



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
MISCELLANEOUS CIVIL APPL. NO. 34 OF 2019
IN THE MATTER OF THE MENTAL HEALTH ACT (CAP. 248) OF THE LAWS OF KENYA
IN THE MATTER OF AN APPLICATION BY CNM
TO BE APPOINTED GUARDIAN OVER THE AFFAIRS AND MANAGER OF THE ESTATE OF AN
CNM.....APPLICANT
AND
AN.....INTERESTED PARTY
JUDGMENT

1. Before this Court is a Petition dated **18th March 2019** by which the Applicant **CNM** seeks the following orders:-

- a. SPENT**
- b. THAT the Interested Party be adjudged as suffering from mental incapacity.**
- c. THAT the Petitioner be appointed Guardian Ad Litem of the Interested Party.**
- d. THAT the Petitioner be appointed Manager of the patients estate and be authorized to administer the finances, properties of the Patient including the financial obligations.**
- e. THAT this Honourable Court be pleased to issue any such further orders as it deems just.**
- f. THAT the costs of this Application be awarded to the Petitioner.**

2. The Petition was supported by an Affidavit dated **8th March 2019** and the Further Affidavit dated **6th May 2019** and the Supplementary Affidavit dated **8th January 2021** sworn by the Petitioner, as well as the Supporting Affidavit dated **8th March 2021** sworn by **JAW** a caregiver of the Patient.

3. The Petition was canvassed by way of viva voce evidence on the online platform. The Petitioner **CNM** told the Court that he resides in **Los Angeles California**, in the **United States of America**. The Petitioner told the Court that the Patient **AN** who is aged **76 years** is his mother who lives alone in **Nairobi** in the **Republic of Kenya**.

4. The Petitioner told the Court that he is seeking to be appointed as Guardian of his mother's affairs and manager of her estate. He states that the Patient is unwell and is not in a position to manage her own affairs. That she is hostile towards visitors and even declined to see the Petitioner (her son) when he came to Kenya for a visit in the year **2000**. The Petitioner further stated that from the year **2000** the Patient took to barricading herself inside her house and has declined to accept medical treatment. That he had to seek the assistance of the Local Administration who broke into the house which was found to be in a filthy state with the Patient literally living in faeces and urine. He has annexed copies of photographs of the condition in which the Patient was living. (Annexed at **pages 1 – 15** of the Supporting Affidavit).

5. The Petitioner then travelled to Nairobi and had his mother admitted at **Nairobi Women's Hospital** where it was found that her leg had become gangrenous. That the Patient had earlier been diagnosed with '**Schizophrenia**' but had stopped taking her medication which caused her condition to decline. The Petitioner told the Court that he has been providing for the Patient by paying her rent, hiring two (2) care givers for her and that he had to date expended approximately **Kshs. 700,000/-** towards the medical care of the Patient.

6. The Petitioner stated that he now seeks to be appointed as Manager of the Patients finances so as to manage said finances so that the Patient may be in a position to cater for her own upkeep and medical care. The Court interviewed the Patient AN online on **29th July 2021**. She vehemently opposed the Petition.

7. I have carefully considered this Petition, the Affidavits and Reports filed in Court as well as the evidence adduced in the matter. **Section 25 of the Mental Health Act, Cap 248, Laws of Kenya** provides for the circumstances under which a Court may make orders for the Guardianship of a Subject (Patient) and the management of their affairs 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]

8. The Petitioner has sought to be declared as Guardian and Manager of the Patient. To merit the above orders the Petitioner must adduce evidence sufficient to satisfy the Court **firstly** that the Patient is a person suffering from a mental disorder under the **Mental Health Act** and **secondly** that the Patient is incapable of managing her own affairs. The Petitioner testified that the Patient was diagnosed with **Schizophrenia**. He gives a long narration of her odd behavior such as barricading herself in her house, refusing to accept visitors, failing to take her medication and living in filthy surrounding, as proof of her mental incapacity.

9. A Medical Report dated **17th April 2019** prepared by **DR. OMWENGA** of **Nairobi Womens Hospital** (Annexture 'SNM-1') dwelt mainly on the physical injuries which the Subject had sustained being a fracture of the left fibula. The Doctor noted that the Subject suffered '**Psychotic episodes and dementia**' and put her on anti-depressants and Psycho-social therappes.

