



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI – FAMILY DIVISION**

**PETITION NO. 29 OF 2017**

**IN THE MATTER OF MENTAL HEALTH ACT (CAP 248) OF THE LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF IB (PERSON SUFFERING FROM MENTAL DISORDER)**

**-AND-**

**IN THE MATTER BY DOPP AND NPO TO BE APPOINTED AS GUARDIANS OVER THE AFFAIRS AND ESTATE OF IB**

**DOPP.....1<sup>ST</sup> PETITIONER**

**NPO.....2<sup>ND</sup> PETITIONER**

**CONSOLIDATED WITH**

**PETITION NO. 63 OF 2017**

**IN THE MATTER OF PROTECTION OF OLDER MEMBERS OF THE SOCIETY**

**AND**

**IN THE MATTER OF IB**

**RB.....PETITIONER**

**-VERSUS-**

**NO.....1<sup>ST</sup> RESPONDENT**

**DP.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The subject **IB (I)** is about 94 years old, having been born on the 14<sup>th</sup> of June 1924 in Pakistan. She is a citizen of the United States of America, where she resided until she was moved to this Country in 2015. She is since caught in a controversy pitying her only surviving child; a son **RB (R)** against her sister **SP**'s daughters; her nieces; **DOPP (D) AND NPO (N)**.

2. I is not only old and frail, she is sick. In a medical report dated 25<sup>th</sup> April 2016 she was diagnosed as having a variety of serious medical conditions, including heart arrhythmias, chronic lung disease, seizure disorder, a brain tumour (meningioma) and an element of dementia.

I previously lived with her only daughter, **MB** in Pittsburg, United States of America until September 2015 when the daughter died in a road accident. At the time of **M**'s death **R** was away, and returned on 20<sup>th</sup> of October, 2015. Upon learning of his sister's death, he visited the mother on 29<sup>th</sup> October 2015, who by then was in a nursing home. **D** and **N** were already by **I**'s side, having received the news of **M**'s death earlier and having arrived a week apart and taken charge of **I**. It appears that upon meeting, **R** and his cousins immediately had issues of how

to manage I and her affairs. There are divergent positions of what ensued immediately thereafter.

3. According to D and N, I was 'alone' on their arrival having been estranged from her son R since 2000 when I's husband died. Further they contend that I of her own volition and on recommendation of her doctor requested to relocate to Kenya to live with her elderly sister and be looked after by her nieces.

4. On the other hand, R 's case is that when he visited his mother on the 29<sup>th</sup> of October 2015, D and N were constantly present. Without his knowledge or consent, they withdrew his mother from the nursing home on the 1<sup>st</sup> of November 2015. Thereafter the two flew his mother to Kenya without his input, frustrating his efforts for appointment as a guardian to his mother, a process he had begun in United States of America.

5. R later arrived in in Kenya ostensibly in search of his mother. As he was seeking legal help, his cousins on the other hand had Petitioned this court without his knowledge seeking for guardianship orders and with no such information, he equally Petitioned the court on the same subject. Since then, the two rival parties have been in and out of the Kenyan courts, with a short stint in a criminal court where R was incarcerated on an allegation of assault, which case D who was the complainant later withdrew. This court has seen the parties file one application upon another as though, to outdo each other, all the while I has been tossed from one home to the other, amongst the two warring parties, without a say to what is happening to her dear life.

6. **D and N** moved the Court in **Petition No. 29 of 2017**, dated 24th February 2017 citing I's medical condition and her incapacity to take care of herself and run her affairs. Further it is their case that I lacks a person to take care of her in the United states of America as her only living child; R was estranged from the family for years. They sought for orders as follows; -

**a. That the Honourable Court appoints both of them as guardians of the affairs of I in accordance with the Mental Health Act with powers to sign, access, withdraw, execute and/or carry out any act incidental to her affairs.**

**b. That the two be appointed as managers of I's estate with special permission pursuant to Section 27 (1)(a) of the Mental Health Act to charge, sale, gift, surrender, transfer, exchange or otherwise deal with any movable or immovable property which belongs to I.**

7. On his part R filed **Petition No.63 of 2017** dated 24th April 2017. His case is that he is the only surviving member of his immediate family and ought therefore to be the one taking care of his ailing mother, who has also expressed the wish to be with him. Further he contends, that his cousins took his mother away without his knowledge or consent, and relocated her to Kenya. It is his position that his mother ought to have remained in the United States of America an environment she is accustomed to and under his care. He sought for orders that;

**a. Spent.**

**b. Spent.**

**c. The Respondents be ordered to return the Subject to the United States of America and to the custody of the Petitioner.**

**d. In the alternative this Honourable Court do grant custody of the Subject to the Petitioner to take the subject back to the United states of America.**

**e. The court do direct the Inspector General of Police and the Department of immigration to assist with the enforcement of the orders**

**f. Costs.**

8. The two Petitions which raise similar issues and same parties necessitated consolidation of the same with consent of the parties on the 11<sup>th</sup> of May 2017.

