



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 107 OF 2017
IN THE MATTER OF M A C
PETITION FOR GUARDIANSHIP BY N A C AND M I C

RULING

1. N A C and M I C have filed this petitioner seeking orders for Legal guardianship ad litem over the M A C and for the following special powers:-

- a. To immediately access Bank Account No. ***[particulars withheld]*** held at **National Bank of Kenya Limited Harambee Avenue Branch** in the name of **M A C** for purposes of ensuring that her medical expenses and related care and maintenance are taken care of.
- b. To immediately access Bank account No. ***[particulars withheld]*** held at **National Bank of Kenya Kitale Branch** in the name of **M A C** for purposes of ensuring that her medical expenses and related care and maintenance are taken care of.
- c. To access take control and over the affairs of **C I L** registered as **No. CPR *[particulars withheld]*** which powers are to handle the management of any movable properties of the company, power 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 any money or goods and to proceed to take over or institute any litigation and or claims and also to include not only such property as has been originally in the possession or under the control of any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise.
- d. To access take control and over the affairs of **C H L** being registered as no. ***[particulars withheld]*** which powers are to handle the management of any movable properties of the company, power 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 any money or goods and to proceed to take over or institute any litigation and or claims and also to include not only such property as has been originally in the possession or under the control of any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise.
- e. To access take control and over the affairs of **M V L** registered as No***[particulars withheld]*** which powers are to handle the management of any movable properties of the company, power 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 any money or goods and to proceed to take over or institute any litigation and or claims and also to include not only such property as has been originally in the possession or under the control of any property into or for which the same has been converted or

exchanged and anything acquired by such conversion or exchange whether immediately or otherwise.

f. To access take control and over the affairs of **M P L** registered as no. *[particulars withheld]* which powers are to handle the management of any movable properties of the company, power 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 any money or goods and to proceed to take over or institute any litigation and or claims and also to include not only such property as has been originally in the possession or under the control of any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise.

2. The petition is premised on the following grounds:-

i. That M A C (the Patient) has been unwell since April 2017 and was admitted at the High Dependency Unit (HDU) of the Nairobi Hospital where she has been receiving treatment for cancer of the esophagus and other ailments under Admission Number 260649.

ii. That the Patient holds three bank accounts at National Bank of Kenya Limited namely Account number *[particulars withheld]* and *[particulars withheld]* at Harambee Avenue Branch and Account number *[particulars withheld]* at Kitale branch respectively.

iii. That at the initial stage of her hospitalization in May 2017, the Patient was able to independently transfer money to her daughter's account to be used for meeting her medical expenses and incidentals.

iv. That the Patient's Physician namely Dr. Gladwell Kiarie who has been attending to her has confirmed that as a result of her current illness, the Patient is not able to make any decision regarding her affairs nor is she able to sign any documents which includes instruments to facilitate the withdrawals of money to meet her medical expenses and related care.

v. That the subsequent medical bills incurred by the Patient at the hospital were paid directly by the bank to the hospital under the cover of an indemnity signed by some of the Patient's children.

vi. That the Patient lost her husband, the late Chief Justice R Z C in 1999 and has the following living children.

- a. S N C (step son) resident in USA.
- b. E S C (Step daughter) resident in USA
- c. J C (step Son) Resident in Israel.
- d. N A C (daughter) resident in Kenya
- e. M I C (daughter) resident in Kenya
- f. L C (Daughter) resident in USA
- g. S A C (daughter) resident in USA.

vii. That because of the current inability on the part of the Patient to make any decision regarding her general affairs or sign any documentation, and because it is apparent that she is not able to understand or appreciate the consequences of her inability aforesaid, her immediate family have agreed to appoint two (2) of her daughters resident in Kenya namely N A C and M I C (the Petitioners) as her guardians.

viii. That the Patient was most recently discharged on 18th July 2017 and re admitted on 30th July 2017 at the Nairobi Hospital where her medical bills continue to accrue and the family has run out of funds to meet the said medical bills.

ix. That the Patient now urgently requires to travel to India for specialized treatment and further care. It is estimated that the total cost of her care both at the Nairobi Hospital and the treatment in India will be Kshs. 9,000.000/- for an initial period of 8 weeks.

x. That a portion of the monies required for the treatment both locally and abroad can immediately be funded from the Patient's accounts at the Bank but unfortunately the Patient cannot withdraw the same as a result of her impaired ability caused by her debilitating illness.

xi. That the Bank through its Branch Manager at Harambee Avenue has advised the family members that they will not be making any further direct payments from the Patient's accounts to the hospital or any other medical institution or at all without a formal court order authorizing it or a nominated individual (s) to debit any of the Patient account at the bank.

xii. That in the circumstances set out above, it has become absolutely necessary and urgent move the court under Section 26(1) 27 and 32 of the Mental Health Act to facilitate the appointment of the petitioners as guardians of the Patient so as to facilitate the procurement of the urgently needed further treatment locally and abroad for the Patient by the Patient's children.

3. The petitioners in their affidavit reiterate what is stated on the grounds and as attached documents to support their averments.

