



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 5 OF 2018

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

AND

IN THE MATTER OF PWK (AN ADULT SUFFERING FROM MENTAL DISORDER)

AND

**IN THE MATTER OF AN APPLICATION BY ATKK & SMK TO BE APPOINTED
GUARDIANS OVER THE AFFAIRS AND MANAGERS OF THE ESTATE OF PWK**

ATKK.....1ST PETITIONER

SMK.....2ND PETITIONER

R U L I N G

A. Introduction

1. The petitioners herein moved this court through originating summons dated 9/03/2020 filed under certificate of urgency seeking the following orders: -

1. That this Honourable Court be pleased to appoint the petitioners ATKK and SMK as the guardians of the affairs of PWK in accordance with the Mental Health Act with the powers to carry out incidentals and general functions of PWK.

2. That this Honourable Court be pleased to appoint the petitioners as managers of the estate of PWK in accordance with the Mental Health Act with special permission pursuant to section 27(1) of the Mental Health Act operate and withdraw funds held in an account with [particular withheld] SACCO account No. [xxxxx] for the purposes catering for the subject's medical bills and maintenance.

3. That the said guardians be authorized to manage all the properties, assets, bank account held by PWK by collecting, maintaining and doing all that appertains to the preservation of the same.

4. That the costs of this petition be provided for.

2. The application was premised on the grounds on the face of the application and supported by the affidavit sworn by the petitioners herein and in a nutshell, it was the petitioners' case that they are daughter and son respectively of PWK the subject herein who had been diagnosed with dementia at Embu Teaching and Referral Hospital. That the said illness had reduced her mental capacity and thus she required assistance from her next of kin to manage her legal, financial, social and personal affairs and which condition had deteriorated. As such it was necessary for the petitioners to be appointed as guardians and managers of the estate of the said PWK.

3. At the hearing of the application, the 1st petitioner made oral submissions wherein she reiterated the contents of the application and further submitted that due to the mental condition of their mother (PWK) she requires constant medication that costs Kshs. 8,000/= - 10,000/= and which amount they were not able to meet as they (petitioners) were persons of little income. The 1st petitioner working in a salon while the 2nd petitioner is a small scale farmer. It was further submitted that it was their belief that the money in their mother's account was capable of catering for her medical expenses.

B. Issues for determination

4. I have considered the application herein in its entirety together with the submissions made by the 1st petitioner in support of the same and it is my opinion that the main issue for determination is whether the instant application has merit.

C. Analysis of the law and determination of the issue

5. The law which governs the handling of persons suffering mental illness is the Mental Health Act Cap 248 of the Laws of Kenya. Part XII of the Act deals with the judicial power over persons and estates of persons suffering from mental disorder. Under section 26(1) of the said Act, this court is bestowed with the power to make orders **for the management of the estate of any person suffering from mental disorder and for the guardianship of any person suffering from mental disorder by any relative or any other suitable person.**

6. **Under the law, the basic requirement before one is appointed a manager of the estate and guardian is that the patient must be suffering from mental disorder. The petitioners herein attached a medical report by Dr. Thuo J.N. wherein the doctor concluded that “the subject is suffering from a mental illness known as dementia which has reduced her mental capacity and that she requires assistance from her next of kin to manage her legal, financial, social and personal affairs.” This situation was confirmed by the petitioners in their affidavit and their oral testimony in court. It is my opinion that the petitioners have discharged the burden of proof to the required standards that the subject suffers from a mental disorder.**

7. Under Section 26 of the Act, the person who can be ordered to be the manager and guardian of the patient should be a *ny near relative or by any other suitable person*. Where there is no known relative or other suitable person, the court can appoint the Public Trustee to manage the affairs of such a person. The petitioners deposed that they were the children of the subject and attached a copy of the Chief’s letter, [particulars withheld] West Location confirming that their relationship with the subject. The letter recommends that the applicants are indeed suitable to act as guardians.

8. The 1st petitioner submitted that they were persons of little means and could not afford the medical bill which is between Kshs. 8,000-10,000/= every month and that the subject holds a joint account with her deceased husband with [particulars withheld] Sacco being account No. [xxxx]. The petitioners attached a letter from the said Sacco and which indicates that the subject is a member therein.

9. It is noted that the petitioner’s brother one JNK did give authority and consent to the petitioners to be appointed as managers and guardians of the estate. On the day of the hearing of the summons, he was present in court and confirmed on questions put to him by the court that he had no objection to the appointment of the applicants as guardians of their mother. The need to cater for the medical needs for the patient herein in my considered opinion present a case for this court to invoke its powers under Section 26 and to appoint the petitioners herein as the managers of the said account.

10. Under Section 27(1), this court has discretion to determine the powers of the guardians/managers to be appointed maybe either general or special powers for the management of the estate. In its granting the orders sought, the court must have regard to the nature of the property whether movable or immovable, of which the subject’s estate may consist. In prayer 1, the petitioner sought orders that they be appointed as the guardians of the affairs of the subject herein with the powers to carry out her responsibilities within the family.

11. In respect of prayer 2, the petitioners sought to be appointed as managers of the estate of the patient herein with special permission pursuant to Section 27(1) of the Mental Health Act operate and withdraw funds held in an account with [particulars withheld] Sacco account number whose particulars were not given for the purposes catering for her medical bills and maintenance. It was the petitioners’ case that the said account was held in the joint names of the patient and their deceased father. It is my opinion that a joint account ought to be governed by the rules of survivorship in the sense that the demise of one of the joint account holder **leaves the survivors the sole beneficial owner of the funds held in the joint account. As such, it is my opinion that by invoking of the powers of this court under Section 27, the court ought to allow** access to run the said account only if it is intended to get funds to meet the medical needs and personal care of the patient subject to production of proof or evidence to that effect.

12. The petitioners sought in prayer 3 sought for orders that they be *authorized to manage all the properties, assets, bank account held by the patient by collecting, maintaining and doing all that appertains to the preservation of the said assets*. However, the only asset of the subject is only the bank account with [particulars withheld] Sacco.

13. From the foregoing, I am of the considered that the applicants have satisfied this court as to their suitability as guardians and managers and as to the need of intervention in the affairs of their mentally sick mother.

14. I find the application merited and allow it in terms of **prayers 1, 2 and 3** as set out in this application.

15. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF AUGUST 2020.

F. MUCHEMI

JUDGE

In the presence of: -

2nd Petitioner