



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS CAUSE NO. E001 OF 2020

IN THE MATTER OF THE ESTATE OF VFM (PATIENT)

ASWG.....APPLICANT

JUDGEMENT

Factual background

1. Through **Divorce Cause No. 1056 of 2019** Chief Magistrate's Commercial Court Nairobi, VFM (hereinafter referred to as the Subject) Petitioned for divorce against her husband ASWG (hereinafter the Petitioner/Applicant). During the pendency of the divorce proceedings, A moved to this court vide application dated 8th August, 2020 pursuant to Section 26, 27 and 28 of the Mental Health Act seeking orders as follows:

- a) In the event the inquiry reveals that the subject is suffering from mental disorder as to be incapable of managing her own affairs, the Honourable Court be pleased to appoint the Petitioner as manager of the subject's estate and guardian of the subject.**
- b) This Honourable Court be and is hereby pleased to issue judicial review order of certiorari and to call the record of the Milimani Commercial Court Divorce Cause No. 1056/2019 for the purpose of quashing and to quash the said divorce proceedings.**
- c) Any other orders that the Honourable Court may deem fit and just in the interest of the subject.**
- d) Costs incidental to this suit be borne by the estate of the subject.**

2. The Petition is premised upon grounds that the subject herein is a legally wedded wife to the Petitioner having solemnized their marriage through a Christian wedding on 7th October 2000. That the couple has been blessed with three children namely; VN aged 19 years, MG aged 14 years and AM aged 12 years

3. It is the Petitioner's claim that during the subsistence of their marriage, they acquired a number of landed properties some of which are allegedly at the a risky of disposal due to the mental illness of the subject.

4. It is further the Petitioner's case that the subject has a history of brain disorder otherwise known as brain infarct associated with multiple atrophy (MSA) which is said to disrupt communication between her brain and the body. That after several tests and treatment locally by Drs. Nyaim Opot and Pius and later in India at Apollo hospital, the subject was diagnosed to be suffering from severe migraine and lucunar infarcts which is the cause for her predisposition to insomnia.

5. According to the Petitioner, the subject has been behaving strangely thus exhibiting symptoms of dementia giving rise to her making suspect decisions which leaves her family and the petitioner to suspect that the subject was suffering from dementia.

6. He expressed shock that on 3rd December, 2019 the subject had Petitioned for dissolution of their marriage. He wondered how the subject would file for divorce yet at times she is affectionate and keen towards him a fact that makes him feel that the subject is susceptible to manipulation and exploitation hence the need for court's intervention to declare her as being mentally unfit to discharge her duties responsibly and independently.

7. That while the suspect's medical condition is being inquired, it is critical that her property jointly or singly owned be protected by appointing the Petitioner as the guardian and manager of her estate.

8. During the hearing, the Petitioner basically adopted the averments contained in the affidavit in support of his application. He urged that the subject was not mentally stable hence cannot discharge her daily and routine activities. On cross examination by Mr. Kiti for the patient, the Petitioner confirmed that his wife the subject herein is a Lecturer at [particulars withheld] lecturing in Information Technology. On further cross examination, he stated that his wife was suffering from stress.

9. He also confirmed that it is the subject who is staying with the children and that she was discharging all her affairs unaided. He did acknowledge that he came to court because they had a dispute over matrimonial property. He further stated on cross examination that; the subject has been discharging her duties properly with no complaint from the children.

10. When the patient (Pw 2) took the stand, she stated that she is a lecturer at [Particulars withheld] and currently undertaking her Doctoral studies project having completed her course work. She denied being of unsound mind nor suffering from dementia. She stated that at some point she started losing sleep a factor that precipitated to her husband taking her forcefully to a psychiatrist claiming that she was insane.

11. She confessed that whenever she was annoyed, she would suffer severe headache a fact which offends her husband. She claimed that the petitioner wanted to micromanage whatever she was doing without listening to her. According to her, she is sound and has been normally discharging her daily duties and employment responsibilities without any complaint from her employer nor children.

12. Pw3 VN and MG (PW4) their daughters stated that their mother was of sound mind and that she has been providing for their needs in the absence of their father who ceased staying with them in their matrimonial home. Unfortunately, on the date the doctor was scheduled to testify, the applicant and his counsel did not turn up hence the case was closed without the Doctor testifying.

Determination

13. I have considered the petition herein, affidavit in support, response thereto and testimonies by various witnesses. The issues that crystalizes for determination are; whether the subject is suffering from a mental health condition known as dementia. If so, whether the said mental condition has impaired her mental capacity to make sound judgment in discharging and or managing her affairs and duties independently or responsibly.

14. The relevant provisions governing Mental health proceedings are sections 26, 27 and 28 of the Mental Health Act Cap 248 Laws of Kenya. Section 26 of the Act provides that:

(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

c) 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.

d) Where upon inquiries 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 just 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.

