



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
MISCELLANEOUS APPLICATION NO. 20 OF 2020

IN THE MATTER OF JMM (JMM)

GWN.....1ST PETITIONER/APPLICANT

TWM.....2ND PETITIONER/APPLICANT

JMM.....3RD PETITIONER/APPLICANT

AGM.....4TH PETITIONER/APPLICANT

RULING

1. Before me is a petition dated 6th February 2020 brought by four (4) petitioners under **Section 26, 28(1) & (2) and 29(1) of the Mental Health Act (Cap. 248)**, seeking that the petitioners be appointed guardians and managers of the estate of JMM (JMM).
2. The petitioners who are all children of JMM and aver in the petition that their mother (JWM) was wheelchair ridden and fighting alcoholism and was thus not able to bring or be a party in this petition.
3. It is averred in the petition also that JMM was suffering from dementia and not capable of making rational decisions to manage his properties which included assets and a business empire in Kenya worth more than Kshs 800,000,000= with a monthly income of about Kshs 3 million, thus the necessity for filing this petition.
4. The petitioners have thus come to this court through the petition seeking the following orders –
 - (a) The petitioners be appointed as the guardians of JMM and the managers of JMM's estate.
 - (b) The petitioner be granted access to the following accounts in the name of JMM. –
 - ***** – Barclays Bank of Kenya (now ABSA) Nyahururu Branch.
 - *****Barclays Bank of Kenya (now ABSA) Nyahururu Branch.
 - ***** – Barclays Bank of Kenya (now ABSA).
 - ***** – KCB Bank Limited Nyahururu Branch.
 - Any other Bank account held with any financial institution or otherwise, in the name of JMM within Kenya.
 - (c) The Honourable Court be pleased to order that any disposition and or dealings with any property belonging to JMM be carried out by the petitioner jointly.
 - (d) All proceeds to JMM and or his estate, including rental income from any property registered to him under tenancy be collected into one account in the joint names of the petitioners herein, being Barclays Bank (*now ABSA*), Sarit Centre Branch, Account Number *****.
 - (e) Only such sums that shall be necessary for the treatment and maintenance of JMM shall be withdrawn (*all petitioners to sign per withdrawal*) from the Account referred to in (d) above and applied for that purpose save for any expense that shall be incurred by the

petitioners in the care and maintenance of JMM and or his estate, which expenses shall be presented to the court for approval before withdrawal from the said account.

(f) The orders herein once allowed, be registered against the titles to all properties in the name of JMM and served upon any of the tenants occupying property registered to JMM.

(g) Such other orders as this Honourable Court may deem fit and just to grant.

(h) Costs be borne by the estate of JMM.

5. The petition was filed with a supporting affidavit sworn by TWM (*the 2nd petitioner*) on 6th February 2020 a biological daughter of JMM.

6. It was deponed in the affidavit that JMM was currently undergoing treatment for dementia and receiving care from Aga Khan University hospital, that his estate was worth Kshs 800,000,000= with several properties registered in his name, that he did not have capacity to manage his business empire with an income of over Kshs 3 million per month, that JMM was now not capable of writing and speaking, and that the mother of the petitioners JWM the wife of JMM was not a petitioner herein because she was illiterate, wheelchair bound due to chronic arthritis and currently battling severe alcoholism, and that the petitioners if appointed guardians and manager would administer the estate of JMM according to law and render a just and true account of the estate whenever required by law to do so as well as account to the court when needed.

7. Annexed to the supporting affidavit was a medical report dated 6th August 2015 on JMM from Aga Khan University Hospital signed by Dr. John Weru, as well as consents from the other children of JMM, to the petitioners filing the petition.

8. When the matter came up before me on 15th July 2020 Dr. John Weru – Medical Practitioner Registration No. A.4638 adopted his report virtually and said that he was an Assistant Professor at Aga Khan Hospital University and that JMM (JMM) had been his patient since 2018, and that JMM suffered from dementia and did not have the capacity to make any voluntary and rational decisions.

9. This being a petition for appointment of legal guardians of a person and managers of the estate of a person who is said to suffer from mental incapacity to make rational decisions, Section 2 and Section 26 of the Mental Health Act (Cap. 248) are relevant.

