



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC APPLICATION E012 OF 2020
IN THE MATTER OF SECTION 26,28(1) & (2) OF THE MENTAL HEALTH ACT CAP248 LAWS OF KENYA

AND

IN THE MATTER OF RWG SUFFERING FROM MENTAL DISORDER

MMM.....APPLICANT

JUDGMENT

1. Through a petition dated 8th December, 2020 filed pursuant to Sections 26,27,28,29,32,33,28 and 39 of the Mental Health Act Cap 248, the petitioner MMM a sister to RWG the subject herein moved to this court seeking to be appointed as a guardian to the said RWG (subject) on the grounds that, the petitioner is old and suffering from mental illness (senile dementia) and therefore unable to discharge her day-to-day activities.
2. The petition is supported by an affidavit deponed on 8th December 2020 by the said Millicent (hereafter referred to as the petitioner) who averred that her sister subject of these proceedings aged 73 years old is suffering from progressive memory loss hence incapable of taking care of herself since 2005.
3. She further averred that prior to the subject's loss of memory, she (the subject) had executed a power of attorney in her (petitioner) favour giving her (petitioner) authority to discharge various responsibilities on her behalf.
4. She further stated that since the patient lost her memory, she (petitioner) has been taking care of her by facilitating provision of diapers, regular medical attention through home care based medical treatment with the help of visiting doctors. According to her, she is the only next of kin to the subject whose parents are deceased and was not blessed with any living issues.
5. She therefore sought authorization to manage the subject's estate which basically is her bank account funds arising from her retirement benefits.
6. As proof of the subject's medical condition, she attached a medical report dated 16th November, 2020 from Dr. Darius Wambua Kiema of My Clinic LLP which confirmed that the subject was not able to take care of herself due to progressive memory loss.
7. During the hearing, the petitioner MMM (Pw2) told the court that she has been staying with her sick sister a retired nurse since 2015 when she became seriously sick. She further told the court that the subject is bedridden and therefore cannot independently perform her day to day activities. She stated that she has employed two care givers who work in shifts as they attend to the patient.
8. She urged the court to allow her access the subject's Bank account held at KCB Bank to withdraw funds for purposes of maintaining her. She told the court that the bank has since refused to recognize the power of attorney which she used to use in accessing the bank account. That she is the only sibling of the subject who was not blessed with any biological child.
9. To corroborate her testimony, Dr. Darius Kiema (Pw1) testified confirming that he examined did prepare the medical report dated 16th November, 2020 in which he held the medical status of the subject as suffering from dementia thus rendering her helpless.
10. At the close of the case, the court had an opportunity to see the patient who was brought outside the court house inside a private car lying helpless with the aid of a care giver. She could not open her eyes nor respond to any call or noise around her.
11. I have considered the petition herein, affidavit in support and evidence by the petitioner and the doctor who prepared the medical report.

The applicant/petitioner is seeking appointment as a guardian to the patient and a manager to manage the patient's estate owing to the patient's mental condition.

12. Pursuant to Section 26 of the Mental Health Act, this court is duty bound to ascertain from the testimony of the witnesses and documentary evidence in support whether the patient is suffering from mental illness that impairs her capacity to independently discharge or perform her duties normally and whether the orders of guardianship and management of the subject's estate should issue to the applicant.

13. Section 26 of the Mental Act therefore provides as follows;

“Order for custody, management and guardianship of the estate

(1) The court may make orders-

(a) for the management of the estate of any persons 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) Where upon 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 or the maintenance of such members of his family as are independent upon him for maintenance, but need not in such case, make any order as to the custody of the person suffering from mental disorder”.

14. In the instant case, there is evidence from Pw1 a medical doctor and Pw2 a sister to the patient confirming that the patient is suffering from mental disorder (Dementia). The patient is under 24 hours' attention by care givers while bed ridden. The medical report produced in court is clear on her mental condition. From my own observation of the patient, she is incapable of discharging any responsibility in her current medical condition.

15. I have no doubt the patient is a fit person to be declared as a person suffering from mental disorder and therefore incapable of taking care of herself pursuant to Section 26 of the Mental Health Act. She needs somebody to be her guardian and manage her estate so that it does not go into waste and also safeguard her life.

16. As regards the suitability of the petitioner, she is the only close relative to the patient. She has been taking care of the patient for six years now. She understands the patient more than anybody else. Pursuant to Section 27 of the Mental Health Act, the petitioner is suitable to be appointed as guardian to the patient as well as a manager to her estate.

17. Accordingly, the application herein is allowed with orders that;

a. The patient RWG is hereby declared to be suffering from mental disorder pursuant to Section 26 of the Mental Health Act Cap.248 of the Laws of Kenya.

b. That the petitioner herein MMM be and is hereby appointed as the legal guardian to the patient herein RWG.

c. That MMM is hereby appointed as the manager of the estate of RWG under Section 28 of the Mental Health Act to manage her estate including any such description of movables or immovable properties, money, debts and legacies, power to execute, sign all deeds and instruments relating to or evidencing the title or right to any property or giving a right to receive any money or goods.

d. The legal guardian shall where necessary represent the patient in court proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF MARCH 2021

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J N ONYIEGO

JUDGE