



**In re TG (Miscellaneous Application E096 of 2021)  
[2022] KEHC 10953 (KLR) (Family) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10953 (KLR)

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

**MISCELLANEOUS APPLICATION E096 OF 2021**

**MA ODERO, J**

**JULY 29, 2022**

**IN THE MATTER OF SECTION 26,27 AND 28 OF THE MATTER  
OF MENTAL HEALTH ACT, CHAPTER 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF TG (A PERSON SUFFERING FROM MENTAL DISORDER)  
IN THE MATTER OF AN APPLICATION BY COA AND REV. BBM TO BE APPOINTED  
LEGAL GUARDIANS OVER THE AFFAIRS AND MANAGER OF THE ESTATE OF TG**

**IN THE MATTER OF**

**COO ..... 1<sup>ST</sup> PETITIONER**

**REV BBM ..... 2<sup>ND</sup> PETITIONER**

**JUDGMENT**

1. Before the Court for determination is the Petition dated 4<sup>TH</sup> November 2020 by which the Petitioners COA and Rev. BBM seek the following orders:-

- “ a. That TG be adjudged as a person suffering from a mental disorder under Section 26 of the Mental Act, Cap 248 of the Laws of Kenya.
- b. Thatthe Petitioners namely COA and Rev. BBM appointed as the legal guardians to TG.
- c. Thatthe Petitioners namely COA and Rev. BBM appointed managers of the estate of TG under section 28 of [Mental Health Act](#) to jointly manage all the affairs of his estate.
- e. Thatthe Honourable court do make any other or better orders as it may deem fit and just to grant.”



2. The Petition was supported by the Affidavit of even date sworn by the Petitioners. The matter was canvassed by way of 'viva voce' evidence on the virtual platform.
3. The Petitioners who are both Kenyan Citizens told the court that the Subject TG is an Ethiopian National residing in Kenya, who has been known to both Petitioners for several years. That the wife and children of the Deceased all reside abroad.
4. The Petitioners state that the Subject who is now aged about Eighty Two (82) years old has been diagnosed with 'Dementia' and is under medical care and requires constant nursing care. That as a result of his condition the Subject is not in a position to manage his own affairs.
5. The Petitioners stated that they have consulted with the family of the Subject and with their consent and approval now apply to be appointed as Guardians of the Subject and Managers of his estate.

### **Analysis and Determination**

6. I have carefully considered the Petition filed by the two Petitioners, as well as the evidence adduced before this court. In order for a Petition seeking management of an estate to be granted it must be proved that the patient (Subject) is suffering from a mental disorder which renders him/her incapable of managing his/her own affairs.
7. Section 26 of the *Mental Health Act* 248 Laws of Kenya 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)



8. In the case of In Re NMK [2017] eKLR, the Court considered what should be borne in mind when an application is made under Section 26 and 27 of Cap 248 and 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 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 principles in applying all these factors is that the welfare and best interest of the Subject must be the overall guiding principle. (own emphasis)

9. The Petitioners told the court that the Subject has been diagnosed with ‘Dementia’. That he requires constant medical attention and is not in a position to manage his own affairs. The wife and children of the Subject all testified in this matter. They confirmed that the Subject was unwell. The immediate family of the Subject all reside abroad in Canada and the USA. They told the court that in consultation with the Petitioners they have been providing the resources necessary for the medical care of the Subject.

10. I have seen the medical report dated 2<sup>nd</sup> February 2022 prepared by Dr Thomas Kwasa a Consultant Neuro Physician. The doctor confirmed that he is treating the Subject for ‘Dementia’. The doctor states that the Subject “does not now have the mental capacity to manage his financial and business affairs.” That “the condition is progressive and will only get worse with time”.

11. I was able to see the Subject online. He was an elderly gentleman and was being attend to by a Nurse. The Subject appeared confused and did not seem to comprehend the reason for the court proceedings. After a few minutes, he became agitated and stated that he did not wish to talk to anyone.

12. Based on the Medical Report and from my own observation I find that the Subject is suffering from a mental disorder as defined by Section 26 of the *Mental Health Act*.

13. The Petitioners have applied to be appointed as Guardians for the Subject and Managers of his Affairs. The Subject is an Ethiopian National who has lived in this Country for a long time. His immediate family reside in Canada and the USA. As such, it is left to close family friends to manage the medical care of the Subject.

14. PW3 WTM the wife of the Subject. She has annexed a copy of her Canadian passport No HK XXXXXX as well as a copy of a Marriage Certificate issued by the City of Addis Ababa, Ethiopia indicating that she got married to the Subject on 18<sup>th</sup> July 1964.

15. PW3 told the court that initially she and Subject both lived in Kenya where they carried on business. In August 2009 PW3 relocated with the couple’s children to Canada where she also holds citizenship. The understanding was that the Subject would also move to Canada to live with his family abroad. However, PW3 stated that although the Subject often visited his family abroad he later declined to relocate to Canada. It is for this reason that the Subject now lives alone in Kenya.



16. PW3 told the court that the 1<sup>st</sup> Applicant Christopher Awich is very well known to her. That he has been a close family friend and a business partner of the Subject. PW3 states that the 1<sup>st</sup> Petitioner was like a son to the family PW3 said she knew the 2<sup>nd</sup> Petitioner as a Pastor in the Church where the Subject worshipped.
17. The Subject's wife told the court that she is aware of and fully supports this petition. That she fully trusts the Petitioners to manage the affairs of the Subject. Indeed PW3 told the court that since the Subject fell ill, she has been collaborating with the Petitioners to manage the medical care of the Subject.
18. The children of the Subject also testified in this matter. PW4 EG of American Passport Number xxxx told the court that the Subject is her Father. PW5 PTG holder for Canadian Passport Number xxxx and PW6 DTG are both sons of the Subject. The children of the Subject all confirm that their father is unwell and is unable to manager his own affairs. They state that they are all aware of and fully support this Petition.
19. The children of the Subject all confirm that the 1<sup>st</sup> Petitioner CA is well known to them as a close family friend and business associate of their Father. They all state that the 1<sup>st</sup> Petitioner is more like a Family member whilst the 2<sup>nd</sup> Petitioner was a Pastor in the Church where the Family worshipped. Indeed one of the sons 'P' told the court that he travelled to Kenya in the year 2019 to facilitate the filing of this Petition.
20. From the evidence availed it is clear that the Subject is an elderly gentleman who is ailing. His immediate family do not live in Kenya. The closest person to the Subject appears to be the 1<sup>st</sup> Petitioner, a person wo is well known to and trusted by the wife and children of the Subject. I do find that in the circumstances, the Petitioners are best placed to manage the affairs of the Subject. The Subjects family members have all given their consent to this Petition.
21. In conclusion therefore I do allow this Petition and make the following orders:-
  1. The Subject TG is declared to be a person suffering from a mental disorder under section 26 of the *Mental Health Act*, Cap 248 Laws of Kenya.
  2. The Petitioners COA and Rev. BBM hereby appointed as the legal Guardians of the Subject.
  3. The Petitioners are hereby appointed as Managers of the Estate of the Subject.
  4. No orders on costs.

**DATED IN NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2022.**

**MAUREEN A. ODERO**

**JUDGE**

