



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**MISC. APPL. NO. 49 OF 2016**

**IN THE MATTER OF THE PETITION BY N W M FOR APPOINTMENT OF GUARDIAN FOR  
S M K**

**AND**

**IN THE MATTER OF A PETITION BY N W M FOR THE APPOINTMENT OF THE  
MANAGERS OVER THE AFFAIRS AND THE ESTATE OF S M**

**N W M.....PETITIONER**

**VERSUS**

**J M M.....RESPONDENT**

**AND**

**M W M.....INTERESTED PARTY**

**JUDGMENT**

1. The subject S M K is about 86 years old and is the husband of M W M (the interested party) and N W M (the petitioner). With the interested party he has 8 children who include the respondent, and with the petitioner he has 6 children. He has 5 other children with M W whom the respondent and the interested party recognise to be his third wife. The petitioner, however, does not recognise her as a co-wife.

2. On 1<sup>st</sup> February 2015, the subject donated a power of attorney to the respondent to receive and recover all money due to him; to settle and adjust all accounts on his behalf; to submit on his behalf any matters to arbitration; to let and hire out his houses; to receive rents and make any recoveries of the same; to commence, prosecute and defend on his behalf any suits or claims; to draw any cheques, bills and promissory notes on his behalf; to buy and sell any movable on his behalf; to borrow or give money on mortgage or immovable property; to apply and obtain shares in any joint stock or companies and to sell and exchange the same on his behalf and to attend any shareholders meetings in person or by proxy and to vote, and to transfer all shares held or thereafter acquired by him. The power of attorney was registered at the Lands Office on 7<sup>th</sup> December 2015.

3. To be able to appreciate the magnitude of this power of attorney one has to consider the extent of the

subject's property which the petitioner estimated to be valued at about Kshs.3.5 billion. It is indicated in paragraph 18 of the petitioner's supporting affidavit to support the petition. The rental property was shown and stated to yield about Kshs.2.5 million monthly. The subject's property also includes [particulars withheld] Limited which operates a hotel at Eldoret. The subject holds 50% of the shares in the company. The petitioner and the interested party own the remaining 50% equally.

4. This petition was filed on 12<sup>th</sup> April 2016. It alleged that about 12<sup>th</sup> February 2016 when the petitioner and the interested party were in India where they had taken the subject for medical treatment, they came to learn from the subject's tenants that the respondent had a power of attorney from the subject and that the power of attorney had vested the management of all properties and businesses to him. According to the petitioner, this power of attorney had been obtained irregularly, fraudulently and through misrepresentation from the subject. This is because, on 1<sup>st</sup> December 2015 when the same was donated the subject was hospitalised at the Nairobi Hospital where he was diagnosed with colon cancer; that he was very sick and unable to understand anything or any legal document or its import due to ill-health and sickness. He was in a lot of pain. During the said period, it was pleaded, he was unable to understand what was happening around him or to his business and/or investments due to memory loss and ill-health. He stated that the subject was suffering from mental illness to the extent that he was not able to make any decision on the control, operations and management of his assets and businesses. The petition was brought for the declaration that the power of attorney obtained by the respondent was null and void for the reasons stated above; a declaration that the subject suffers from mental disorder; that petitioner and interested party be appointed as legal guardians of the subject; that the petitioner and the interested party be appointed as managers of all the affairs of the subject; and there be a permanent injunction restraining the respondent, by himself or through his agents and representatives, from operating or accessing the accounts of the subject at Barclays Bank and Family Bank, or any other bank, and from dealing with any of the tenants of the subjects, including proclaiming or distressing for rent or attaching their property for rent over the subject's property. The application was brought under the **Mental Health Act (Cap.248)**.

5. The petitioner's complaint was that, without reference to her and the rest of the family, the respondent has used the power of attorney to withdraw monies from the subject's account. He has appointed Urban Properties Consultants and Developers Limited to manage the subject's rental properties in Nairobi, and to collect rental income, and had distressed for rent some tenants some of whom have no outstanding rent. Using the power of attorney, he has taken over the management of all the family property without reference or consultation.

6. The respondent opposed the petition and asked that it be dismissed with costs. His defence was that he has a valid power of attorney donated to him by the subject; and that the subject was, and has always been, sane and sober and of sound mind. He stated that although the subject was suffering from physical illness, he has always been of sound mind, and has always carried out conversations with him, the petitioner and the rest of the family; and that he had discussed the issues with all the family members before he donated it to him. Initially, the respondent stated, the subject had wanted to issue the power of attorney jointly to him, his brother H K, sister E G and the petitioner's son G K, but this was opposed by the petitioner who wanted her other son R M to be included. The subject refused and instead appointed him alone to the knowledge of all of them. Lastly, that the subject and the petitioner had had several meetings, and at each time she had sought to persuade him to revoke the power of attorney but that had not been done.

