICATION BY AW AND NMM TO BE APPOINTED  
AS GUARDIANS OVER THE AFFAIRS OF THE ESTATE OF MN ALIAS EMN**

**AW**

**NMM.....PETITIONERS**

**VERSUS**

**NM**

**ENM.....OBJECTORS**

**RULING**

1. By a petition dated 2<sup>nd</sup> September 2021 filed on 27<sup>th</sup> October, 2021 the petitioners invoked sections 2, 26 and 28 of the *Mental Health Act*, Cap 248 Laws of Kenya seeking the following orders:-
  - a. A declaration that MN alias EMN is a person suffering from dementia pursuant to Section 26 of the *Mental Health Act*.
  - b. An Order that the Petitioners be appointed as joint guardians of MN alias EMN.
  - c. An Order that the Petitioners be appointed the general managers of the estate of MN alias EMN.
  - d. Special permission be granted to the petitioners to access and jointly transact on the account number Kenya Commercial Bank Account No. xxxx for the interest of MN alias EMN and the Dependants of the subject.
  - e. The costs of the Petition are provided for.



- f. Such other and further orders as this honourable court may deem just to grant.
2. Grounds on the face of the application are that, the subject has been diagnosed with a mental disorder and is unable to make sound decisions or act reasonably.
  3. The application is supported by affidavit sworn by the 1<sup>st</sup> Applicant on 2<sup>nd</sup> September 2021 and supplementary affidavit filed on 28<sup>th</sup> March 2022. She averred that they are the daughters of EM who is currently 98 years, ailing and in constant medical care receiving treatment at Gatundu Level 5 hospital.
  4. They averred that the subject is suffering from dementia and is not in a position to make decisions and therefore unable to cater for himself and the applicants intend to manage the bank account no. xxxx and land parcel nos. Juja/Juja East Block 1/1xxx, Juja/Juja East Block 1/1xxx, Githunguri/Nyaga/T.281,Kiganjo/Nembu/xxx and Komothai/Kibicho /T.284.
  5. She stated that there is a need to access the money in the bank to cater for the subject's medical bills.
  6. In the supplementary affidavit filed on 28<sup>th</sup> March 2022 she averred that the 2<sup>nd</sup> Applicant is currently staying with the subject at home and taking care of him.
  7. The petition is opposed by NM affidavit sworn on 4<sup>th</sup> February 2022. She averred that she is the 6<sup>th</sup> born of the subject and whereas she agrees the subject is old and has a memory challenge, she is opposed to the petitioners being made the sole managers of the Subject.
  8. The objector averred that the applicants have continued to mismanage the estate of the subject and to some extent, they have withdrawn monies from the Bank account as well as from M-pesa. She stated that the applicants have intermeddled with the estate of the subject and halted the construction of rental rooms at Kwa Michael. Mismanaged the rent collected from the Huruma flats and their aim is to squander the property of the subject.
  9. In response to the Petition, the objector filed a Replying affidavit sworn on 2<sup>nd</sup> March 2022 reiterating the averments of the objection to the petition:
    - i. That whereas is true their father is old and has a challenge on his memory however it is not to the extreme state as alleged by the petitioners for he is able to comprehend what is going on around him.
    - ii. That from their conduct it is evidently clear that the petitioners are only interested in squandering their father's property for their own selfish gain rather than preserving and proper management of their father's estate as well as his well being.
  10. ENM also filed a supporting affidavit sworn on 26<sup>th</sup> April 2022, in which she objects to the applicants being made manager of the Subject. She contends the Applicant lives in Ol-kalaou and Sagana respectively and thus they cannot be good caretakers of the subject. She disposes the petitioners have confiscated the subject's Identity card and title documents in an attempt to dispose of the properties. She also contends the applicants are mismanaging the estate of the subject.
  11. On 10<sup>th</sup> March 2022, directions were taken to have the application be disposed by way of written submissions. Both parties have complied.

