



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

PETITION CASE NO. 51 OF 2018

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

AND

IN THE MATTER OF AMG (“SUBJECT”)

PETITION FOR GUARDIANSHIP OF AMG AND MANAGEMENT OF HIS ESTATE UNDER SECTION 26(1) AND SECTION 29 OF THE MENTAL HEALTH ACT, CAP 248 OF THE LAWS OF KENYA

RULING

1. By a Petition dated 11/5/2018 and filed on 14/5/2018, the Petitioners herein sought the following orders:

a) That **AMG**, the “Subject” herein be hereby adjudged to be a person suffering from a mental disorder under section 26 of the Mental Health Act Cap 248 of the Laws of Kenya. The Respondent **MW** Ndung’u is the wife of the Applicants’ deceased brother **ANM**.

b) That **JWN** and **EWM**(hereafter the Applicants) be appointed as managers of the estate of **AMG** which includes any such description of moveable or immovable property, money debts and legacies, with powers to execute and sign all deeds and instruments relating to or evidencing the title or right to any property or giving a right to receive money or goods; and proceed to take over and/or institute any litigation or claim(s) and also to include not only such property as has been originally in the possession or under the control of any person but also any property which has been converted or exchanged and anything acquired by such conversion whether immediately or otherwise.

c) That the Applicants be appointed as guardiansto **AMG**.

d) That the Applicants, in their capacities above be hereby granted leave to institute action on behalf of the estate of **AMG** and to execute all court papers necessary for the filing of any litigation on behalf of **AMG** for the preservation, protection and realization of the estate or any of its assets.

2. The Petition is premised on grounds that the “Subject” is senile and in a state of physical and mental deterioration and istherefore incapable of managing and administering his estate, as set out under the Mental Health Act. Contemporaneously filed with the Petition was the Petitioners’ Notice of Motion dated 11/5/2018 supported by the affidavits of the Applicants. The Respondent opposed the motion through two affidavits.

3. The gist of the Applicants’ affidavits is thatthey are biological daughters of **AMG** the “Subject” herein who is 92 years old and suffering senility and therefore unable to conduct any meaningful business transaction. They contended that the Respondent using their late brother’s unlawfully acquired Power of Attorney, has taken over the management of the estate of the “Subject” and has failed to provide sufficient care to the “Subject” while deliberately excluding them. They urged the court to issue an order of injunction in order to protect the estate of the “Subject” and that they be appointed as his managers/guardians.

4. For her part, the Respondent has raised the following matters. She deponed that her deceased husband who was the “Subject”’s son, had been charged with the management of his father’s financial affairs pursuant to a Power of Attorney in his favour. The Respondent contended that she has since the demise of her husband been taking care of the “Subject” and the allegations that she has mistreated him are untrue. She further, stated that the “Subject”’s health is well taken care of; and that there is no conclusive opinion on the mental status of the “Subject”. Lastly, she stated that the Applicant’s motion is unmerited and the prayer to be appointed as managers should not be granted at the interlocutory stage.

5. The Motion was heard by way of written submissionsThe Applicants’ filed their written submissions through their counsel. It was submitted that the Respondent should have invited the Applicants to discuss the best way to manage the affairs of the “Subject” and that all the Applicants want is to take care of their father. Counsel submitted that the medical report from Limuru Nursing Hospital showed the

“Subject” was diagnosed with senile dementia. It was submitted that the Applicants want to manage the affairs of their father as they have noted a deliberate neglect on the part of the Respondent. That they also seek to protect the estate assets from further alienation. The case of ***Giella vs Cassman Brown (1973) EA 358*** was relied upon on the principles applicable in an application for an interim injunction.

6. The Respondent also filed her written submissions. She submitted that the “Subject” is above 90 years of age and suffers from dementia but that he is in good health and that there is no conclusive opinion on the mental status of the “Subject”. It was her contention that the allegations that she has mistreated the “Subject” are untrue as well as the alleged denial to the Applicants of access to the “Subject”. The Respondent further submitted that she has no access to the “Subject”’s income and that her deceased husband had been properly appointed under the Power of Attorney by the “Subject”. Lastly, it was submitted that what is before court is a supremacy battle between biological daughters and daughters-in-law and that the Applicants have not demonstrated that the Respondent has accessed any of the “Subject”’s properties. She urged the court not to grant the prayers sought at this interlocutory stage.

7. The court has considered the rival affidavit material and submissions by the parties. Whereas there is no dispute that the aged “Subject” herein is currently ailing, and for the most part, unable to take care of himself or to manage his affairs, it would appear that much of the disputation in this cause is exacerbated by the fact that no person has been appointed to manage the estate of the “Subject”.

8. In light of the contestation reflected in the affidavits by the parties, the court is of the view that it is urgent that the Petition herein be heard at the earliest opportunity. Substantive issues arising in the Petition have been agitated in the canvassing of the motion, that are key to the determination of the Petition itself. The court is wary of making any determination on these issues at this stage.

9. In the circumstances, the court will direct that an early date be set for the hearing of the Petition. In the meantime, the court will issue an order to the effect that the status quo obtaining in respect of the assets comprising the estate of the “Subject” as of today’s date, is to be maintained. This order binds the Applicants, Respondent and all other members of the “Subject”’s family in equal measure.

10. In addition, the court directs that all rents and income generated from the estate of the “Subject” be deposited directly, by the tenants of the various rental units, into an account to be opened in the joint names of the advocates representing the Applicants and the Respondent, respectively within 10 [TEN] days of today’s date. Within 5 (five days) of the opening of the said account, the parties’ advocates are to jointly serve notice, on all the said tenants, of this order for their compliance. Further, the advocates are to file into court, on a monthly basis, statements of accounts in respect of the said account, on or before every 5th day of each succeeding month, until this Petition is determined or until further orders of this court.

11. Concerning the upkeep of the “Subject”, the court directs that out of the monthly income collected, a sum of KShs.50,000/= (Fifty Thousand) is to set aside for that purpose.

12. For purposes of preparing for the hearing, the court further directs that within 21 days of today’s date, the parties will present the “Subject” at the Mathari National Teaching and Referral Hospital for his examination by a psychiatrist who will file his report into this court. The “Subject” is also to be produced before the court on the date assigned for the hearing of the Petition. The hearing will proceed by way of *viva voce* evidence. The deponents to the respective filed affidavits will adopt their affidavits and be subjected to cross-examination. The advocates representing the parties are to ensure that the orders herein are extracted and served on every member of the immediate family of the “Subject” for compliance.

DELIVERED AND SIGNED AT KIAMBU THIS 21ST DAY OF NOVEMBER 2019

C MEOLI

JUDGE

In the presence

Mr. Wachira for the Respondent

Petitioners – in person