



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISC. CIVIL APPLICATION NO. E034 OF 2021

IN THE MATTER OF AN APPLICATION FOR CUSTODY, MANAGEMENT AND APPOINTMENT OF GUARDIANS AND ESTATE MANAGERS OVER DMK

AND

IN THE MATTER OF THE MENTAL HEALTH ACT, CAP 248, LAWS OF KENYA

AND

IN THE MATTER OF DMK, AN ELDERLY PERSON SUFFERING FROM A MENTAL DISORDER

AND

IN THE MATTER OF THE PETITION OF CWK AND EWK

CWK.....1ST PETITIONER

EWK.....2ND PETITIONER

AND

DM..... RESPONDENT

JUDGMENT

CWK and EWK, Petitioners, filed a Petition dated 3rd March, 2021 brought under sections 2, 26, 27 and 28 of the Mental Health Act (Cap 248 Laws of Kenya) Section 3A of the Civil Procedure Act, Order 32, Rule 15 of the Civil Procedure Rules 2012, and all other enabling provisions of the law. The Petitioners are seeking the following orders;

1. That this Honorable Court do issue a Declaration that DMK, the patient herein, is a patient and a person suffering from Mental Disorder, within the meaning of section 2 of the Mental Health Act Cap 248 of the Laws of Kenya.
2. That this Honorable Court do issue an Order that CWK and EWK are to have full custody and management over DMK and are jointly and severally appointed as guardians and Estate Managers over DMK and his estate as provided under sections 26, 27 and 28 of the Mental Health Act Cap 248 Laws of Kenya.
3. That each party to bear its own costs.
4. Any such further or other relief as this Honorable Court may deem fit and just to grant.

The Petition is supported by an affidavit sworn on 3rd March, 2021 by CWK for herself and with the consent of the 2nd Petitioner, EW. From the contents of the Petition, the supporting affidavit and the evidence by C, the Petitioners are biological children of the Respondent. The Respondent and their mother, VMK, are divorced. The Respondent was born in 1953. In the past one year his health condition has deteriorated. He would forget things including their names, the names of his tenants and whether they have paid rent or not causing friction

between him and the tenants. The Respondent has been living alone and this caused the Petitioners concern. They took him for medical examination by Dr. R.P Lubanga from Kenyatta National Hospital. The doctor diagnosed him as suffering from severe dementia. He was found to be incapable of protecting his interests and managing his affairs.

The Respondent's deterioration of his mental health necessitates constant monitoring and care as he is elderly and was incapable of caring for himself. He was showing incompetence in dealing with his own affairs particularly on matters of health, finance and his general well-being as well as managing his estate. Petitioners are solely responsible for organizing and purchasing of medicine needed, daily items and clothes. They have faced difficulty in supervising him owing to his aggressive nature which he has developed recently. The efforts by the Petitioners to get the Respondent a care giver bore no fruits as he only allows the petitioners near him and no one else. Petitioners are however unable to give the Respondent the proper attention he requires.

This court directed that the matter proceeds by viva voce evidence but virtually. The 1st Petitioner and Dr. Reuben Paul Lubanga testified. Dr. Lubanga told the court that he is a neuro surgeon based at Kenyatta National Hospital. He testified that he knew DMK as he was brought to him for consultation and the main complaint was that his memory was failing. It was his testimony that the patient exhibited hostile behavior and changes from his known personality. He examined him and found that he was unable to understand basic tests for memory and cognitive functions. He testified that the patient was unable to carry out simple basic test such as the subtraction tests. He further explained that by cognitive functions he referred to normal intellect and that with the loss of cognitive functions, a person is not able to appreciate the activities of daily living. He stated that he diagnosed him with dementia as captured in his report dated 25th January, 2021 and produced in court. He testified further that 90% of dementia cases do not have underlying causes as the condition occurs spontaneously. He stated that the Respondent's dementia did not reveal an underlying condition and could be called, "**an act of God.**" He stated that most patients do not recover but continue to deteriorate.

In her testimony the 1st petitioner reiterated the contents of her Affidavit that DMK is their biological father. She told the court that she has annexed their birth certificates to the pleadings. She told court that they are asking to be granted legal guardianship of their father as a result of his deteriorating mental health; that their father has been living alone having divorced with their mother in 1997. She testified that they booked their father at the [Particulars Withheld] Home, Karen, for the elderly for care and that he was receiving good care and attention at the Home and was doing much better. She testified that the rent was being banked by the tenants on a good will arrangement. She testified that the father has some properties but is unable to manage them due to his illness.

Caroline explained that they have opened a joint account being Account No.1450xxxxxwith Equity Bank Ltd. She did not explain which branch. She told the court that this is the account where tenants are paying rent. She also said that their father has property in Ruai which does not bring in rental income and another one in Rituta Satellite which he inherited and which produces some rent. She testified that their uncle manages the property on behalf of their father.

The court questioned Caroline with a view to having some issues clarified. She told the court that before taking their father to Alpine Pristine Home, they had considered several options and decided that the best option was to have him committed to a Home where he would get 24 hour security and attention.

At the conclusion of the hearing, counsel for the Petitioners sought time to file submissions. At the same time this court called for a social inquiry report from the Probation on the circumstances of the Respondent at the Alpine Pristine Home for the elderly. The court also called for the Valuation Report on the properties owned by the Respondent. These have been filed. The submissions are dated 27th July, 2021. The Probation Report is dated 13th October 2021. I have read both and noted their contents.

The valuation report dated 22nd July 2021 lists the following properties:

1. Nairobi/Block xx/xxxx situated at Tena Estate Nairobi County. This is a building consisting of Ground floor which contains 6 shops, 2 bedsitters, 2 stores and one semi-basement store. It has a First floor which contains 3 bedsitters and 1 two-bedroom unit which is owner-occupied. This property earns gross monthly rent of Kshs 90,000. The report shows that the 2 bedroom unit can fetch an estimated Kshs 18,500 per month.

2. Dagoretti/Riruta/S.xxx Nairobi situated at Mutindwa area Riruta Satellite. This property contains 1 double storey house with a sitting room, bathroom cum toilet, kitchen and one bedroom; 10 bedsitters; 2 bathrooms; 2 toilets with all units fully let out bringing in gross rent of Kshs 40,000 per month. This property belongs to AW and JW. Alice is deceased and her four sons including the Respondent share the rental income. My understanding of this report is that the Respondent is not the owner of this property but he has a share with his three brothers. This did not come out of the evidence of the Petitioners but from the valuation report.

3. Share Certificate in respect of plot Number xx of LR Number xxx/xxx. The Valuation report shows that the Respondent holds purchaser's interest in this property.

4. Shares in the following Companies:

- i. Central Depository & settlement Corporation Limited (CDSC) Account Number EQBC/C – 000000xxx/LI -0 in the name of DMK. Broker is Equity Custodial.
- ii. Kenya Reinsurance Corporation Limited Shares Account No. xxxx in the name David Mwangi Kamau.
- iii. Safaricom Limited Shares Account No. 1016xxxxx in the name of DMK.

iv. Co-operative Bank of Kenya Limited Shares Account No. 1000xxxx in the name of DMK.

v. Ken Gen Limited Shares Account No. 1134xxx in the name of DMK.

vi. Kenya Commercial Bank – shares Account No. to be ascertained. NB: CDSC statement shows that DMK held the above shares KCB shares included.

5. Bank Accounts as follows:

i. Equity Bank Limited Account No. 01201xxxx in the name of David Mwangi Kamau.

ii. Equity Bank Limited Prepaid Account No. 11814xxxxx in the name of David Mwangi Kamau.

iii. Co-operative Bank of Kenya Limited Account No. 01109xxxx in the name of DMK.

6. Mobile Money

Safaricom Limited Mobile Telephone No. 0721xxxxxx in the name of DMK.

7. Insurance

National Hospital Insurance Fund Membership No. xxxxx in the name of David Mwangi Kamau.

I have considered this matter. Section 2 of the Mental Health Act defines a person suffering from a 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 a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.

I have considered the evidence of Dr. Lubanga and the report he produced in court. I have considered the evidence of Caroling in regard to the behaviour of the Respondent. Her description of how the Respondent was behaving is consistent with the behaviour of a person suffering from a mental disorder described by Dr. Lubanga. Indeed even the Social Worker who visited the Respondent at the Home with a view to preparing a report on his circumstances at the Home described him as hostile and non-communicative. I am satisfied that the Respondent is a person suffering from a mental disorder. He has been so diagnosed.

I have read Section 26 of the Mental Health Act, Cap 248. It provides as follows: -

26. 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 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.

From the evidence adduced in court it is clear that the Respondent’s condition has deteriorated to a point where he has frequent outbursts and becomes violent. He has also become disoriented in time, place and person to an extent of not recognizing his own relatives. After considering the evidence of Caroline and Dr. Lubanga, I am satisfied that the Respondent is not able to manage himself or his estate. For these reasons the Petitioners have made out a case for their appointment as the guardians of DMK and managers of his estate.

