



In re SMS (Petition E007 of 2021) [2022] KEHC 11307 (KLR) (Family) (22 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
PETITION E007 OF 2021
MA ODERO, J
JULY 22, 2022**

**IN THE MATTER OF AN APPLICATION BY SS TO BE APPOINTED AS
CUSTODIAN OVER THE AFFAIRS AND MANAGER OF THE ESTATE OF SMS**

IN THE MATTER OF

SS PETITIONER

AND

MS INTERESTED PARTY

JUDGMENT

1. The petitioner herein SS filed in court the petition dated February 22, 2021 in which he sought for orders that:-

“(i) The honourable court appoint the petitioner, SS as the guardian of the estate of MS.

(ii) This honourable court appoints the petitioner as the manager over the estate of MS with general powers to deal with all the estate comprised of but not limited to the following:-

(a) Land Reference No 209-8343/1XX

(b) Bank Account NO 9586XXXXXXXXXXXX held in Bank of Baroda and

(c) Bank Account No 0021XXXXXXXXXXXX and 0021XXXXXXXXXXXX held in Bank of India.

(iii) This honourable court issue an order allowing the petitioner to deal with these assets and defray medical costs accruing in the treatment of MS.

2. The petition was supported by the affidavit of even date sworn by the petitioner.



3. The petition was opposed by the cross-petitioner MS who filed a replying affidavit dated May 19, 2021. Thereafter the cross-petitioner filed an answer to petition and cross-petition dated June 7, 2021 in which he sought the following orders: -

“ i. Upon examination of the subject by this honourable court, a declaration that the subject is incapable of managing his own affairs on account of infirmity of body and mind caused by Alzheimer’s and therefore making it necessary to appoint one to take his custody and manage his affairs.

ii. An order appointing the cross-petitioner as the manager over the estate of MS with general powers to deal with the estate comprised of but not limited to –
Bank Account 9586XXXXXXXXXX held in the Bank of Baroda Bank Account 0021XXXXXXXXXX and 0021XXXXXXXXXX held in the Bank of India.

iii. In the alternative, an order appointing the petitioner and cross-petitioner as the joint managers over the estate of MS with general powers to deal with the estate comprised of but not limited to
Bank account 9586XXXXXXXXXX held in the Bank of Baroda Bank Account 0021XXXXXXXXXX and 0021XXXXXXXXXX held in the Bank of India.

iv. A declaration that Land Ref No 209/8343/1XX does not form part of the subject’s estate.

v. Any other order that this honourable court may deem fit and just to grant.”

4. The cross petition was supported by the affidavit of even date sworn by the cross-petitioner.

5. The court did refer the matter for court annexed mediation. However no agreement was reached. On June 16, 2021 the parties entered into a consent as follows:-

“ 1. SS, the petitioner herein and MS, the Interest party herein be appointed as interim managers over the affairs of MS solely for the purposes of procuring the statements from the following bank accounts:

a. Bank account 9586XXXXXXXXXX held in the Bank of Baroda

b. Bank Account 0021XXXXXXXXXX and 0021XXXXXXXXXX held in the Bank of India.”

6. The said consent was adopted by the court on June 17, 2021. The hearing proceeded by way of oral evidence.

Background

7. The subject herein MS is the Father of both the petitioner and the cross-petitioner. The subject has a total of five (5) children, the other three (3) being –

(a) SS – who resides in Qatar

(b) NS (nee S) – who resides in the USA

(c) RS – who resides in Kenya

8. The petitioner and the cross-petitioner both stated that the Subject was diagnosed with dementia on January 20, 2021 and is not in a position to manage his own affairs. They both state that the wife of the



