



**REPUBLIC OF KENYA**

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

**MISC.CIVIL CASE NO.78 OF 2018**

**IN THE MATTER OF EKW (A PERSON OF UNSOUND MIND)**

**AND**

**IN THE MATTER OF GMW.....APPLICANT**

**RULING**

1. The applicant before me is the Notice of Motion of 3<sup>rd</sup> November 2018 supported by the supporting affidavit of GMW sworn on 31<sup>st</sup> October 2018.

2. It was brought under the certificate of urgency of Duncan Waweru Macharia Advocate dated 3<sup>rd</sup> November 2018.

3. It seeks orders under section 26(1) of the Mental Health Act Cap 248 Laws of Kenya, and Order 32 rules 1 to 15 of the CPR.

The orders sought are set out in the face of the application:-

i) That GMW be and is hereby appointed guardian and next friend of EKW – a person of sound mind.

ii) That GMW be and hereby appointed as the manager of the affairs of EKW.

iii) That there be no orders to costs.

4. The grounds for the application are set out on the face as follows:-

a) The said EKW is a person of unsound mind.

b) The said EKW has become incapable of taking care of his own affairs and property.

c) It is only proper that the applicant be appointed as next friend, guardian and manager.

d) The applicant is willing and able to act in the said capacity.

e) The applicant is a brother of the said EKW and has no interest adverse to those of the said EKW.

f) The said EKW is unable to take care of himself due to his medical condition and there is need for the applicant to be appointed urgently to take care of the interests and welfare of the said EKW.

g) That the applicant also needs to protect the land of the subject i.e. LR No. Mahiga/Munyange/1179 which is at risk of being sold to creditors who are taking advantage of his mental illness.

5. A psychiatrist report by Dr. R Mwenda following court orders of 7<sup>th</sup> November 2018, was filed on 8th January 2019 from the Nyeri Referral hospital including that the subject was 1<sup>st</sup> seen on 7<sup>th</sup> December 2017 on referral from Othaya sub-county hospital. the report indicated that he had been suffering from psychiatric illness from 1 year and before 7<sup>th</sup> December 2017 and that he had been admitted to John Mututho Empowerment Centre in 2018.

6. His current mental status was described as

**“He is well oriented in all aspects, well groomed, speech, mood, thoughts, memory and concentration are all within normal limits. He has no current perception abnormalities. He currently has full emotional insight and judgment. He however is separated and unable to follow up his property”.**

However, the Doctor was of the view that the subject suffers from “relapsing mental illness” (schizoaffective/bipolar) associated with “mood swings, occasional poor judgment”

7. It was recommended that a next of kin be appointed to manage his property. Annexed to the applicant’s affidavit are lease agreements dated 2<sup>nd</sup> November 2016, 5<sup>th</sup> November 2016, 14<sup>th</sup> December 2016, 7<sup>th</sup> December 2016 where the subject has leased out 700 tea bushes for three years at a total of Kshs.9000/- 300 tea bushes for three years at Ksh.9000/- per year =Kshs.12000/-. Loan agreement 3<sup>rd</sup> May 2018 borrowing Ksh. 109,000/-. Application for subdivision of his land LR Mahiga/Munyange/1179 into 2 portions. Sale agreement for the entire parcel No.Daiga Umande Block 2/2017 North Tetu dated 6<sup>th</sup> July 2018 which shares that the vender acknowledged receipt of Kshs.1,000,000/-.

8. Section 26 of the Mental Health Act falls under part *XII “Judicial powers over persons and Estates of person’s suffering from mental illness”*. It provides for the orders a court may make for the management of the estate of any person suffering from mental disorder and for the guardianship of that person by any near relative/any other suitable person. It States:

## **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) Whereupon 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.*

9. The application herein is brought by the brother of the subject whose concern is to protect the subject’s estate from wanton waste resulting from the poor judgment arising out of his illness.

10. The Act under section 27 gives the court the discretion to set the boundaries of the powers a person appointed under s.27 may exercise.

11. Order 32 rule 1 to 15 of the CPR 2010 provides for procedures applicable to persons with unsound minds.

12. The applicant has demonstrated that from 2016 -2018 the subject herein engaged in rapid ‘disposal’ of his property- tea bushes, and even sale of his land and it is clear from the sale and lease agreements none of his relatives were aware as none is witnessed by any relative.

13. It is also clear from the medical report that although the subject’s mental state is currently within normal limits – he is not capable of dealing with his property because of the nature of his illness- it is ‘relapsing’.

14. Hence having considered the Notice of Motion, the supporting affidavit and the annexures hereto, I find that the application is merited and allow the application subject to s.27 of the Act which provides.

*(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.*

*(2) Where the person appointed to be manager of an estate or guardian of a person under this Part is unwilling to act gratuitously, the court may fix such allowance to be paid out of the estate of the person in respect of whom the manager or guardian has been appointed as, in the circumstances of the case, the court may think fit.*

*(3) Any manager appointed under any other law in force before the Commencement of this Act shall be deemed to have been appointed under this Act as from such commencement, but shall not be required to file any inventory or statement under subsection (1) of section 33 if he has already done so before such commencement.*

*(4) For the purposes of this Act and the Penal Code (Cap. 63), a manager shall be deemed to be a trustee under any other law for the time being in force.*

15. That GMW be and is hereby appointed guardian and next friend of EKW and as the manager of the affairs of EKW.

16. The applicant herein will file a report with the court on the status of the subject and the subject's estate every three months commencing from the date hereof.

17. The Deputy Registrar to work out a calendar of dates and the set up the requisite mentions before the Judge.

No Orders as to costs

**Dated, signed and delivered in open court at Nyeri this 25<sup>th</sup> March 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of: -

Juliet: Court Assistant

Mr. Magoma holding brief for Waweru Macharia

**Mumbua T. Matheka**

**Judge**

**25/3/19**