



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. E4 OF 2020

IN THE MATTER OF THE MENTAL HEALTH ACT (CAP 248) LAWS OF KENYA

AND

IN THE MATTER OF LWLG (A MENTALLY INCAPACITATED PERSON)

AND

IN THE MATTER OF AN APPLICATION BY LWG AND JLWK TO BE APPOINTED AS THE GUARDIANS AND MANAGERS OF LWLG (A MENTALLY INCAPACITATED PERSON).

JUDGEMENT

Brief Facts

1. By a Petition dated 9th November 2020 and filed in court on 12th November 2020, the Petitioners invoked Section 26 of the Mental Health Act, Cap 248 Laws of Kenya and sought the following prayers:-

a) This Honourable Court be pleased to appoint the Petitioners as Guardians of LWLG with powers to take any action necessary to seek and obtain medical treatment and her general good care, accommodation and general comfort.

b) This Honourable Court be pleased to appoint the Petitioners as Managers of the Estate of LWLG with powers to take charge and manage her properties, execute court documents as well as other relevant documents and carry out other incidental and general functions.

2. The Petitioners are adults of sound mind who reside and work in Kenya and who are granddaughter and cousin respectively to the subject LWLG.

3. The basis of the Petition is that LWLG is a mental infirm having being diagnosed with dementia. Dr. Mwenda, a psychiatrist in Nyeri County Referral Hospital, had certified her as suffering from dementia which has incapacitated her to transact in business. Her situation has become worse due to her old age and her mental condition has become visibly obvious to anyone that deals with her including her neighbours.

4. The Petitioners state that they came into to know that some people have been trying to have her properties transferred to themselves to the extent that the petitioners were forced to place a restriction on land Title Number Aguthi/Gatitu/xxxx.

The Petitioner's Case

5. The Petition is supported by affidavits of the Petitioners sworn on 9th November 2020. In their affidavits, It is stated that the subject has been diagnosed with dementia, which has been confirmed by Dr. Mwenda and the subject has many properties which have been left unattended and others are at a risk of being transferred necessitating the petitioners to place restrictions on them. Also that if this Honourable Court does not grant the prayers sought by the petitioners, the properties of the subject stands are at risk of being wasted by fraudsters who are taking advantage of her mental state.

Petitioners' Submissions

6. By invoking **Section 26 of the Mental Health Act**, the petitioners submit that as granddaughter and cousin to Lucia, they are the closest persons/relatives to Lucia and who have been and are willing to continue taking care of her. The subject has a daughter, PNM who has expressed her unwillingness to take care of her mother and has signed a consent dated 9th November 2020 for the petitioners herein to be

appointed guardians of the subject.

7. The petitioners submit that the subject is incapable of transacting business and in support of this they have produced in court a medical report by a psychiatrist, Dr. Mwenda who examined the subject and confirmed that she suffered from progressive dementia. The 1st petitioner herein has been responsible in ensuring that the subject attends her monthly clinics at the hospital and she produced medical visitation card reports to confirm the same. From the foregoing, the petitioners humbly submit that this court make a declaration that the subject is mentally ill and consequently appoints them as guardians to manage her affairs.

8. The petitioners further submit that upon declaring the subject mentally incapacitated, the court grant them powers to manage the estate. Some people are taking advantage of the subject's mental situation and have tried to illegally trespass and/or transfer some of the subject's suit properties. The petitioners supported this contention by producing a copy of search from Nyeri Lands Registry for Land Parcel Number Aguthi/Gatitu/xxxx which indicates a transaction in favour of one NMN, who is a stranger to the family. Meanwhile, the petitioners have placed a restriction on the said land to avoid any further transactions/dealings on the land.

9. Further, the petitioners produced a letter by the Nyaribo Chief which explains the mental condition of the subject. The Chief further confirms that fraudsters have tried to illegally transact on the subject's land to the extent that he had to intervene and recover some of the land documents including title documents from persons trying to defraud the subject of her properties.

10. The petitioners further submitted that the court ease their financial burden by granting them access to the subject's bank account in Barclays Bank account Number 003xxxxxxx where they can withdraw monies to take care of the subject.

11. The petitioners relied on the case of **Re M. W. M (A person suffering from mental disorder) [2017] eKLR** where the High Court at Nairobi allowed the application to have the applicants as legal guardians of the subject therein having satisfied that the subject was mentally incapacitated as per the provisions of **Section 26 of the Mental Health Act** and also to manage the estate of the subject as per provisions of **Section 28 of the Mental Health Act**.

12. The petitioners in seeking their application be allowed submitted that it is a constitutional right of everyone, including a mentally incapacitated person, to live and be treated with dignity and to have his/her properties protected.

Issues for determination

13. On perusal of the Petition, the affidavits and the submissions, there are two main issues for determination as follows:-

- a) Whether the subject should be declared as suffering from mental disorder pursuant to the Mental Health Act, Cap 248.
- b) Whether the petitioners qualify under the law to be appointed guardians to the subject as well as manages of her estate

The Law

Whether the subject should be declared as suffering from mental disorder pursuant to the Mental Health Act, Cap 248.

14. **The Mental Health Act** provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons.

15. **Section 2** of the Act defines "person suffering from mental disorder" as follows:-

"person suffering from mental disorder" means a person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse."

16. **Section 26 provides 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 of the 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 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.

17. According to the Medical Report by Dr. Mwenda, the subject has had a history of progressive memory loss and lazy memory which affects recent and immediate events. On examination, he found that she is suffering from progressive dementia. Dr. Mwenda is a psychiatrist and is currently practicing in Nyeri County Referral Hospital. Additionally, the subject has been attending psych clinics.

18. It is apparent from the doctor's report that the subject is suffering from a mental disorder as per Section 2 of the Mental Act and further a medical condition contemplated under Section 26 of the Act and is thus incapable of managing her own affairs.

Whether the petitioners should be appointed as guardians to the subject as well as managers of the Estate of the subject.

19. As noted above, Section 26 of the Act gives court the power to make an order regarding management of the estate of any person suffering from mental disorder to any relative or any person suitable but giving preference to a relative.

20. The petitioners have stated that they are granddaughter and cousin to the subject, respectively. It is deposed in their affidavits that the subject has a daughter, PNM, who resides in Kitale who has expressed her unwillingness to take care of her mother and has signed an affidavit dated 13th January 2021 to that effect and given consent dated 9th November 2020 that the petitioners be appointed guardians to her mother.

21. On record is an affidavit of GJM and in which he states that he is a grandson of the subject and that she has a mental illness that has rendered her incapable of managing herself and her properties. The deponent has no objection to the applicants being appointed guardians to the subject.

23. It is my finding that the applicants have satisfied the requirements of the law in regard to appointment of guardians. They have availed sufficient evidence to demonstrate that the subject suffers from progressive dementia and is incapable of managing herself and her properties which are already under threat from third parties.

23. For the foregoing reasons, I find this petition successful and allow in the following terms:-

- a) That the applicants LWG and JLW are hereby appointed guardians to the subject LWLG.
- b) That the applicants are hereby appointed managers of all the properties registered in the names of the subject.
- c) That there will be no order as to costs.
- d) It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 18TH DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 18th day of March 2021.