- subject (their mother), who was his main caregiver died on December 26, 2020. They are in agreement that the subject is a need of a legal guardian as well as a manager of his estate.
9. It is common ground that while the Subjects wife was alive the couple resided in their own home being LR No 209-8343/1XX located in Nairobi South C (hereinafter the ‘South C property’). The couple resided in that home together with the cross-petitioner ‘M’ who is the eldest son in the family, his wife and children.
 10. Following the demise of the subjects wife, the petitioner came and took the subject to live with him in his home in Langata. The petitioner told the court that the Subject requires 24 hours nursing attention, thus he has hired a nurse to care for the subject from 6.00 am to 6.00 pm. During the night the petitioner and his family take care of the subject and ensure that he is comfortable and that he takes his medication. The petitioner told the court that his sisters who reside abroad contributes money to provide for the medical care required by the Subject. He seeks to be appointed as legal guardian for the subject and manager of his estate.
 11. As stated earlier this petition is opposed. The cross-petitioner confirmed that he was previously residing with his parents on the family home in South C That following the death of their mother in December 2020, the subjects medical condition deteriorated. The cross-petitioner states that the petitioner who is his younger brother, came and collected the subject in January 2021 on the pretext that he was taking him to visit the family of the petitioner in Langata.
 12. That the petitioner did not bring the subject back to the home in South ‘C’. The cross-petitioner states that when he attempted to go and visit his father at the petitioners home he was not well received. That the petitioner even filed a report against him with the OCS Langata Police Station.
 13. The cross-petitioner conceded in his evidence that the subject is being well cared for by the petitioner and that he recognizes that the subject is comfortable and settled in the home of the petitioner. The cross-petitioner says he has no objection to the appointment of the petitioner as the legal guardian for the subject. However, the cross-petitioner states that as the eldest son in the family is best suited to be appointed as manager of the subjects estate.
 14. The cross-petitioner stated that the siblings held a virtual meeting on January 8, 2021 chaired by their sister N to discuss how their father’s care would be managed. That the cross-petitioner suggested that each sibling contribute Kshs 20,000 per month to cater for their father’s medical care. The other siblings rejected this suggestion and instead resolved that the cross-petitioner be granted six (6) months to leave the family home in South ‘C’ which would then be rented out and the rental income be used to provide for the Subject.
 15. The cross-petitioner states that the intention of his siblings is to remove him from the family home and render himself and his family homeless. Moreover the cross-petitioner insists that the house, the South ‘C’ property does not form part of the estate of the subject as his parents had ‘gifted’ the house to the cross-petitioner by way of a deed of gift dated May 15, 2014.
 16. The siblings were unable to agree on the way forward regarding the management of the estate of the subject. This led to the filing of the cross-petition.
 17. PW2 NS, PW3 SS and PW4 RS who are all children of the subject and siblings to the parties herein all testified online. They all supported the appointment of the petitioner as manager of the estate of the subject. At the close of evidence, the parties were invited to file written submission. The petitioner filed the written submissions dated December 13, 2021 whilst the cross-petitioner relied upon his written submissions dated January 10, 2022.



Analysis and Determination

18. I have carefully considered this petition and cross-petition, the evidence adduced before the court as well as the submissions filed by both parties.
19. The following are the issues which arise for determination.
 - (i) Whether the subject is suffering from a mental disorder.
 - (ii) Who should be appointed as manager of the estate of the subject.

(i) Whether the Subject is suffering from a mental disorder.

20. The petitioner and the cross-petitioner told the court that the subject who is their father a 78 year old man who suffers from a mental disorder which has rendered him incapable of managing his own affairs. That the subject was on January 20, 2021 diagnosed with advanced dementia, Alzheimers disease. As a result of this diagnosis the subject requires constant nursing care and medication. The other children of the subject confirm that their father is ailing.
21. I have perused the medical report dated January 20, 2021 prepared by Dr Jazar Hooker a Consultant Neurologist (annexture '551') to the supporting affidavit dated February 22, 2021 filed by the petitioner. The report confirms that the subject suffers from advanced dementia from alzheimer disease and is hypertensive. The doctor stated that as a result of his order the Subject has "severe cognitive impairment causing inability to write and/or express his wishes competently ..."
22. The doctor opined that the subject was not capable of managing his own affairs.
23. I was able to see the subject online. He was an elderly gentleman. The subject appeared confused and clearly did not comprehend the court proceedings. The subject told the court that he lives with his wife yet the truth of the matter is that his wife died in December 2020. Her death certificate serial No 10xxxx9 appears as annexture 'SS2' to the petitioners supporting affidavit. From this, I deduced that the subject does not have a grasp on reality.
24. Based on the evidence of his children, the medical report produced in court and my own observation, I find that the subject is suffering from a mental disorder as contemplated by section 26 of the *Mental Health Act*, cap 248, Laws of Kenya. I further find that as a result of this mental disorder the subject is incapable of managing his own affairs. It is therefore essential that a guardian be appointed for the subject as well as a manager for his estate.

(ii) Who is best suited to be appointed as Guardian and Manager

25. Both the petitioner and the cross-petitioner are sons of the subject. They each apply to be appointed as guardian for the subject and manager of his estate.
26. The parties are in agreement that the subject previously lived with the cross-petitioner in the family home in South C In January 2021, the petitioner came and removed the subject to his own house in Langata. That subject has continued to reside with the petitioner and his family to date.