15. Section 27 of the Act goes further to provide the role and powers of the Manager of the estate if appointed as follows:

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:

(1) 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 of any immovable property of which the estate may consist.

b) ...

c) ...

d) ...

e) ...

(2).....

(3)....

(4).....

16. For the court to grant the application for appointment of a manager of the estate and guardian to the patient, the Petitioner/Applicant is duty bound to prove that:

1. **There exists medical proof by show of evidence confirming that the subject suffers from mental disorder.**
2. **The petitioner/applicant seeking to be appointed as manager or guardian must be legally fit to be so appointed.**
3. **That due to the subject's mental disorder, he or she is incapable of managing his/her own affairs independently and responsibly.**
4. **That the proposed manager/guardian will manage the subject's property effectively and efficiently for the benefit of the estate and welfare of the subject**

17. As stated in the case of **In Re NMK (2017) eKLR**, the overriding principles in the appointment of a manager/guardian is that of the welfare of the best interest of the subject.

18. In the instant case, the Petitioner/Applicant is claiming that the subject is suffering from dementia occasioned by mental conditions known as chronic migraine, brain infarct and Bipolar mood disorder. In support of the petition, several medical notes and reports prepared by various medical experts were attached showing that the subject has undergone treatment in various local hospitals and in India. From the medical notes attached to the affidavit in support of the application in particular medical report marked ASN prepared by Dr. Patrick Akuku Okoth a consultant Neurosurgeon Mater Hospital dated 22nd February, 2013, it states that;

“Examination revealed that she is anxious and under stress. chest cardiovascular and other systems are normal. MRI scan of the brain shows Micro Angiopathic changes. MRI cervical spinal shows spinal spondylosis with C4/C5 and C5/C6 disc bulges compressing the cal sac. However, there is no neural exist foramina compromise.

At paragraph 4 he stated that:

“She has been advised to attend psychotherapy and near cervical caller. Also, she requires review by neurologist for the migraine headaches”.

19. Despite all these medical notes, the petitioner did not call a medical expert to confirm that the subject although suffering from stress and migraine headaches, she is not capable of managing her affairs. Without the Doctor's evidence, the crucial ingredient of proving mental illness is left in doubt and therefore not clear.

20. Regarding the claim that the suspects behavior has been strange, the subject admitted that she has been suffering from stress and migraine headache but the same did not and does not impair her mental faculties to be able to transact normally her daily activities. It is incumbent upon the Petitioner to show that the subject is mentally ill and that the illness has affected her mental capacity to manage her day to day affairs hence the need for intervention from the court.

21. From the testimony of the petitioner, and in particular on cross examination, it was admitted that the subject is a lecturer at [particulars withheld] and that she is staying with the children. He further stated that the subject has been managing rent collected from their rental properties.

22. On the other hand, the subject gave a detailed testimony. She explained that she had suffered stress and migraine headache which was a culmination of the harassment and mistreatment by the Petitioner/Applicant. She further stated that she is currently teaching at [particulars withheld] and that she is undertaking her

Doctoral degree studies in IT to which she is about to complete her project.

23. Further, it was an admitted fact that since the couple separated, it is the subject who has been taking care of the children. From this evidence and admission, it is clear that the subject although suffering from recurring headache and stress, she is capable of managing her daily activities and affairs. A person suffering from dementia cannot execute heavy responsibilities including lecturing and undertaking PHD studies at the same time taking care of the children without my complaint from the employer nor the children.

24. Further, the children (Pw3 and Pw4,) supported their mother's position that she was mentally sound. Based on the definition who a person suffering mental disorder is under Section 2 of the Act, the subject does not fit that description. Section 2 of the Act provides;

“A person suffering from mental disorder” means a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse”.

25. It is apparent from the pleadings and testimony of the petitioner that he does not want the pending divorce proceedings to continue and that he wants to exclusively control their matrimonial property. From my own assessment, and considering the evidence of the witnesses who appeared before court, the subject is quite sound despite her stress and migraine headache. Those are daily challenges that a big number of the Kenyan population is living with without any interruption to the performance of their day to day affairs or activities.

26. In view of the above holding, it is my finding that the petition herein does not meet the threshold for declaring a person as suffering from mental disorder to warrant appointment of an estate manager or guardian. The application was not filed in good faith. As regards the issue of Judicial Review orders of certiorari seeking to quash divorce proceedings, I do not find any administrative action, irrationality or illegality committed by the court handling the matter to warrant the orders sought. I need not belabour on this issue as it is totally misplaced. To that extent, the application/petition is hereby dismissed.

27. Regarding costs, this is a family matter. I will order that each party bears OWN COSTS.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF NOVEMBER 2020.

J.N. ONYIEGO

JUDGE