



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO. E007 OF 2021

IN THE MATTER OF A PETITION FOR APPOINTMENT OF A MANAGER FOR DWK AND HER ESTATE

IN THE MATTER OF DWK (A PERSON SUFFERING FROM A MENTAL DISORDER)

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

ESK.....1ST PETITIONER/APPLICANT

JMK.....2ND PETITIONER/APPLICANT

JUDGMENT

Brief Facts

1. By a Petition dated 13th July 2021 and filed in court on 15th July 2021, the petitioners invoked **Sections 26, 27 and 28 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 DWK (the subject) pending the hearing and determination of the petition.
- b. This Honourable Court be pleased to appoint the petitioners as managers of the estate of the subject herein and to manage her estate.
- c. This Honourable Court be pleased to then allow the petitioners to transact jointly, the subject's bank account at Cooperative Bank of Kenya Limited, Nyeri Branch Account Number [particulars withheld] in the bid to bridge the family's serious financial gap for the much-needed cash to pay for her living expenses.

2. The petitioners are adults of sound mind who reside and work in Kenya and who are the daughters of the subject. They add that they are in actual and physical custody of the subject and take care of her.

3. The basis of the petition is that the subject is a mental infirm having been diagnosed with senile dementia in 1990. Dr. Ruth Korir, a psychiatrist at Mathari National Teaching and Referral Hospital has certified the subject as suffering from dementia which has incapacitated her rendering her fully dependant on other people. The subject is a septuagenarian and she is almost eighty years old making her situation worse due to her old age.

4. The petitioners contend that they require money to meet the subject's living expenses namely to buy her drugs, give her a proper diet and hire a caregiver, and therefore seek the indulgence of the court to operate the subject's bank account number [particulars withheld] Cooperative Bank of Kenya Limited, Nyeri Branch. It was further stated that the applicants are combining efforts with their two other siblings financially, to sustain themselves and the subject as they experiencing financial challenges with the outbreak of covid 19.

5. The petitioners further contend that the subject can neither manage her affairs nor can she carry out transactions and therefore her estate stands to suffer irreparable loss if the petitioners are not appointed guardians and managers of the subject's estate.

The Petitioners' Case

6. The petition has been supported by affidavits of the petitioners sworn on 13th July 2021. In their affidavits, they have reiterated the contents of the petition and pray that the court allow their application and grant them legal and actual/or physical custody and guardianship

of the subject and access to her bank account to care for her.

Issues for determination

7. On perusal of the pleadings and identify two issues for determination thus:-

- a. Whether the petitioners have made a case that the subject ought to be declared as suffering from mental disorder pursuant to the Mental Health Act, Cap 248.
- b. Whether the petitioners have satisfied this court that they are suitable be appointed as guardians of the subject as well as managers of her assets of the subject.

The Law

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

8. **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.

9. **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.”

10. **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.**

11. According to the Medical Report by Dr. Ruth Korir the subject has been suffering from dementia since 1990 and she has had poor cognitive functions rendering her fully dependent on others. On examination, she found that the subject is suffering from progressive dementia. Dr. Ruth Korir is a psychiatrist currently practicing in Mathari National Teaching and Referral Hospital.

12. 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.

13. For that reason, this court is satisfied that the petitioners have demonstrated that the subject ought to be declared as suffering from mental illness.

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

14. 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.

15. The petitioners have stated that they are the daughters of the subject deposing in their affidavits that their siblings are agreeable to them been appointed as guardian and managers of the subject’s estate. To support their contention, a family agreement is annexed to their affidavit. There is also on record, a letter by the area chief confirming that the subject suffers from dementia and that she has four children as listed in his letter.

16. This application is not opposed and the siblings of the petitioners have given their consent. I am of the considered view that the applicants have satisfied this court as to the mental and physical state of the subject. It has also been demonstrated that the applicants who are children of the subject are best suited to be appointed guardians of the subject as well as managers of their properties.

17. This petition is hereby allowed in the following terms:

a. That the subject is hereby declared mentally unfit in terms of Section 26 of the Mental Health Act.

b. The petitioners are hereby appointed guardians of the subject to take care of her and to manage her properties as well as to have access to the subject's bank account No. [particulars withheld] for withdrawal of funds for the upkeep of the subject and her children.

c. That there shall be no order as to costs.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF AUGUST, 2021

F. MUCHEMI

JUDGE

Judgment delivered though video link this 26th day of August, 2021