27. Whereas initially the cross-petitioner had sought to have the subject returned to the family home in South 'C', he later abandoned that prayer and conceded that the petitioner was best suited to be appointed as legal guardian for the subject. In his evidence, the cross-petitioner stated that: -
- “I accept that the subject is very comfortable in his present surrounding in the home of S (the petitioner) and he is receiving proper care there.....”
28. The cross-petitioner went to state that –
- “I have no objection to guardianship being given to the petitioner.”
29. The cross-petitioner submitted that he has made this concession based on the fact that it is in the best interest of the subject that he remain where he is – in the home of the petitioner.
30. The petitioner did narrate to the court the steps, which he is taking to ensure that his father receives the best possible medical care and attention. He has hired a nurse to care for the subject during the daytime whilst the petitioner and his family care for the subject during the night. The petitioner ensures that the subject attends all his medical appointments and purchases any medication prescribed.
31. The other children of the subject who testified in this matter all stated that they had confidence in the petitioner to provide the father with all the care he needed. My own observation is that the subject appeared healthy and well looked after. In the circumstances, I find that the petitioner is best suited to be appointed as the guardian of the subject.
32. The next question is the appointment of a manager for the estate of the subject. Once again, both the petitioner and the cross-petitioner urge to be appointed as manager. As stated earlier given the subject's fragile mental condition it is necessary that a manager be appointed to manage his estate.
33. The cross-petitioner stated that as the eldest son of the subject he is best placed to be appointed as manager. In this, the cross-petitioner is mistaken. The court is concerned with the best interest of the subject not the birth position of the manager of his estate.
34. The petitioner told the court that he has been providing for the care of the subject from his own finances and with the help of financial contribution from his siblings who live abroad. He states that the cross-petitioner has not made any financial contribution towards the care of the subject since 2021. That the cross-petitioner has only made sporadic visits to check on the welfare of the subject. PW2 SS and PW3 NS both told the court that they send financial assistance each month to the Petitioner to help with the medical costs for their Fathers care.
35. The cross petitioner told the court that he had suggested that each sibling contribute Kshs 20,000 per month towards the care of the subject. However this suggestion was not accepted by the other siblings. The cross-petitioner has not demonstrated what (if any) financial contribution he has made towards the care of his father. The cross-petitioner also admitted that he has not accompanied the subject to any of his medical appointments.
36. It is a contradiction that whilst the cross-petitioner has kept away from contributing to the care of the subject and has not bothered to keep tabs on the medical care his father is receiving, he wants to be appointed as manager of the estate of the subject. Given the lack of participation by the cross-petitioner in the care of the subject, I do not feel he is best suited to be appointed as manager.



37. The other siblings all state that they support the petitioner's appointment as manager as they all believe he is best suited to manage the affairs of the subject. They state that they have all along collaborated with the petitioner in ensuring that their father receives the best care possible.
38. The cross-petitioner has applied to be appointed as joint manager with the petitioner. The petitioner rejects this on grounds that the two do not enjoy cordial relationship and would not be able to work together.
39. The fact that the petitioner and the cross-petitioner are not on good terms is evident from their own evidence. The cross-petitioner accused the petitioner of removing the subject from the home in South 'C' without his consent. He states that he received a hostile reception when he went to the petitioners home to visit the subject. The cross-petitioner accuses the petitioner of reporting him to police. The petitioner countered that the cross-petitioner had created a disturbance when he came to his house leading to complaint from neighbours. That is why he reported the matter to the police. Indeed the very fact that this matter has ended up in court is evidence enough that the parties cannot get along.
40. The duty of a manager is to utilize the estate of the subject for the benefit of said subject. Joint managers must be able to act in harmony to advance the welfare of the subject. It is evident that there exists two factions in this family pitting 'M' the cross-petitioner against his siblings. Given the bad blood between the brothers. It is unlikely that the two would be able to work in harmony to advance the best interest of the Subject. In the circumstances, it would be counterproductive and detrimental to the welfare of the subject to appoint the petitioner and cross-petitioner as joint managers of the estate.
41. It is clear to this court that the bone of contention and the real reason why this matter has ended up in court is the interest which both parties have in the South 'C' property. The petitioner and the other siblings propose that the house be rented out and the rental income be used to cater for the subject's care. The cross-petitioner opposes this because he resides in that home with his family. He states that the suggestion to rent out the house is a ploy to evict him and render his family homeless.
42. The cross-petitioner has prayed that this court issues a declaration that the South 'C' property does not form part of the estate of the subject. The cross-petitioner relies on a deed of gift dated May 15, 2014 (annexture 'MS5' to cross-petitioners supporting affidavit dated May 19, 2021) as proof that his parents gifted the house to him. It is notable however that title to the South C house still remains in the names of MS and IMS of the subject and his late wife eight (8) years after the said deed of gift was allegedly executed. A copy of the title deed to South 'C' property is annexture 'SS3' to the petitioners supporting affidavit.
43. The question of 'ownership' of the house in South C house is not one which the court has the jurisdiction to determine. By virtue of article 162(2)(h) of the *Constitution of Kenya* the mandate to determine question of 'ownership use and occupation of land' lies within the exclusive jurisdiction of the Environment and Land Court. Accordingly, I decline to make the declaration sought by the cross-petitioner. Any claim the cross-petitioner may have to LR No 209/8343/1XX must be ventilated in the appropriate forum which is the Environment and Land Court.
44. Finally, I find that the petitioner is best suited to be appointed as manager of the estate of the subject. In conclusion, I make the following orders:-
- (i) The subject MS is declared to be a person suffering from a mental disorder under the terms of section 26 of the *Mental Health Act* Cap 248, Law of Kenya.
 - (ii) The petitioner SS is appointed as guardian of the subject MS.
 - (iii) The petitioner SS is appointed as manager of the estate of the subject MS.



(vi) Prayer (iv) of the cross-petition dated June 7, 2001 is dismissed.

(v) This being a family matter each party will meet its own costs.

DATED IN NAIROBI THIS 22ND DAY OF JULY 2022.

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MAUREEN A. ODERO

JUDGE