10. I have perused the second Medical Report dated **6th August 2019** prepared by **DR. MACHUA KIPKORIR IRENE** Consultant Psychiatrist of **LIFEBRIDGE HOSPITAL**. The Report indicated that upon examination the Subject was found to have sustained a fracture of the Tibia in **September 2018**. The Subject was reported to have suffered from a mental disorder for the past **thirty (30) years** but had not been properly followed up.

11. The said Medical Report further contained the following findings:-

“Mental status examination

She is well kempt elderly lady, mildly wasted, mild left lower limb edema, avoids eye contact, mood – anxious, affect – congruent, has no hallucination, no delusions, no suicidal ideations, memory and intelligence – good, oriented in time, place and person. She has no insight with good judgment.

She is currently on follow-up for Schizoaffective disorder and hypertension in the facility, and is on antipsychotic, antihypertensive and multivitamins on a daily basis.

Recommendations:

1. She requires urgent orthopedic review for the left lower limb for assessment and the best way forward.

2. She requires urgent physician's review to assess for the mild wasting and poor feeding to rule out any medical disorders.

3. Psychiatry review and Psychotherapy (Counseling) sessions are mandatory and key in her adherence to medication and further management.” [own emphasis]

12. Nowhere in that report prepared by a professional Psychiatrist was it indicated that the Subject was incapable of managing her own affairs on account of her mental illness. On the contrary the Psychiatrist noted that the Patient **did not** suffer delusions and/or hallucinations, was well oriented in time, place and person and had good judgment. It is a fact that many people in the world suffer from and indeed live with mental illnesses, but this does not prevent them from living full and successful lives. The indication in this Report is that the Subjects declining condition was occasioned by her failure to stick to her medical regime. Being an elderly person this is not surprising. What the Patient would require in the circumstances is a caregiver to ensure that she takes her medications as and when directed by her Psychiatrist / Doctor.

13. The picture that emerges is of an elderly woman who due to the fact of living alone, had neglected herself and failed to take her medication as required. This is something that can be remedied by ensuring that the Subject does not continue living on her own which is precisely what the Petitioner has done by hiring care-givers for his mother. Indeed it is a fact that in African Societies the elderly are not left to manage on their own. The family will always make provision and ensure that there are people around to provide companionship and care for the elderly. In my view the odd behavior of the Subject may not have arisen strictly due to her mental disorder, but rather arose on account of lack of supervision and companionship in her life.

14. I note that following directions made by the Court, the **Honourable Deputy Registrar of the High Court** paid a visit to the Subject on **23rd October 2019 at 1.00pm** and filed her Report in Court. After holding a lengthy conversation with the Subject the **Hon. Deputy Registrar** concluded as follows:-

“5. From my interaction with the Patient, I could tell she knew what she was talking about and was well aware of her environment. Though she looked physically sick and frail, she did not exhibit any signs of mental instability. She was quite calm through the visit and only appeared agitated whenever she would have to explain the situation with her son. She also seemed hopeless as she kept saying she wished to be discharged from hospital but her son wouldn’t allow it and that she wouldn’t have somewhere to go since she had been evicted from her home.” [own emphasis]

15. As stated earlier the Subject did appear in person before this Court on the virtual platform. The Court held a lengthy conversation with the Subject who confirmed to the Court that being an Advocate of the High Court (now retired) she fully comprehended the proceedings. The Subject expressed her opposition to the Petition. Whilst the Subject confirmed that the Petitioner was her son, she denied suffering mental illness and stated that she was perfectly capable of managing her own affairs. Throughout my engagement with the Subject I found her to be perfectly lucid and fully aware of the Court proceedings. The Subject stated that she was both hurt and bewildered by the fact that her son would file such a Petition against her. She ventured that the Petitioner may be motivated by a desire to control the Subjects share of her late mother’s estate.

16. The Subject insisted that she did not need a Guardian or a Manager over her affairs and asserted that she had a right to manage her own affairs. I must confess that in the Subject I saw an assertive engaging and competent human being. I saw nothing to suggest mental illness or incapacity. The Subject was alert and answered all questions put to her succinctly. I find no evidence in the circumstances to suggest much less prove that the Subject suffers a mental illness under the **Mental Health Act** rendering her incapable of managing her own affairs. Accordingly I find no merit in this Petition. The same is hereby dismissed in its entirety. I make no orders on costs.

DATED IN NAIROBI THIS 13TH DAY OF AUGUST, 2021

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MAUREEN A. ODERO

JUDGE