MWM (Petition for guardianship of KNW and the management of his estate under section 26(1) and section 29 of the Mental Cap 248 of the Laws of Kenya) (Miscellaneous Application E037 of 2021) [2022] KEHC 12579 (KLR) (Family) (22 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12579 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

MISCELLANEOUS APPLICATION E037 OF 2021

MA ODERO, J

JULY 22, 2022

IN THE MATTER OF HEALTH ACT CAP 248 LAWS OF KENYA

IN THE MATTER OF

MWM ..... PETITIONER

PETITION FOR GUARDIANSHIP OF KNW AND THE MANAGEMENT OF HIS ESTATE UNDER SECTION 26(1) AND SECTION 29 OF THE MENTAL CAP 248 OF THE LAWS OF KENYA

(Petition for guardianship of KNW and the management of his estate under section 26(1) and section 29 of the Mental Cap 248 of the Laws of Kenya)

JUDGMENT

1. Before this Court is the Notice of Motion Application dated March 4, 2021 by which the Applicant MWM seeks the orders that:-

   " 1. Spent

   2. That this Honourable court be pleased to appoint MWM as the guardian of KNW.

   3. That this Honourable court be pleased to grant the authority to manage.

   4. The Costs of this application be borne by the estate of the said RNW."

2. The application was premised upon sections 26 and 29 of the *Mental Health Act*, Cap 248, Section 3 and 3 (a) of the *Civil Procedure Act*, Order 51(1) of the *Civil Procedure Rules* and was supported by the Affidavit of even dated sworn by the Applicant.

3. The application was canvassed by way of oral evidence in open court. The Applicant Mercy Wanjiku Mwangi who is the biological mother of the Subject Kelvin Njenga Wanjiku told the court that her son who was born on February 16, 1990 suffers from a mental disability caused by the difficult circumstances surrounding his birth. That the Subject is not in a position to take care of his own affairs. She states that the Subject was involved in a motor vehicle accident but is not in a position to file suit on his own behalf. The Applicant now seeks order of Guardianship to enable her file suit on behalf of her son.

Analysis and Determination

4. I have carefully considered the Petition filed by the 2nd Petitioner, the Replying Affidavit on record as well as the written submissions filed by both parties. 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.

5. 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)

6. 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)

7. The Applicant told the court that the Subject, who is her son has suffered from Mental disability for his entire life. That he cannot take care of his own affairs.

8. PW2 NMM is a brother to the subject. He confirms to the court that the Subject was born with a mental disability which renders him incapable to taking care of his own affairs. PW2 told the court that he has no objection to this application.

9. Annexed to the Application is a medical Report dated October 13, 2020 prepared by Dr Leonard Njeru a Medical officer at the Mathari National Teaching and Referral Hospital. The Report indicates that the Subject 'suffers mental retardation with intellectual disability since birth". The report further indicated that the Subject was not able to express himself coherently and could not state what was on his mind.

10. The Applicant has also annexed a letter dated February 22, 2021 written by the Chief of Kayole North sub-location where the family resides. The Chief also confirms that the Subject has been plagued with mental illness for a long time. The Applicant has also annexed to her Supplementary Affidavit dated June 6, 2022 a copy of a card indicating that the Subject is registered with the National Council for Persons with Disability.

11. The court had an opportunity to talk to the Subject online. He appeared lucid and was able to answer basic questions put to him. The Subject confirmed that he lived with the Applicant who was his mother. The Subject confirmed he had been involved in a motor vehicle accident. He further told the court that he had no objection to the Applicant filing a case on his behalf in respect of the motor accident. It must be appreciated however, that the court had a less than one minute interaction with the Subject and could not adequately assess his mental capacity.

12. From the evidence available, I am satisfied that the Subject does suffer from a mental disability under Section 26 of the *Mental Health Act*.

13. The Applicant told the court that she seeks orders of Guardianship to enable her pursue a civil case on behalf of the subject. I find that the application has merit. The same is allowed as prayed. The court makes the following orders-

    (1) The Subject KNW is declared to be a person suffering from a mental disorder as defined in the *Mental Health Act*, Cap 248, Laws of Kenya.

    (2) MWM be and is hereby appointed as Guardian for the Subject KNW.

    (3) The Applicant MWM is appointed as manager of the estate of the Subject KNW.

    (4) No orders on costs.

DATED IN NAIROBI THIS 22ND DAY OF JULY, 2022.

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MAUREEN A. ODERO

JUDGE