Parties filed their submissions on the 21<sup>st</sup> of September 2018 & 26<sup>th</sup> September 2018 respectively. The submissions are summarised as follows; -

#### **D & N submissions**

The two were alerted of I's condition and both travelled to the United states of America to attend to her. On arrival they immediately took charge of I as R was unavailable. I voluntarily expressed her wish to travel with the two to Kenya, where she has for the last 3 years resided and since then they have diligently taken care of her by providing care and attention including medical needs and as a result I's health and emotional stability has tremendously improved.

It is also their case that R has neither lived with his mother nor participated in taking care of her while she was resident in the United States of America. Indeed, the mother and son have had disputes including a case between the two in India, which severely dented their relationship. Further, R's sudden change of heart towards his mother is suspect and may be informed by his wish to have unfettered control over her properties. Further even in the current situation R has entrusted the care of his mother most of the time to his them.

They also contend that it is unfair, absurd, impertinent and ungrateful of R to assume that they seek custody of his mother in order to control her properties and assets.

They urge that allowing removal of I from Kenya will strip the court of its jurisdiction over the subject and therefore any orders likely to be made to safe guard the best interest of I will be ineffective.

### **R's submissions**

9. It is R's case that on visiting his mother for two days from 29<sup>th</sup> of November 2015 D and N did not give him with him time her, culminating in their removal of his mother from the nursing home and on the 1<sup>st</sup> of November, 2015 without his knowledge and consent, his mother was flown to Nairobi. He further contends that while still in America the cousins caused his mother to sign a power of Attorney in their favour and using the same, they sold her house for a paltry sum. Due to his mother's relocation he was not able to pursue his case for guardianship in the United States of America as her nearest relative. He was only able to access his mother after instituting Petition No. 63 of 2017 and an order issued on 11<sup>th</sup> May 2017.

As the nearest relative of I, he urges that he is most suited to be the mother's guardian and in support of his desire to return her to the United States of America, he submits, America was her home for over 40 years, medical care is more advanced and he has a home, the time and adequate finances to take care of her. He also made reference to the medical reports of **Dr. Juzar Hooker** and **Dr. Mohamed Mohamed Noorani** dated 10<sup>th</sup> & 11<sup>th</sup> October 2018 respectively, who both were of the opinion that I could safely travel abroad if placed in a business class seat and accompanied by a close relative.

He further submitted that he is retired and would be available for his mother full time, whereas his cousin N works and resides in Canada, D works from midday to 4 p.m., and I's sister Santosh is sick, sees I only twice a week for 1 hour, and the two have separate lives, sleep and eat separately.

Further as a sign of concern for his mother, he has expended huge sums of money and time to be with his mother during her stay in Nairobi and

though D and N have questioned his capacity to support his mother as an amputee, not only is this discriminatory but the assertion is far from the truth. His leg was amputated at the age of 13 and he has since led a normal life and was able to take care of his sick wife who suffered from cancer until her death.

10. In their submissions Parties raised separate issue for determination. Having considered the same, examined the parties, I's Sister, doctors, a nurse, a care giver, other persons of interest, the subject and documents placed before it, the court has narrowed issues for determination as follows; -

**i. Whether I is suffering from a mental illness as defined by The Mental Health Act, Chapter 248 of the laws of Kenya, so as to require appointment of a guardian(s) to take care of her and manage her affairs?**

**ii. If the answer to i above is in the affirmative, who should the court appoint as such guardian(s)?**

**iii. What powers should the guardian(s) be granted &**

**iv. Where should I reside?**

11. In the book **Promoting Judicial Acceptance and Use of Limited Guardianship**, 31 Stetson L. Rev. 735(Spring 200), Lawrence A Folk wrote as follows; -

**“Judges are not like baseball umpires, calling strikes and balls or merely labelling someone competent or incompetent. Rather, the better analogy is that of a craftsman who carves staffs from tree branches. Although the end result—a wood staff—is similar, the process of creation is distinct to each staff. Just as the good wood-carver knows that within each tree branch there is a unique staff that can be ‘released’ by the acts of the carver, so too a good judge understands that, within the facts surrounding each guardianship petition, there is an outcome that will best serve the needs of the incapacitated person, if only the judge and the litigants can find it.”**

12. **Section 26** of the Mental Health Act, Chapter 248 of the Laws of Kenya(The Act) provides as follows on custody, management and guardianship; -

**“(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 suitable person, the court may order that the Public Trustee be appointed as manager of the estate or guardian of any such person.**

**(3) Where upon inquiry it is found that to whom 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 others or likely to act in a manner offensive to public decency, the court may make such orders as it deems fit for the management of the estate**

of such person, including provision for his maintenance, and maintenance of such family members of his family as are dependent upon him for maintenance, but need not in such case, make any order of custody of the person suffering from mental disorder.

