



**In re MWN (Miscellaneous Civil Application E016 of 2021)
[2021] KEHC 9801 (KLR) (26 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 9801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E016 OF 2021
JN ONYIEGO, J
NOVEMBER 26, 2021
IN THE MATTER OF: MWN
AND
IN THE MATTER OF: AN APPLICATION FOR GUARDIANSHIP ORDER
BY
RNKAPPLICANT**

JUDGMENT

1. By a petition dated 7th May, 2021, RNK (hereafter the petitioner) moved to this court seeking orders that he be appointed as a guardian in respect of MWN as well as a manager with general powers to manage the estate, undertake legal transactions and judicial proceedings in respect of the said MW his wife who is suffering from mental disorder and therefore unable to discharge her duties and responsibilities. Further, that the petitioner be allowed to access Martha's bank account No. xxxxxx KCB for purposes of her medical expenses/personal needs and care.
2. The application is based on the grounds stated on the face of it and the content contained in the affidavit in support sworn by the petitioner on 7th May, 2021. Basically, the applicant's case is that since early 2020, the patient herein has been unwell both physically and mentally. That she is suffering from hypertension, diabetes mellitus and stroke which have mentally incapacitated her hence requiring full time medical care.
3. That she cannot write, read, feed herself, and totally incapable of taking simple instructions. As proof of her medical condition, he attached a medical report prepared by Dr. Faraj Amir Tamim dated 30th March, 2021 confirming the alleged sickness and mental impairment.
4. During the hearing, the petitioner (Pw1), his children N (Pw3), JN (Pw4) and VN (pw5) confirmed that MW is mentally incapacitated hence the need to appoint a guardian and manager of her affairs and estate. Dr Faraj Amir Pw2 who has been attending the patient corroborated the evidence of Pw1,



Pw3, Pw4 and Pw5 to the extent that the patient is mentally incapacitated. He produced a medical report as an exhibit to corroborate his testimony (Exb 3).

5. Upon my assessment of the patient who was presented before court, she was incapable of engaging in any communication. She could not answer a single question. She kept staring at the court a sign of incapacity to communicate and mental impairment.
6. I have considered the petition herein which is not filed under any specific provision of the law. I guess this is because the petitioner is a lay person. The only issue for determination is, whether the patient is suffering from mental disorder thus rendering her incapable of discharging her daily activities and or responsibilities.
7. Although not specifically stated, the application by its very nature appears to be based on Sections 26, 27 and 28 of the Mental Health Act. Section 26 of the said Act provides;

“ 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) where upon inquiry it is found that the person to whom the inquiry relates is suffering 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”

8. From the evidence of all witnesses, court’s own assessment and the medical report produced, the patient is suffering from mental disorder as contemplated under Section 26 of the Mental Health Act hence incapable of discharging her daily duties or responsibilities without being helped .
9. According to the medical report dated 30th March, 2021 authored by Dr. Faraj, it states that;

“ She was admitted at Premier Hospital Mombasa, under my care on 28th January, 2020 at the intensive care unit with stroke making her aphasic (unable to speak), right sided weakness (her dominant hand side) and neurological impairment such as amnesia (memory loss) and mental problems (low intelligence and judgment). She is current(sic) under medication being supported and undergoing rehabilitation to improve her limbs power”

10. I have no doubt from the evidence of all witnesses and the doctor’s report that the patient is suffering from mental disorder and is therefore not able to perform her daily affairs nor manage her estate



pursuant to Section 27 of the *Metal Health Act* which provides that; power of manager in respect of estate;

“where a manager is appointed under this part, the court may order that the manager shall have such general or specific powers of the management of the estate as the court considers necessary and proper regard being had to the nature of the property whether movable, or immovable, of which the estate may consist....

11. Since the petitioner has exhausted the resources in treatment of the patient, and considering that the patient has an account with money, it is prudent that a guardian be appointed to look after her affairs and also to access her account to withdraw cash for her maintenance in terms of food, medical care, clothing or provision of other basic necessities.
12. It is however worth noting that a guardian or a manager assumes these positions purely on trust on behalf of the patient hence any property or asset belonging to the patient can only be sold or disposed for the benefit of the patient with authority from the court pursuant to Section 27 (4) of the *Mental Health Act*. See *In re VMC (2015) e KLR*.
13. Having found as above, it is my holding that the application herein is merited and consequently allowed with orders that;
 - a. MWN is hereby adjudged to be a person suffering from mental disorder.
 - b. That RNK is hereby appointed as the guardian of MWN
 - c. That RNK is hereby appointed as the manager of MW estate with authority to access and operate Bank Account No. xxxxxx KCB branch held in the name of MWN
 - d. That the petitioner shall file quarterly reports to the court regarding the patient’s progress commencing 1st March, 2022.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH NOVEMBER, 2021

J. N. ONYIEGO

JUDGE

