



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

PETITION 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

J W N

E W M.....PETITIONERS

RULING

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

i. "That AMG is 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.

ii. That J W N and E W M be appointed as manager of the estate of AMG which includes any such description of moveable or immoveable property, money debts and legacies, powers to execute, 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 proceeds 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 into or for which the same has been converted or exchanged and anything acquired by such conversion whether immediately or otherwise.

iii. That J W N and E W M appointed as guardian of AMG.

iv. That J W N and E W M hereby granted leave to institute a suit on behalf of the estate of AMG as guardian and to execute all court papers necessary for the filing of any litigation on behalf of and geared towards preservation, protection and realization of the estate of any of its assets."

2. The Petition is premised on the grounds that the Subject is senile and in a stage of physical and mental deterioration and is incapable of managing and administering his estate as set out under the Mental Health Act. The Petition, however, was not supported by a supporting affidavit.

3. On the same day, the Petitioners filed a Notice of Motion dated 11/5/2018. The court ordered that a hearing date for the application be fixed at the registry and the same be served upon the Respondent.

4. Consequently the Respondent filed a **Notice of Preliminary Objection** dated 18/6/2018 based on the grounds that:

a. The Petition as drawn and filed is fatally and incurably defective.

b. The Petition is not grounded on any Supporting Affidavit or any evidence and hence does not lie in law.

5. When the application came up for hearing, the court ordered that the preliminary objection be dispensed with first by way of oral submissions

The Respondent's Submissions

6. Counsel for the Respondent submitted that the Petition is fatally and incurably defective as it is not supported by affidavit and/or medical evidence. He stated that the Petition cannot stand on its own without a supporting affidavit. He urged the court to strike out the Petition.

The Applicants' Submissions

7. Counsel for the Applicants opposed the preliminary objection and stated that lack of a supporting affidavit is not an issue of law. He stated that the pending application was supported by an affidavit sworn by the Applicants, thus the same could proceed and as this is a civil matter, parties could subsequently file an affidavit in support of the Petition.

8. Counsel contended that the Respondent has not stated inability to answer the Petition. He therefore, urged the court that no point of law had been argued

Analysis and determination

9. I have considered the preliminary objection raised by the Respondent in respect of the Petition herein as well as the Petitioners' response thereto.

10. It is a fact that the Petition on record is not supported by evidence, namely, a supporting affidavit, as required. The Petition itself is a plain pleading and in my view cannot stand on its own in a proceeding of this nature which is ordinarily determined on the basis of affidavit evidence.

11. The Petitioners have correctly observed that the motion that was slated for hearing today is itself supported by an affidavit. However, the foundation of the Petitioners' case in my opinion is the Petition. The motion is premised on the Petition. It is therefore obvious that a Petition that is not supported by an affidavit is more or less a defective pleading, for the purposes of these proceedings.

12. Nonetheless, striking out a pleading is a draconian act that ought to be taken in circumstances where a pleading cannot be salvaged. In order to do justice between the parties, I would direct that the Petitioners do within 14 days amend the Petition as necessary and also file a supporting affidavit thereto. Upon filing the amended pleading the Petitioners are to serve the Respondents. A date maybe taken in the registry for the hearing of the motion upon compliance with this orders.

13. Costs of preliminary objection are awarded to the Respondents.

Delivered in open court at Kiambu this 19th Day of June, 2018.

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C. Meoli

JUDGE

In the presence of:

Both Counsels

Nancy Mburu Court Assistant