7. The petitioner was represented by Mr. Munge and the respondent by Mr. Wandabwa. Each side filed written submissions on the petition, and was allowed to address the court on the same. I am grateful to them for their industry.

8. The jurisdiction of this court under the **Mental Health Act (Cap.248)** can only be invoked if it is shown that the subject is suffering from such mental illness and disorder that he is not capable of managing his movable and immovable property. In order to protect his estate, therefore, the court has to appoint the petitioner to manage it. This is what **sections 26 and 27** of the **Act** generally provide.

9. The contention by the petitioner was that the subject was not of sound mind at the time he donated the

power of attorney to the respondent. Because the subject was of unsound mind, the power of attorney was null in law, it was argued. She relied on the case of **Grace Wanjiru Munyinyi & Another –v- Gedion Waweru & 5 Others, Civil Appeal No. 116 of 2002** at Nakuru.

10. It should be clear, however, that the petitioner has sought a declaration that the subject suffers from mental disorder and therefore she and the interested party be appointed as managers of all his affairs. Such declaration and appointment attach to the time of the petition. The petition proceeds on the basis that the subject is presently of unsound mind. One can see a two-pronged attack. One, that at the time of the power of attorney he was of unsound mind, in which case the power of attorney is null and void. Two, that the subject is presently of unsound mind, hence the quest for a declaration to that effect.

11. The **Black's Law Dictionary (Eighth Edition)** at **page 1007** 'mental illness' is defined as:-

**“1. A disorder in thought or mood so substantial that it impairs judgment, behaviour, perceptions of reality, or the ability to cope with the ordinary demands of life.....”**

**2. Mental disease that is severe enough to necessitate care and treatment for the affected person's own welfare or the welfare of others in the community.”**

In the authority cited above, the Court of Appeal reiterated that:-

**“The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption. Otherwise no one would be held responsible for their actions. It is also a position in law, and we find persuasive authority for in the Wiltshire Case (supra), that the burden of proof lies on the person who alleges that incapacity.....”**

There is a presumption of sanity in favour of the subject. The petitioner alleges that he was of unsound mind when he donated the power of attorney, and at the time of the petition. The burden to prove the allegation rests on her.

12. To support the claim that the subject was of unsound mind, the petitioner stated that the subject was diagnosed with arthritis, blood clot and kidney failure, among other conditions. He was treated in various hospitals in and outside the country. On 1<sup>st</sup> January 2015 his medical condition worsened and he was airlifted to South Africa and hospitalised at the Mill Park Hospital in Johannesburg where he was in ICU for about 4 months. In March 2015, while still in hospital, he suffered decreased level of unconsciousness, collapsed and suffered a stroke. The attack affected his brain and he had challenges remembering most things. He had challenges making business decisions. Between 23<sup>rd</sup> September 2015 and 8<sup>th</sup> October 2015, between 30<sup>th</sup> November 2015 and 5<sup>th</sup> December 2015 and between 22<sup>nd</sup> December 2015 and 24<sup>th</sup> December 2015 the subject was admitted at the Nairobi Hospital due to continuous ill health and abdominal issues. His condition did not improve and he was diagnosed with colon cancer leading to his referral to India for surgery. Between January and February 2016 he was admitted at the Apollo Hospital in New Delhi in India for further treatment. Following successful operation a permanent colostomy was fashioned. His condition improved and he was returned to Kenya. Between 26<sup>th</sup> February 2016 and 5<sup>th</sup> March 2016 he was admitted in High Dependency Unit (IDU) at the Nairobi Hospital after his condition deteriorated. The petitioner stated further that upon discharge the subject has been subjected to 24 hour nursing care. He has not been able to communicate well, and suffers mental lapses. He is not able to make any business decisions. Lastly, that he currently suffers from multiple organ diseases that have been caused or aggravated by diabetes and several heart attacks. His present medical condition includes cerebral vascular accident, encephalopathy, acute kidney injury, diabetes mellitus, neuropathy, retinopathy, cardiomyopathy and decreased levels of consciousness.

