



**JM v Public Trustees (Miscellaneous Civil Application 5 of 2020)
[2021] KEHC 9784 (KLR) (30 April 2021) (Judgment)**

Neutral citation: [2021] KEHC 9784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 5 OF 2020**

**JN ONYIEGO, J
APRIL 30, 2021**

BETWEEN

JM PETITIONER

AND

PUBLIC TRUSTEES RESPONDENT

JUDGMENT

1. Through a petition dated August 13, 2020, JMN (herein after the petitioner/applicant) moved this court pursuant to sections 2,26(1) (a) and (b) ,38,39 and 40 of the [Mental Health Act](#) seeking orders from the Honourable court appointing her as the manger and guardian to the estate of EM (hereinafter the subject) who is suffering from mental disorder.
2. The petition is based on grounds stipulated on the face of it and an affidavit sworn on August 13, 2020 by the applicant.
3. It is the petitioner’s case that she is a daughter to the subject who is suffering from mental disorder to the extent that she is incapable of managing her affairs. To support this fact, she attached a letter from coast neurology clinic dated December 3, 2019 authored by Dr Erick J Maina who confirmed that the subject has been their patient from 2017 suffering from early onset of progressive dementia leading to loss of intellectual functions which includes memory retention, calculation and judgment.
4. That following the subject’s early retirement on medical grounds, her retirement benefits have been processed by the pension department but cannot be released by the Public Trustee to anybody else without court’s authority. She averred that; they are financially constrained in that they are not able to meet the ever demanding medical expenses for the subject as well as pay school fees for her (subject’s last born) son JT who is schooling at [Particulars Withheld] . She further stated that; all family members had given her consent to process the petition; the subject is unable to take care of her personal affairs and, that her medical condition requires constant personal care and attention.



5. During the hearing, JM the petitioner and daughter to the subject herein urged the court to allow the prayer sought.
6. Pw3 FM a son to the subject and a student at technical University also supported the petition stating that their mother is very sick and cannot do anything on her own. Pw4 JT also a son to the subject supported the petition confirming that their mother is mentally sick.
7. Pw5 Mr Charles Mwangome a psychiatrist at Coast General Hospital prepared a medical report dated 17th February, 2020 in which he found that the subject was suffering from progressive memory impairment otherwise known as dementia. He told the court that she is suffering from permanent mental disability and that she cannot survive on her own without getting daily support.
8. When the patient was presented before court, I observed and tried to interrogate her. She appeared confused, kept staring at me and her children without uttering a word. The court concluded that she was indeed sick and unable to comprehend anything affecting and revolving around her life.
9. I have considered the application herein, materials placed before court and testimonies from various witnesses.
10. The only issue that arise for determination is whether the subject is suffering from mental disorder thus rendering her incapable of discharging her day-to-day activities. The orders prayed for have been brought under various sections under the *Mental Health Act*. Section 26 of the Act does provide;
 - (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) Where upon inquiry it is found that the person to whom the inquiry relates is suffering 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 or maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.
11. Under section 2 of the Act, a person suffering from mental disorder is described as;

“a person suffering from mental disorder” means, a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.”
12. From the medical report tendered before court by Dr. Charles Mwangome, medical notes and history presented before court, the subject is suffering from mental disorder otherwise described as dementia. This fact has been confirmed by her children and husband all of whom have consented for the petitioner to be appointed as guardian to the subject and manager of her estate.



13. From the medical report, testimonies from all witnesses and my own observation, I have no doubt the subject is suffering from mental disorder which has hampered her capacity to personally discharge her day-to-day activities or responsibilities independently and responsibly. To that extent, there is need for a guardian and manager of her estate to safeguard her life and property. Besides, she needs further medical and daily attention by a responsible person. Her children too need to further their studies which is only possible by accessing her pension to pay their school fees.
14. Having taken into account the circumstances of this case, the mental condition of the subject and the urgent need to access her retirement benefits, I am convinced that the application is merited and in the best interests of the subject and therefore allow it with orders that;
 - (a) the applicant/petitioner is appointed as a guardian to the subject herein EM and to be a general manager of her estate
 - (b) that the manager's general power do not in any way involve power to alienate, sale or transfer of the subject's property.
 - (c) The managing powers shall where appropriate include powers to plead and prosecute and or defend any action brought by or against the subject in respect to any assets comprising the subject's estate.

DATE, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 30TH DAY OF APRIL, 2021

J. N. ONYIEGO

JUDGE