In respect of managing the estate of a person found unable to manage his estate due to mental disorder, the law under Section 27(1) provides that:

Power of manager in respect of estate

1. Where a manager is appointed under this Part, the court may order that the manager shall have such general or special powers for 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:

Provided that (i) a manager so appointed shall not, without the special permission of the court—

(a) mortgage, charge or transfer by sale, gift, surrender, exchange or otherwise any immovable property of which the estate may consist;

(b) lease any such property for a term exceeding five years; or

(c) invest in any securities other than those authorized by section 4 of the Trustee Act (Cap. 167);

(ii) no manager may invest any funds belonging to the estate of which he is manager in any company or undertaking in which he himself has an interest, nor on the purchase of immovable property under the authority of paragraph

(d) of section 4(1) of the Trustee Act without the prior consent of the court.

Mental Health Act has adequate provisions on the guardianship and management of a person found to be suffering a mental disorder and his/her estate. For instance Section 27, cited above, provides for powers of such a guardian and manager. Secondly, Section 33 of the Act requires accounting by such manager. It provides that:

Manager to furnish inventory and annual accounts

31. (1) Every person appointed by the court to be manager of the estate of a person under this Part shall, within six months of the date of his appointment, deliver to the court and to the Public Trustee (to whom he shall pay such fee as may be prescribed) an inventory of the property belonging to the person of whose estate he has been appointed manager and all such sums of money, goods and effects as he receives on account of the estate, together with a statement of all debts owed by or due to such person, and every such manager shall furnish to the court and to the Public Trustee (to whom he shall pay such fee as may be prescribed) annually, within three months of the 31st December, an account of the property in his charge showing the sums received and disbursed on account of the estate during the year and the balance; such inventory, statement and account shall be in the prescribed form.

The duty of the manager of an estate of a person found to be suffering from mental disorder was recognized by the court in **Steven Kariuki Kiriamburi & another v Jane Gaturi Kiriamburi & 4 others [2020] eKLR**. In that case the court went further to state that:

“Once the order for appointment is granted, a trust relationship is created between the applicant and the subject and thus the subject’s estate that may be vested in him will only be held on behalf of and for the benefit of the subject. In any event, the trustees will not be able to dispose of the property without court’s authority as provided for under Section 27 of the act. In addition, Section 33(1) of the Act requires the manager or guardian provide an inventory and annual accounts of the subject’s estate.”

The Petitioners have in this case proved that the Respondent is incapable of managing his own properties. The petitioners have adhered to the court’s directives on providing inventory of the assets of the Respondent. They testified that the Respondent is currently being taken care of at Apine Pristine Homes. They also stated that they would continue to pay the fees needed by the home from the Respondent’s estate. A report was also made by the probation department on 13th October, 2021 which stated that the Respondent is a patient at Alpine Pristine Home where he is on treatment and management of dementia health condition and that he was not able to express himself and his memory appeared to be heavily impaired. The report also confirmed that he appeared to be in good hands and recognized his care givers at the said home. For the above reason I am satisfied that the Petitioners deserve the orders they are seeking in the Petition dated 3rd March 2021 in the following terms:

1. That this Honorable Court hereby issues a Declaration that DMK, the subject, is a patient and a person suffering from Mental Disorder, within the meaning of section 2 of the Mental Health Act Cap 248 of the Laws of Kenya.

2. That this Honorable Court hereby issues an Order that CWK and EWK, the Petitioners herein, shall have full custody and management over DMK and are jointly appointed as Guardians and Managers over DMK and his estate as provided under sections 26, 27 and 28 of the Mental Health Act Cap 248 Laws of Kenya.

3. They shall open a joint bank account for purposes of the management of the subject and his estate and shall bank all the rental income and any other income that may accrue to the estate in that account.

4. They have general powers to withdraw funds from that account from that account *such sums as are necessary for the treatment and maintenance of the subject* which sums shall be *applied for that purpose only*.

5. The Petitioners, while acting as such Guardians and Managers over the subject and his estate, shall exercise, and are granted, special powers as may become necessary to sue and/or defend a suit for and against the estate of the subject. This power includes pursuing title deeds and ownership documents where these are not available to them.

6. They have no powers to do any acts prohibited under Section 27 unless the court has authorized such acts.

7. The petitioners shall file in this court *bi-annual returns of the status of Subject's estate and the first quarter for this purpose shall commence on the first day* after delivery of this judgment.

8. The *Petitioners are at liberty to apply* for variation of any order(s) after satisfying the court for such variation.

9. The costs of the *Petition* shall be borne by the *estate*.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF NOVEMBER, 2021

S. N. MUTUKU

JUDGE