13. The petitioner produced medical reports to support her case. These were the medical reports by Dr J.O. Opolot (Specialist Physician/Pulmonologist) dated 3<sup>rd</sup> February 2015 and 31<sup>st</sup> March 2015, Dr. Robert Mathenge (Heart and Blood specialist, Interventional Cardiologist and Phlebologist) dated 10<sup>th</sup>

March 2016 and Prof. Kiama Wangai (MO – Advocate/Phathologist) dated 8<sup>th</sup> April 2016. Dr Opolot stated that the subject has multiple health complications including diabetes mellitus, encephalopathy, polyneuropathy, hypertension, metabolic syndrome, he is weak and requires sufficient physiotherapy and has been in and out of ICU. He is elderly but a pleasant businessman. However, that:-

**‘His functional status has been fair with him with still active in his business.’**

Dr. Mathenge has attended the subject since 2007. None of the two doctors said that the subject suffers from any mental illness. Unlike the two doctors, Prof. Kiama Wangai did not examine or manage the subject. He gave his medical report dated 8<sup>th</sup> April 2016 based on medical reports that were presented to him. Yet his opinion was as follows:-

**“S suffers from serious kidney, heart and brain conditions. Due to the brain condition ie encephalopathy his memory and higher cognitive functions are generally inhited. He is unable to voluntarily perform mental functions and most importantly cannot be held accountable for the same. This is obviously worsened by the diabetes that he suffers from. He continues to suffer from deteriorating and fluctuating levels of consciousness. Though stable he is unlikely to recover fully from these conditions.”**

14. It is on the basis of this evidence that the petitioner stated that the subject was of unsound mind; that he lacked capacity even at the time of the power of attorney.

15. It is material that the subject was not subjected to any mental status examination by any psychiatrist (**K. -v- K. [2009] eKLR**). In that case the court cited with approval the case of **Re S (FG) (Mental Health Patient) [1973]A11 ER Ch.D. 273** where at page 274 it was observed that:-

**“The functions of the judge under this part of this Act shall be exercisable where, after considering medical evidence, he is satisfied that a person is incapable, by reasons of mental disorder, of managing and administering his property and affairs, and the person to whom the judge is so satisfied, is in this part of this Act referred to as a patient.”**

The doctor who came close to saying that the subject had mental problems was Prof Kiama Wangai. However, he is not a psychiatrist, and did not conduct any mental tests on the subject.

16. It is very serious to allege that a person is of unsound mind or suffers from mental disorder (**Patrick Machira -v- Patrick Kabiaru, HCCC NO. 113/1999 [2000]eKLR**). Even then, the disease of mental disorder varies quite widely, and

**“incompetence to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady from which a person must be suffering.....”**

Degrees of unsound mind vary greatly, with some persons of unsound mind being able to make competent decisions and be able to appreciate the quality of what they are doing. This is why it is of critical importance to receive the evidence of a specialised doctor who has examined the patient as to his mental status. Such evidence was not produced by the petitioner.

17. On 10<sup>th</sup> November 2016 counsel for the parties consented to the bringing into court of the subject for cross examination as to his mental status. The subject was availed on 15<sup>th</sup> December 2016. The court examined him. He was on a wheelchair. He stated his name and where he resides. The court asked him what he was suffering from. He stated as follows:-

**“I have leg problems, have arthritis. I am on wheelchair because of the weakness in the legs”.**

He was asked whether he was able to manage his affairs. He stated as follows:

**“I was in hospital 3 times. I called my family at Garden Estate and told them I wanted to choose one person to manage my property while I was sick. I picked on J M while I supervised him. I was feeling quite sick and old. I am 86.”**

When questioned by counsel (M/s Muthee) for the petitioner he stated as follows:-

**“I see this power of attorney. I recognise my signature. I do not recall when I signed it. I know what I signed. I was handing over my property to my son to manage because I was sick. I was in hospital when I signed it. I was aware of what I was doing. I was with Mrs Waweru when I signed it. “**

When asked by Mr Wandabwa, he stated:-

**“My advocate explained the document before I signed.”**

18. I carefully observed the subject and followed his testimony. It was quite clear to me that he had consciously and knowingly donated the power of attorney to the respondent. He fully appreciated the extent of his illness and, given his age, he wanted the respondent to manage his business under supervision. I find that, considering the totality of the evidence that the parties presented, the subject does not suffer from any mental disorder. He had no mental incapacity at the time he donated the power of attorney to the respondent. I find that the power of attorney donated by the subject to the respondent was valid.

19. The consequence is that the court has no jurisdiction to grant any orders against the subject under the **Mental Health Act (Cap 248)**. The petition dated 4<sup>th</sup> April 2016 and filed on 12<sup>th</sup> April 2016 by the petitioner is dismissed with costs.

**DATED and SIGNED at NAIROBI this 22<sup>nd</sup> day of MARCH 2017.**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 23<sup>RD</sup> day of MARCH 2017.**

**R.E. OUGO**

**JUDGE**