



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS CIVIL APPLICATION E057 OF 2020

IN THE MATTER OF LGM (SUBJECT)

MAM.....APPLICANT

RULING

(1) Before this Court is the Notice of Motion dated 5th November 2020 by which **MAM** the Applicant seeks orders as follows:-

“1. SPENT

2. THAT the subject LGM be and is hereby adjudged a person suffering from mental sickness under the Mental Act.

3. THAT the Honourable Court finds that the subject LGM is incapable of protecting her interests with regard to her affairs due to aneurismal subarachnoid hemorrhage which has mentally incapacitated her.

4. THAT the Applicant MAM be appointed as the subject’s ‘guardian ad litem’.

5. THAT the Applicant MAM do manage the affairs of the subject.

6. THAT the Applicant be and is hereby authorized to access and operate the subject’s bank account held at Co-operative Bank of Kenya, Parliament Road, Account No. XXXXXXXXXXXX for purposes of meeting the subject’s medical costs.”

(2) The application was premised upon **Sections 1a, 1B, 3A** of the **Civil Procedure Act, Order 37 Rule 16 and Order 32 Rule 12** of the **Civil Procedure Rules, Sections 26, 28(1) and (2)** of the **Mental Health Act, Cap 248** and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant. The Motion was canvassed before the Court on the online platform by way of viva voce evidence on **21st January 2021**.

BACKGROUND

(3) The subject **LGM** is a **57 year old** lady who is said to have suffered a major intracranial aneurismal rupture (stroke) which resulted in permanent brain injury. As a result the subject’s memory and neurological functions have been adversely affected. She is currently bedridden and according to doctors is unlikely to make a full recovery.

(4) The subject is married to one **AN** who was also at the time admitted at the Intensive Care Unit at **Coptic Hospital in Nairobi**. The couple have two (2) adult children namely **PWN** born on **31st January 1993** and **MKR** born on **12th August 1990**. (Annexed to the Supporting Affidavit are copies of Marriage Certificate ‘**MAM 3**’ of the couple as well as the Birth Certificates of the two children **PNW’2** and **MKR’1**’).

(5) The Applicant is the elder sister to the subject. In view of the subject’s illness and incapacity and due to the fact that the subject is not capable of protecting her interests and managing her own affairs, the Applicant seeks to be appointed as guardian to the subject to manage the affairs of the subject herein. Hence the present application seeking Guardianship orders.

ANALYSIS AND DETERMINATION

(6) I have carefully considered the application before me, the Affidavit in support as well as the various reports and consents filed in this matter. **Part XII** of the **Mental Health Act, Cap 248 Laws of Kenya** provides for judicial power over persons and estates of persons who

are shown to be suffering from mental disorder and/or incapacity. **Section 26** of the **Act** provides 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]

(7) This Court has been told that the subject suffered from a major intracranial aneurismal rupture which has left her with permanent brain injury. Annexed to the Supporting Affidavit dated **5th November 2020** are copies of a Medical Report confirming this fact. (Annexure 5 'a'). This Report dated **15th November 2019** prepared by **Dr. Mogere E. K.** a Neurosurgeon at the **Aga Khan University Hospital** confirms that **LGM** (the subject herein) was admitted at the said hospital on **30th July 2019** and was discharged on **2nd September 2019** “while fully dependent and bed-ridden.” The children of the subject who testified in Court confirmed that they live with the subject and confirm that she requires 24 hour nursing care as she is unable to do anything for herself.

(8) Also annexed the Supporting Affidavit is a card Serial No. **XXXXXXXXXX** issued on **18th September 2020** to the subject by the **National Council for Persons with Disabilities** confirming that the subject suffers from both physical and mental disability. Based on the evidence available I find and hold that the subject does suffer mental disability and in the circumstances is not in a position to manage her own affairs.

(9) The subject herein is a person suffering from both mental and physical disability. She requires round the clock care. The family need to provide for her medical care, nursing care as well as any medications required. The subject is unable to take care of her own affairs. She obviously needs a guardian to take over her affairs in her best interests.

(10) Ordinarily the person who would be expected to take up the Guardianship of the subject would be her husband. However the subject's husband one **AN** was unwell and was admitted in the **ICU** at **Coptic Hospital** at the time this application was filed (see Annexures **7(a)** and **7(b)** to the Supporting Affidavit). On **21st January 2021** when this matter came up for hearing the Applicant informed the Court that the subject's husband who was suffering from Brain Cancer sadly passed away on **21st December 2020** and was buried on **30th December 2020**.

(11) The two (2) children of the subject **PWN** and **MK** have both signed consents dated **5th November 2020** (Annexed to the Supporting Affidavit) supporting the Applicant's application to be appointed as Guardian for the subject. The said two children of the subjects testified before the Court and they each confirmed their consent and stated that they trusted their Aunt (the Applicant) to take care of the affairs of the subject.

(12) Based on the foregoing I am satisfied of the merit of this application. Accordingly I do allow the Notice of Motion dated **5th November 2020** and make the following orders:-

(1) The subject **LGM** is hereby adjudged to be a person suffering from mental illness under the **Mental Health Act**.

(2) The Applicant **Margaret Ann Igoki Mujwa** is hereby appointed as the subject's legal guardian to manage the affairs of the subject

(3) The Applicant is hereby authorized to access and operate the subject's bank account held at **Co-operative Bank of Kenya, Parliament Road Branch, Account No. XXXXXXXXXXXX** for purposes of meeting the subject's medical needs.

(4) No orders on costs.

Dated in **Nairobi** this **25th** day of **January, 2021**.

.....

MAUREEN A. ODERO

JUDGE