### **Petitioners Written Submissions**

12. Counsel for the petitioners filed submissions and submitted that the petitioners are relying on the doctor's report and advice to understand the subject's condition which is senile dementia; and



submitted that the applicants' application meets the threshold to be appointed a guardian and administrator of the estate of MN.

13. Counsel submitted that the subject is widowed and not able to remember the names of his children and her condition has been affirmed by the doctor's report dated 18<sup>th</sup> March 2022. Counsel submitted that the 1<sup>st</sup> petitioner is best situated to be appointed as the guardian and manager of the estate as, it was as per the subject's wishes; that subject handed over his important documents to her for safe custody while the 2<sup>nd</sup> petitioner is best situated as a guardian and manager as she has left her home and is taking care of the subject and her estates.
14. Counsel contends the objections are in bad faith and the objectors are geared at embezzling the estate of the subject.

### **Objectors Submissions**

15. Counsel for the objector submitted that this court has the powers to grant the orders of Guardianship under Section 26 of the *Mental Health Act* but the applicants have failed to meet the threshold for the appointment of guardians of the estate of the subject and have appointed themselves as guardians and caregivers of the subject without authority and they have neglected to cater for the subject.
16. Counsel further submitted that the applicants are misusing the estate of the subject by cutting down trees and interfering with other beneficiaries visiting the subject at home. Counsel further submitted that the applicants have failed to issue an inventory and annual accounts of the estate of the subject and urged the court to appoint a social worker to visit the subject to determine the condition of the subject.
17. Counsel for the objector proposed that both the applicants and the objectors be appointed as guardians and managers of the estate of the subjects and proceed to revoke any nomination or appointment of the 1<sup>st</sup> Petitioner/Applicant.

### **Analysis and Determination**

18. The issue for determination by the court is whether the applicants have met the threshold to be appointed as guardians and managers of the estate of the subject.
19. The applicants averred that the subject is suffering from mental dementia and have filed the current petition for appointment as manager and guardians.
20. On the other hand, the objectors contend the applicants have embezzled the estate of the subject, neglected the subject and are therefore not proper persons to be appointed as guardians.
21. The case of *In Re N M K* [2017] eKLR, provide guidelines for the court to consider in determining applications brought under Provisions of Sections 26 and 27 of Cap 248 of the *Mental Health Act* as follows:-

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

- a. There must be medical evidence warranting the determination by the Court that the Subject suffers from a mental disorder;
- b. The person to be appointed to be either a Guardian or Manager must be fit to be so appointed;



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

15. The overriding principle in applying all these factors is that the welfare and best interests of the Subject must be the overall guiding principle.”

22. The beneficiaries of the subject are not in dispute that the subject is old and suffering from mental dementia. The only dispute is who is the best suited to be appointed as guardian and manager.
23. The Doctors report dated 18<sup>th</sup> March, 2022 indicate that the subject has senile dementia, is not cognitively able to make important life decisions including activities of daily living (ADLs) and therefore, requires assistance to perform his ADLs and cannot engage in any contracts as of now.
24. Having found the subject is suffering from mental dementia, I am of the view that the subject’s all children be involved in managing her affairs as all children have equal rights to cater for their parents. In the circumstances, I proceed to appoint both the petitioners and objectors as managers and guardians of the subject.
25. Final Orders
  1. The subject MN alias EMN is hereby declared a person suffering from a mental disorder as defined under *Mental Health Act* cap 248 Laws of Kenya.
  2. The petitioners and the objectors are hereby appointed the guardians and managers of the affairs of the estate of MN alias EMN.
  3. The managers herein to file statements of accounts in respect to the estate of MN.
  4. The costs of the application are to be borne by the estate of the MN.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 23<sup>RD</sup> DAY OF JUNE, 2022**

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**RACHEL NGETICH**

**JUDGE**

In the Presence of:

Kinyua – Court Assistant

Mr. Lokitano for Applicant

Mr. Kimathi for Objector