**“27. 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,”**

13. There is no dispute as relates to I’s health and state of mind. Medical reports made locally and abroad testify to the same. Therefore, this is a fit case under Section 26 of the Act for the appointment of a guardian(s) to take care of I as she is certainly incapable of doing so. Equally the said guardian(s) will have to take care and manage her estate as her state of mind is such that she cannot do so.

14. The bone of contention is who the court ought to appoint as her guardian and manager of her estate. The guidance by the Mental Health Act is that in the first instance the guardian to be so appointed ought to be the nearest relative, if not available the court may appoint a suitable person, thirdly if this is not possible the court may appoint the Public Trustee.

15. Our Mental Health Act does not define “nearest relative” which, it has been argued is not the same as next of kin. The Mental Health Act of England’s definition may assist as a persuasive authority in defining who ‘a nearest relative’ is . Section 26 thereof gives a list, which list is in strict order and the person who is highest on the list is said to be nearest relative in priority;-

**a. Husband , wife or civil partner (including cohabitee for more than 6 months).**

**b. Son or daughter**

**c. Father or mother (an unmarried father must have parental responsibility in order to be nearest relative)**

**d. Brother or sister**

**e. Grandparent**

**f. Grandchild**

**g. Uncle or aunt**

**h. Nephew or niece**

16. From the foregoing in the absence of a husband, I’s nearest relation is R.

**Does he qualify the Court’s appointment?**

R argues that he is the nearest relative yet D & N say they are best suited.

Reason’s adduced for R’s disqualification is the fact that he has been estranged from his mother for long, he is an amputee and may be driven by greed. This R denies and states that he has an excellent relationship his mother and she has also expressed her desire to live with him.

It is claimed by R that since he is available D and N cannot be his mother’s guardians, further that their action and deeds make them unsuitable. They however urge that by the action and deeds they are better placed to take charge of I and her Affairs.

Though suffering from some form of dementia and said to be hard of hearing the court observed that I while in court appeared alert and following proceedings keenly which prompted the court to engage her in camera, without the two sides, to allow her speak her mind without any fear. It must be observed that to the court’s surprise, she engaged the court with ease and expressed her wish to be with her son. When asked why she would like to stay with him, she informed the court that she had not lived with him in a long time and this is a good opportunity.

17. The allegations made by both sides of inability by the other party to be guardian(s) have not in the least be proven. The assertions remain allegations in the absence of evidence. Any side in my view would qualify based on the list of priorities adopted above.

Whilst D and N have done a tremendous job of taking care of their aunt, meeting the necessary costs, according her the love and care needed, the law bestows the obligation and responsibility in the first instance upon her son R. It was said that R filed a case in Indian against his mother, which created bad blood between them. Copies of the court papers were filed in evidence. In the said case R sought to assert his rights and this in my view cannot be used against him. He kept away, he admits and he has adequately explained why he kept away from his mother earlier. He had differences with his sister.

Nonetheless, the allegation of bad blood did not come from the mother or son. I wants her son back. R has on his part proved his willingness to rise to the occasion, he has travelled to and from the United States to attend to this case and to be with his mother. His physical status is

not bad, he walks normally for a man of his age as observed by, no sign of amputation seen unless one is told and no proof medically or otherwise that he cannot deal with day today chores. In any event I is confined to a while chair and has stayed with R in Nairobi.

Against all the above it is my view that the court has no reason not to appoint R as his mother's guardian.

18. The guardian's duties may include taking care and managing the affairs of the subject.

I is fairly old and sick to be able to take care of herself and manage her estate, in this case the guardian's duties will include taking care of I's health, her affairs and full control and management of her Estate.

19. As regards where I would reside, considering I's wish to stay with the son, the fact that the two are citizens of the United States of America and resident in that country and the doctors having indicated that I could travel; the court is of the view that I should be taken back to her home country.

20. The court further directs the guardian so appointed to seek the assistance of the American Embassy to facilitate I's travel in the company of a suitable medical personnel who will accompany the guardian and I to her destination in the manner advised by the doctors.

21. As relates to costs, in the circumstances of this case each party will bear their own costs.

**Dated and Delivered in Nairobi this 28<sup>th</sup> day of February 2019**

**ALI-ARONI**

**JUDGE**