4. **Dr. Johnson Masika Wafula** in his affidavit dated 15th August 2017 states as follows; that Mrs. M A C has been under his care since 22nd July 2017, when he took over her care from Dr. Kiarie. On the 30th July 2017, the Patient was brought into the emergency unit of the Nairobi Hospital subsequently admitted and remains there to date. That the Patient suffers from a number of ailments. She was diagnosed with Cancer of the Oesophagus on 24th April 2017 and has a malignant tumor situated in the upper third of her esophagus (at 17cm) thus occluding her gut. Consequentially she is unable to swallow solid food and can only sip small quantities of thin liquids (her food has to be blended and liquefied in addition she is on prescribed commercial feeds). She currently has to receive nutrition through a feeding tube (peg) in her small intestine that was inserted surgically on 26th May 2017. That given the location of her tumor (in the upper third of the oesophagus) her capacity to breath is also affected; she is at risk of aspiration (having food particles or liquid entering her lungs and causing infections) and is prone to pneumonia (a condition known as "resting pneumonia") Again as the tumor grows due to its position it may occlude her windpipe as well; in such cases the Patient cannot breathe and is at risk of death by asphyxiation. That due to its location, her tumor is inoperable and is treated by radiotherapy and chemotherapy. That it is not possible at this time to state authoritatively what stage the disease is in as Kenya does not have the requisite medical facilities impeding an authoritative prognosis. That the exact status of the disease can be established through a PET scan the technology for which is not available in Kenya. This technology is however available in several places including India. That currently she is hospitalized due to septicaemia and a bladder infection and is still recuperating from another infection, Viral Meningitis and Encephalitis, which resulted in her last hospitalization from 24th June -17th July 2017. That on 24th -30th June, 2017, she suffered a series of seizures due to the Viral Meningitis and Encephalitis. These seizures have had a neurological impact, resulting in confusion, memory loss, paranoia, speech impairment and impacted her linguistic abilities. Her decision making ability is currently compromised. That due to her three previous hospitalizations she is also physically weak, bedridden, has a bedsore and is unable to perform routine tasks such as standing, walking and bathing. That it is difficult to determine the long term impact of the neurological deficit caused by the Viral Meningitis and Encephalitis at this time. That due to the complexity and multiplicity of Mrs. M C ailments, she is currently undergoing and will require several other courses of treatment. That the sooner the treatment begins the better for the Patient. The cancer is spreading and earlier treatment guarantees better outcomes. It is intended that she travels by 24th August 2017 to have further tests undertaken and commence treatment of the Oesophageal Cancer at the HCG –

Healthcare Global Hospital in Bangalore, India. That due to the fact that she is still recuperating from Viral Meningitis and encephalitis, she still suffers confusion, paranoia, memory loss, speech impediments and is sometimes only able to communicate in mother tongue. She therefore continues to need the support not only of an attendant but also persons familiar to her. When testifying in court the doctor confirmed what is deponed in his statement it is stated further that in his view the patient cannot manage on her own and that she needs to get medical health immediately and decisions have to be made quickly.

5. The petitioners reiterated what is deponed in the affidavit and sought to have the orders granted so that their mother can access medical health in India and that plans have been made to take her to India for the specialized treatment.

6. The application is brought under Mental Health Act Cap 248 which empowers this court to make orders for custody management and guardianship of a person suffering for mental disorder. Under Section 26 of the Act the court may make orders –

a. For the management of the estate of any person suffering from mental disorder; and

b. For the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.

7. M A C is said to be suffering from cancer of the oesophagus which has caused her to be hospitalized after suffering a serious of seizures due to Viral Meningitis and Encephalitis. According to Doctor Masika the seizures have had a neurological impact, resulting in confusion, memory loss, paranoia, speech impairment and impacted her linguistic abilities. Hence making her decision making to be currently compromised. There is an urgent need to take her for further treatment in India as stated by the Doctor. I note that there are consents from the applicant's siblings for the orders sought in this application. I note further that the petitioners have not tendered evidence to show that the shareholders of the companies mentioned in the application have been served. However having noted the state of the patient who is very unwell and is incapable of making her own decision due to her mental state, this court shall partially grant the orders sought by the petitioners pending the production of evidence that the shareholders in the following companies have been notified of the current application, namely; C I L, C H L, M V L and M P L. The petitioners have stated that they need about 9 million shillings for the further treatment of the patient in India. They are unable to raise the money and therefore need to access the patient's bank accounts for the said sum.

8. The Petitioners are hereby appointed the **Legal Guardians** of **M A C**. Pending the hearing of the application on later date when the shareholders will have been served this court shall allow the petitioners to access Bank Account No. *[particulars withheld]* held at **National Bank of Kenya Limited Harambee Avenue Branch** in the name of **M A C** and Bank account No. *[particulars withheld]* held at **National Bank of Kenya Kitale Branch** in the name of **M A C** for purposes of ensuring that her medical expenses and related care and maintenance are taken care of. The petitioner shall only withdraw the sum of **Kshs.10 million** from either of the said account as directed by the Bank. On their return the petitioners shall account for the said sum of Kshs. 10 million and the Court shall give further directions on hearing of the application on the pending prayers (c) to (f). Costs be in the cause. It is so ordered.

Dated signed and delivered this **18th** day of **August 2017**.

R. E. OUGO

JUDGE

In the presence of;

Ms. B. A Ouma **For the Petitioners**

Ms. Charity **Court Clerk**