10. In this regard, Section 2 of the Act defines a person suffering from mental disorder as follows –

2. “person suffering from mental disorder” – means a person who has been found to be so suffering under the Act and includes a person diagnosed as a psychopathic person with mental illness and a person suffering mental impairment due to alcohol (or) substance abuse.”

From these provisions of the law, it is clear that the definition of a person suffering from mental disorder is, in my view, quite broad. The causes of such mental disorders are also various.

11. The above said, for the court to intervene, the conditions under **part XII** of the Act – that is **Sections 26 to 39** have to be satisfied. In this regard section 26 of the Act confers on the court the powers to make orders for management of the estate and guardianship of a person with mental disorders, provided that certain conditions are fulfilled. **Section 26** of the Act provides as follows –

26(1) The court may make orders –

a. for 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 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 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.”

12. It follows that for the court to intervene and make guardianship and management orders, the person suffering from mental disorder must be incapable of managing himself or herself, or incapable of managing his or her affairs or both. The court has to be satisfied on inquiry that the person is not capable of managing himself/herself or his or her affairs.

13. In the present case, I have been told, and it is supported by the pleadings by the petitioners and the evidence of Dr. John Weru and his report that JMM is suffering from dementia and incapable for making decisions either to manage himself, or his affairs, and cannot either talk nor is he capable of writing and is dependent on others to survive and thus needs support from other people.

14. I am thus persuaded on the evidence that JMM is incapable of managing himself and his affairs, thus this court can intervene and make orders.

15. In considering what orders this court can make, this court is guided by the provisions of Section 28(1) of the Act, which states as follows –

28(1) The court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or his estate, make such order, subject to this part, regarding such application as, in the circumstances of the case, the court may think fit.”

16. Though the powers of this court to make orders under Section 28(1) are very wide, such orders have to be in line with the provisions of Section 29 through to Section 39 of the Act. In particular, Section 33 requires a manager so appointed by the court to furnish an inventory and annual accounts to the court and the Public Trustee. There is limited case law as most of such applications are not contested. I however, agree with the reasoning of the High Court of Kenya in **Re RNC [2016] eKLR**.

17. Having considered all the prayers sought, and on the basis of the facts and evidence placed before me, I am of the view that this court is justified in granting the orders sought subject to the provisions of Section 33 of the Act. I thus allow the petition and order as follows –

(a) The petitioners be and are hereby appointed as the Guardians of (JMM - JMM) and managers of JMM’s estate.

(b) The petitioners be and are hereby granted access to the following Accounts in the name of J.M.M. –

- ***** – Barclays Bank of Kenya (now ABSA) Nyahururu Branch;
- ***** – Barclays Bank of Kenya (now ABSA) Nyahururu Branch;
- ***** – Barclays Bank of Kenya (now ABSA)
- ***** – KCB Bank Limited Nyahururu Branch
- Any other Bank account held with any financial institution or otherwise, in the name of JMM within Kenya.

(c) The court orders that any disposition and or dealings with any property belonging to JMM be carried out by the petitioners jointly.

(d) All proceeds due to JMM and or his estate, including rental income from any property registered to him under tenancy will be collected into one account in the joint names of the petitioners herein, being Barclays Bank (now ABSA), Sarit Centre Branch, Account Number *****;

(e) Only such sums that shall be necessary for the treatment and maintenance of JMM shall be withdrawn (*all petitioners to sign per withdrawal*) from the Account referred to in (d) above and applied for that purpose save for any expenses that shall be incurred by the petitioners in the care and maintenance of JMM and or his estate, which expenses shall be presented to the court before withdrawal from the said account.

(f) The orders herein will be registered against the Titles to all properties in the name of JMM and served upon any and all tenants occupying property registered to JMM.

(g) The petitioners may hereafter apply herein for reasonable maintenance for their mother JMM, if need be.

(h) In accordance with the provisions of Section 33 of the Mental Act, the petitioners will furnish an inventory and annual statement to this court and the Public Trustee as required by the law.

(i) Costs for these proceedings will be borne by the estate of J.M.M.

Dated and delivered at Nairobi this 27th day of July, 2020.

George Dulu

JUDGE

Due to the COVID-19 pandemic and the Government regulations made by the Minister for Health, this ruling has been delivered virtually.