



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION CASE NO. 28 OF 2021

IN THE MATTER OF SECTION 26, 27 AND 28 OF THE MENTAL HEALTH ACT CAP 248 OF THE LAWS OF KENYA

AND

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

AND

IN THE MATTER OF: PETITION FOR JWK AND DARG TO BE APPOINTED AS THE MANAGERS OF THE ESTATE OF AND THE GUARDIANS OF THE SAID GNN

JUDGMENT

1. GNN the subject is a 77-year-old lady. Her children JWK and DARG, the petitioners, have filed this action for the subject to be adjudicated a person suffering from mental disorder under Section 26 of the Mental Health Act. The petitioners also seek they be appointed guardians of the subject and to managers of her estate by operating her bank accounts in order to provide for the subject's healthcare expenses.
2. The husband of the subject passed away in the year 2008. The petitioners describe the subject's late husband, who was also their father as a devoted husband to the subject. When the subject who was on a visit to the USA, according to the petitioners, she began to behave oddly. The petitioner assumed that the subject was going through depression because of her loss of her husband.
3. In the year 2010 on being persuaded the subject agreed to visit the late *Professor Paul Kioi*, an Associate Professor in Clinical and Basic neurophysiology and general Physiology and a Consultant Neurologist. Following that visit the subject was prescribed drugs to improve her memory. The subject did not find it easy to accept her medical condition and kept at bay the petitioners perceiving their wish to care for her as an affront to her autonomy which led to her refusal to accept assistance. As a consequence of the deterioration of her health and in the absence of a care giver, the subject overdosed herself with her medicine and later on being examined by *Prof. James Ogwang Jowi* the subject was diagnosed with cognitive impairment and also symptoms of dementia. Following that diagnosis, the petitioners and their siblings arranged for the subject to be looked after by care givers. In the year 2019 a medical examination of the subject was done at Kiambu sub-county level 4 hospital and that exam revealed the subject had completely lost her memory and that she had contractures at her elbow and knee restricting her ability to walk. She was by then using a wheelchair. In the year 2021 the subject was diagnosed as being at end stage of Alzheimer disease. The subject is now wholly dependent on the petitioners who have employed four caregivers for her. The subject is receiving palliative medicine.
4. The petitioners until recently were accessing the subject's bank account through the power of attorney donated to them by the subject in the 2014. The banks have intimated the need for a court order to enable the petitioners to continue to access those bank accounts in particular, the subject's United Nations Saving and credit society Limited account. It is the funds from those bank accounts that assist the petitioners to provide care for the subject.
5. The petitioners deponed in their affidavit that their action in having their mother adjudicated as a person suffering from mental disorder is actuated by good faith which has motivated the care they have provided for their mother, the subject, for the last 12 years.
6. The subject is also registered with the National Council for Persons with Disabilities, she is registered thereof as having physical/mental disability.

ANALYSIS

7. The court is empowered under **Section 26** of the **Mental Health Act Cap. 248** to appoint a guardian to manage the estate of a person suffering from mental disorder. That Section provides:-

“(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) ...

(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.”

8. The application of that **Section 26** was considered in the case **re NMK (2017) eKLR** as follows:-

“a. There must be medical evidence warranting the determination by the Court that the Subject suffers from mental disorder;

b. The person to be appointed to be either a Guardian or Manager must be fit to be so appointed;

c. The Court must be satisfied that a proposed Manager will utilize her powers for the benefit and welfare of the Subject.

The overriding principles in applying all these factors is that the welfare and best interests of the Subject must be the overall guiding principle.”

9. The subject was brought before court during the online hearing. This court was able to observe the incapacity of the subject. During that hearing where all the children of the subject, including the petitioners were it became very obvious that the subject's said children's intention is to give optimum care to their ailing mother. There is no doubt in this court's mind that the orders sought in the petition are for the benefit and welfare of the subject. Accordingly, the prayers sought are merited and will be granted.

DISPOSITION

10. This Court grants the following prayers in this petition:-

(a) **THAT GNN** be and is hereby adjudged to be a person suffering from mental disorder.

(b) **THAT JWK** and **DARG** are hereby appointed guardians and managers of the estate of **GNN** to manage her healthcare and to access and operate all bank accounts and SACCO accounts in the name of **GNN**.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 25TH NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice/Kinyua

For Petitioners : Mr. Macharia Ngaru

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE