



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
FAMILY DIVISION MILIMANI LAW COURTS
MISCELLANEOUS CAUSE NO. 160 OF 2017
IN THE MATTER OF K N G
AND
IN THE MATTER OF MENTAL HEALTH ACT,
CHAPTER 248 OF THE LAWS OF KENYA
AND
IN THE MATTER OF THE RIGHTS OLDER MEMBERS SOCIETY
UNDER ARTICLE 57 OF THE CONSTITUTION
R U L I N G

1. The Application now before the Court is brought by a Petition. There are two Petitioners, A K G and A N G Also attached to the Petition is a Chambers Summon. The Chambers Summons seeks the following Orders:

i. THAT this application be heard ex-parte in the first instance;

ii. THAT pending hearing and determination of the petition, this Honourable Court be pleased to appoint A K G and A N G as interim guardians/managers of Kellen Njoki Gachuhi's estate and to thereupon access, make enquiry, take inventory, take control of the listed assets and in addition take all necessary preservatory measures thereto:

iii THAT the Honourable Court do allow the Petitioners/Applicants to take charge of the following assets of the said Kellen Njoki Gachuhi and the proceeds thereof to be utilized for her maintenance and general provision and running the estate.

2. The Application is based on the Gounds which appear on its face and which can be summarised thus:

(a)That K N G "suffers from dementia disease"

(b) The condition is associated with "relentless decline in intellectual function to the point where she has become completely dependent for all her needs;

(c) Her condition led to her admission at Chiromo Lane Medical Centre Bustani Branch

(Lavington, Nairobi).

(d) Due to her condition K N is unable to take care of her assets

(e) Due to the illness K N is unable to look after her affairs and is incapable of independent intellectual judgment

(f) The Applicants are the children of K N G and are therefore in the best position "*to manage K N G's estate in the interests of K N G and her dependants*" (the dependants are not defined); and

(g) THAT the Petitioners, the other children and indeed the entire estate has suffered loss and stands to suffer further irreparable loss and damage if the Petitioners are not appointed as the manager of the estate of the said Kellen Njoki Gachuhi.

3. The property and assets of K N G which are intended to be subject to the orders sought are:

i. Land Title Number Loc. [Particulars Withheld]

ii. Plot No [Particulars Withheld]

iii. Plot No [Particulars Withheld]

iv. Shares in [Particulars Withheld] Co. Ltd

v. Land Title Number [Particulars Withheld]

vi. Land Title Number [Particulars Withheld].

4. The Application is said to be Supported by the Affidavit of A K G and relies on the Grounds in the application and further grounds to be adduced at the Hearing. The Matter was first listed for Hearing on 27th November 2017. Neither the Applicants nor their Advocates attended that hearing.

5. The Applicants have also filed a Petition. It states that the Applicants are a male and a female who live and work in Nairobi. K N G lives in Muranga and that is where her property is situated. The Petition repeats that the Intended Subject has been suffering from dementia disease resulting in a decline in her intellectual function. It also repeats that she was admitted to Chiromo Lane Medical Centre Bustani. They say that the Intended Subject is a person suffering from mental disorder within the meaning of the Mental Health Act. It says that the Petitioners are well versed in the affairs of the Intended Subject and as her children are proper persons to be appointed her guardians. The Petition states that no previous application has been presented for judicial inquiry into the mental capacity of Mrs G. The Applicants are seeking orders that:

a. K N G be adjudged to be a person suffering from a mental disorder under **Section 26** of the **Mental Health Act** and the "Court entrust unto the Petitioner/Applicant the maintenance and general provision for Kellen Njoki Gachuhi. It does not say which of the two Petitioners should be so appointed.

b. The Petitioners be appointed as Managers of K N G's Estate. The information before the Court is that K N is still alive so the interpretation of the phrase her estate is that given in the Mental Health Act. The wording of the powers the Applicants seek is informative of their intention. It is "*THAT the Petitioners be appointed as the Managers of K N G's estate which includes: any such description of movable or immovable property; money; debts; legacies; power to execute or sign all deeds and instruments relating to or evidencing the title or right to any property or giving a rise to receive any money or goods and to proceed to take over and/or institute any litigation and/or claims; also include any property over and/or institute any litigation and/or claims; also including any property as had originally been in the possession or under the control of any other person but*

also any other property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise. The Petitioners also want to take charge over the above listed assets of K N and the proceeds thereof to be utilised for her maintenance.

6. In his Supporting Affidavit, A K G says that the Applicants are two of the 5 Children of K N. He says that his Mother has a "record of mental disorder leading to her being admitted to Chiromo Lane Medical Centre. She was administered treatment by a Dr Pius A. Kigamwa". KNG-3 purports to be a medical report. That provides a suggestion that she was admitted once only. The Applicants claim they will faithfully administer the Estate. K N is said to be unable to look after her affairs and is unable to manage her estate. Paragraph 8 of the Affidavit says; "our siblings have consented to our appointment and to the management of the properties as prayed herein.". There is no evidence of such consent attached to the Application. The Affidavit also states that the husband of K N has passed away but the deponent is unable to provide a date of death and the death certificate is illegible. Further it is certified as a true copy by the Advocate with conduct.

7. The Applicants have not jointed the Intended Subject as a Party to the proceedings. In fact they were hoping the Court would deal with the Chambers Summons Application ex parte. Article 40 of the Constitution provides:

"40. (1) Subject to Article 65, every person has the right, either individually or in association with others to acquire and own property-

a. of any description; and

b. in any part of Kenya.

c. Parliament shall not enact a law that permits the State or any person –

d. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

e. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

f. The State shall not deprive any person of property of any description, or of any interest in, or right over property of any description, unless..."

The Application before the Court seeks orders that if granted would amount to interfering with the K N's right to own and manage her own properties. Before the Court would make such an order the owner of the property has a right to be heard. There are exceptions to that rule and the two principal ones are when the putative respondent lacks capacity either because they have not attained the age of majority or mental incapacity with the result that they are unable to manage their own affairs.

8. The Petitioners allege that the Subject is unable to manage her affairs due to a mental illness and lack of "intellectual function". They are also concerned that will cause detriment to **their** own interests. The Civil Procedure Rules 2010 deal with the question of capacity in Order 32. Order 32, rule 15 provides under the heading; "Application of rules to persons of unsound mind":

"15. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons

1. who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

Law and Procedure

9. The Applicants appear to be making an application for an order for management of the Subject's property and guardianship over her. However, the powers they seek includes the power to sell her assets, without providing any proposals at all about where she will live and continue to be cared for. The Court must ask, is one of the properties they wish to sell, the one she calls home?

Order for custody, management and guardianship

1. 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.

2. Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.

3. Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

10. It is clear from the foregoing that the Applicants are seeking to interfere with the Subject's ownership and enjoyment of her property. They allege that she is unable to take care of herself or her property. Before any decisions are made in relation to that, the Court must first make an adjudication upon K N G's Mental Capacity. The evidence presented to the Court is sparse. The Advocate with conduct of the matter in addition to certifying the photocopy documents exhibited, purports to give evidence contrary to Rule 10 of the Advocates Practice Rules. She says "*That owing to the nature of her illness K N G is unable to look after her affairs and is incapable of independent intellectual judgment*". The Chambers Summons states that "*K N G suffers from Dementia Disease, a condition associated with relentless decline in intellectual function to a point where she has become completely dependant for all her needs and which has led to her admission at the Chiromo Lane Medical Centre Bustani Branch. It also says that "owing to the nature of his illness K N G is unable to look after her affairs and is incapable of independent intellectual judgment". That is different from incapacity.*

11. The Petition states that there has been no judicial inquiry into the mental capacity of K N G. During the Hearing of the Petition the Court was informed that the day to day needs of K N are met by the three workers who live with her in Mur'anga. The Applicants live in Nairobi and see their Mother on the weekend. The frequency or regularity of those visits was not put in evidence. As it is incumbent upon the Court to conduct an inquiry into the mental capacity, the Court can only do so on the evidence placed before it. Mental Capacity in this sense means cognitive functioning. It is not intellectual judgment. In fact judging from the assets she has accumulated the intended subjected possesses both intellectual judgment and cognitive functioning. The evidence place before the Court for it to conduct an inquiry is exceptionally sparse. **Section 107** of the **Evidence Act Cap 46 Laws of Kenya**, provides:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The intended subject has not been produced to the Court, nor any suggestions made as to how the Court could see her. The Application is not even filed in the same County as her residence. The Court is then

presented with a document that purports to be a medical report. The document has been photocopied in a way that obliterates part of the text of the notepaper. It is addressed "To whom it may concern". In the circumstances, it is unclear if the author knows or intends it to be used in Court proceedings. The author did not attend to introduce it into evidence and therefore its contents are not evidence that is properly before the Court. In any event, its content is singularly lacking in any detail that could be of any assistance to the Court in conducting an inquiry. The "report" says that K N was "under our care". The persons who comprise the "our" is not defined. The letterhead gives an address in Aga Khan Hospital and a different one in Nairobi Hospital. There is no explanation as to how and why there is a connection with Chiromo Lane Medical Centre. There is no explanation how a person who is normally resident in Muranga came to be admitted to an institution in Nairobi. Was it voluntary or not? There is nothing to say what are the qualifications of any of Dr Pius Kigamwa. There is no reference to what records were used to make a diagnosis. There is nothing to say whether the diagnosis made in 2015 still endures today. As to the investigations supposedly made, there is no contemporaneous report that resulted from the investigations allegedly made.

12. The "Report" attempts to draw from an MRI and an EEG a diagnosis of dementia with "*a possible underlying mood disorder*". At its very lowest a "possibility" of a characteristic is not a diagnosis. Further the Court takes judicial notice that both dementia and mood disorders manifest themselves in behavioural characteristics and are not usually diagnosed from electronic brain mapping. The "Report" fails to mention even one behavioural characteristic that the intended subject possesses that could give rise to a diagnosis of dementia or mood disorder. In the circumstances, there is absolutely no reliable evidence before the court on which a lack of capacity could be made.

13. The Applicant/Petitioners would like to be appointed guardians and managers over the intended subject and her property. They have not produced any cogent evidence on the agreement of the other family members. They have not demonstrated what qualities make them better disposed to those roles than their older siblings, or anyone else. The real thrust of the Application reveals itself in Ground 4 of the Chambers Summons.

It states

"4. THAT the Petitioners, the other children and indeed the entire estate has suffered and stands to suffer further irreparable loss and damage if the Petitioners are not appointed as the manager of the estate of the said K N G.

Those statements demonstrate very clearly that what concerns the Applicants most is their management of the assets of the Subject and not the care and maintenance of the subject. In the circumstances, the Applicants have placed before the Court a scenario where their own interests are at odds with the interests of the Subject. In the circumstances, they have failed to demonstrate to the Court that they are fit and proper people to manage their Mother's assets were she to be in a situation to need them to do so. The Applicant's Advocate did not call them to give evidence relying entirely on their untested Affidavits with the shortcomings identified above.

14. For those reasons the Application is dismissed.

Order accordingly,

Order accordingly,

FARAH S. M. AMIN

JUDGE

Dated, Signed and Delivered in Nairobi, this 21st day of December 2017

In the presence of Court Clerk: Patrick Mwangi

