



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO.44 OF 2018

IN THE MATTER OF K.K. (A PERSON SUFFERING FROM MENTAL DISORDER)

AND

IN THE MATTER OF AN APPLICANT FOR TERMINATION/REMOVAL OF THE LEGAL MANAGERS/GUARDIANS OF THE SUBJECT K.K

OKK.....1ST APPLICANT

MMK2ND APPLICANT

-VS-

JMK1ST RESPONDENT

PK2ND RESPONDENT

CWK3RD RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 27.12.2018 seeking the removal of the three guardians who were appointed to manage the estate of the Subject of these proceedings on the grounds that the said guardians have illegally and unlawfully misappropriated, apportioned and/or used the Estate funds for their own personal benefit and interest.
2. The Application is supported by the Affidavit of OKK, the 1st Applicant in which he has deposed that the Respondents have illegally and unlawfully engaged in acts which are NOT in the best interest of the Subject.
3. THAT on 19.6.2018, the Respondent illegally and unlawfully paid to themselves a sum of Ksh.50,000 from the funds meant for maintenance of the Subject.
4. Further, that on 29.9.2018 the Respondents jointly and/or severally illegally authorized a payment of Ksh.675,000 to [particulars withheld] SACCO LTD for servicing a loan facility that was individually obtained by the 1st Respondent.
5. The 1st and 3rd Respondent filed Replying Affidavits refuting the claims by the 1st Applicant and detailing the efforts they have made to manage the Estate and take care of the subject.
6. The Parties filed written submissions which this Court was duly considered. I find that it is not in dispute that the Respondents were appointed as guardians and managers of the affairs of the Subject who is their sibling.
7. **Section 34** of the **Mental health Act** in detail sets out the reasons as why a guardian can be removed,

34. Removal of managers and guardians

(1) The court may, for any sufficient cause, remove any manager or guardian appointed by it under this Part, and may appoint any other fit person in his place; and may make such order as it considers necessary to ensure that the person removed transfers the property under his care, and of which he was manager, to his successor, and accounts to the successor for all money received or disbursed by him in connection with the property.

(2) The court may also, for any sufficient cause, remove the guardian of a person appointed by it and appoint any other fit person in his place.

8. The provision of **Section 56 of the Trustees Act** grants the court discretion to allow dealing with the trust property. The said Section provides as follows:-

“Where in the management or administration of any property vested in trustees, any sale lease, mortgage, surrender, release or other disposition or any purchase, investment, acquisition expenditure or other transaction is in the opinion of the court expedient, but cannot be effected by reason of the absence of a power for that purpose vested in the trustees either generally or in any particular instance the necessary power for the purpose, or such terms and subject to such provisions and conditions if any, as the court may think fit, and may direct in what manner any money authorized to be expended and the costs of any transaction are to be paid or borne as between capital and income.

2) The court may, from time to time rescind or vary an order made under this Section or may make any new or further order.

3) An application to the court under this Section may be made by the trustees or by any of them or by any person beneficiary interested under the trust”.

9. I find that the Respondents have paid themselves from the estate of the Subject. Their appointment as guardians was for the management of the Estate and they were not supposed to benefit themselves.

10. The Respondents are not fit to be guardians of the Estate of the Subject. I find that the Respondents are in breach of the fiduciary relationship which was imposed upon them by this Court.

11. I accordingly find that there is sufficient cause to remove the Respondents from the guardianship of the Estate.

12. The Respondents did not deny that Ksh.675,000 was used to pay the 1st Respondent's Personal loan.

13. The 1st Respondent did not deny that she quit her job in order to be compensated Ksh.100, 000/- from the estate of the subject.

14. I direct that all the monies the Respondent paid to them be paid back to the estate of the Subject.

15. The Application dated 27.12.2016 is accordingly allowed in the following terms;

(i) THAT the appointment of JMK , PK and CWK as the legal guardians and/or managers of the affairs and Estate of the Subject K. K. be and is hereby terminated and the said guardians are removed.

(ii) THAT OKK and DR. LMM be and are hereby appointed as guardians and/or managers of the affairs of the Estate of K. K, the Subject herein.

(iii) The Respondents are directed to deliver an account of all the money received, and/or paid by them in respect of the Estate of the Subject herein from the date of appointment to the date of handing over to the said new guardians.

(iv) The Cost of the Application shall be paid from the Estate of the Subject.

(v) Mention on 27.5.2019 for compliance.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 26TH DAY OF APRIL 2019.

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI