



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELC CIVIL SUIT NO. 25 OF 2013

FATUMA MOHAMED ALI.....PLAINTIFF

-V-

FNK.....1ST DEFENDANT

BORU DIKA.....2ND DEFENDANT

HENRY KIMATHI.....3RD DEFENDANT

AGN.....APPLICANT

RULING

1. Before me is a Notice of Motion application brought pursuant to Section 26 & 27 of the Mental Health Act CAP 248 of the Laws of Kenya and Section 1A, 1B, 3 and 3A of the Civil Procedure Act filed in court on 11th July 2010, in which the Applicant AGN sought an order for custody, management and guardianship of one FNK herein and substitution thereof. He is identifying FNK as the 1st defendant which is not the case, as the said Festus is 3rd defendant.

2. The application is supported on the grounds on the face of it and in the affidavit of the applicant where he as deponed inter alia that he is the eldest son of the FNK who is an elderly 78 years man who was diagnosed with a medical condition known as Alzheimer's disease, which disease has apparently interfered with his memory. FNK has difficulties expressing himself, and cannot recognize people and places thus rendering him unfit to testify or give evidence in a trial.

3. The application was opposed by the plaintiff and the 2nd defendant who contended that the application was incompetent, misguided and bad in law as it offended the provisions of the Mental Health Act and that the proper channel to ascertain the mental condition of the 1st defendant would be through a court enquiry and that further the court needs to question the 1st defendant in open court to ascertain whether he had difficulties in comprehending matters.

4. The preamble of the mental health Act provides that;

“It is an act of parliament to amend and consolidate the law relating to the case of persons who are suffering from mental disorder or mental sub-normality with mental disorder, for the custody of their persons and the management of their estate.....”

Section 26 of the said Act provides that;

“The court may make orders— for the management of the estate of any person suffering from mental disorder; and for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person”.

5. In **ELC case no 520 of 2012 Eldoret, Isaac Kipkemboi Chesire & 4 others versus Joseph Kimiti Kwamboi & 3 others and Rose Cheruiyot Rono & 3 others interested parties**, a litigant (2nd defendant) had suffered a stroke thus impairing his mental faculties. The court invoked the provisions of the mental health act and stated that

“The law on management of an estate of a mentally ill person is enshrined in the mental health Act. Orders for the

appointment of a person to manage the estate of any person suffering from mental disorder are provided for under section 26 of the mental health act”.

The court while ruling that an application for guardianship is to be made by the High Court under section 2 of the Act stated as follows;

“This court finds that it has not been established that Matilda Sawe is the guardian ad litem of the estate of John Malan Sawe hence the application for substitution is not well founded....”.

6. From the foregoing, **it is clear that an application under section 26 and 27 of the mental health Act ought to be made before the High Court for appointment of a guardian.** The present application is hence unmeritorious. The same is dismissed with costs to plaintiff.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28th NOVEMBER, 2018 IN THE PRESENCE OF:-

C/A: Kananu

Ogoti holding brief for Ondieki for plaintiff

Rimita for 2nd defendant

Gikonyo holding brief for Mutegi for applicant

HON. LUCY. N. MBUGUA

ELC JUDGE