



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2016

J N K.....SUBJECT

AND

J W M.....1ST PETITIONER

P G K.....2ND PETITIONER

-VERSUS-

M N G.....RESPONDENT

R U L I N G

1. This matter was filed by the Petitioners **JWN** and **PGK** being a daughter and brother respectively of the Subject **JNK** in the wake of a family dispute regarding the welfare of the subject, the management of his estate and access to him by the Petitioners.

2. The Respondent is the 1st Petitioner's mother and wife to the Subject. There are other adult children sired by the Subject and the Respondent, who on the face of it, are aligned to the Respondent. The subject is debilitated by a chronic medical condition and is therefore unable to manage his affairs or take care of his own welfare. At the urging of the court, the parties agreed to engage in deliberations with a view to an amicable settlement.

3. On 5/5/2016 a consent was recorded by the parties to the effect that the 1st Petitioner, the Respondent and a son of the Subject, **JMN** be appointed as legal guardians of the Subject. Subsequently, an estate agent, one **Peter Kingori T/A Snow white Commercial Agencies** was appointed to manage rental properties of the subject. The said agent was required to file half-year reports into court with effect from 10th November 2016.

4. The Respondent's advocate fixed a mention of the matter on 21//7/2016. On that date he sought an order to access the accounts of the Subject for purposes of his maintenance. Counsel for the Respondent while not objecting, requested that an affidavit setting out the exact requirements be filed for purposes of accountability. The court ordered that an affidavit be filed indicating the needs and amounts required to be withdrawn and from which account.

5. Thus on 25th July, 2016 an affidavit jointly sworn by the Respondent and her son and co-guardian **JMN** was filed into court. The affidavit identifies an account of the subject holding a substantial sum of

money. The deponents further state that they require a sum Kshs 300,000/= monthly for the maintenance of the subject, and payments of rates and licences, presumably for the subject's business premises. An additional sum of Kshs 5 million they also stated, is required for the "further development" of the rental houses and business premises comprising the estate of the subject.

6. Attached to the affidavit was a copy of a Bill of Quantities in respect of Plot No 1144/[particulars withheld] Naivasha, authored **Denver -De- Planners Limited** and dated 15/11/2015 and bank statements in respect of the identified bank account for January, 2016.

7. In response to the said affidavit the 1st Petitioner swore her own affidavit stating that she had not been consulted on the matters raised in the affidavit of her co-guardians. She asserted that bank statements, demand notes, invoices and architectural plans related to the request for funds be tendered to the court as justification thereof.

8. Counsel for the parties addressed me on the matter on 28/7/2016. Mr. Waigwa for the Respondent argued that the estate of the subject ought not to be left to go to waste and hence the request for funds to complete the development as indicated in the Bill of Quantities. He urged the court to also make provision for the upkeep of the subject. He asserted that all proceeds from the estate currently go into a bank account hence the Respondent of the subject has no access thereto.

9. Mr. Kimani for the 1st Petitioner emphasised upon the welfare of the subject who he described to be at the mercy of the court. In his view, the development funds being sought are excessive. He cast doubt on the expertise of the Respondent and **JMN** in construction works and insisted on the need for full disclosure, regarding the proposed development. Alternatively, he urged that the said monies be released into the joint account of the co-guardians for accountability purposes. However, he had no objection to the sum of Kshs 300,000/= being paid for the maintenance of the subject.

10. The court has considered the material canvassed through affidavit evidence and oral arguments by counsel. The motion commencing this action was brought under Section 26 (1) b of the Mental Health Act which states that:-

"1) The court may make orders:-

a)

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

11. The said application was effectively compromised by the consent order through which, the three legal guardians were appointed by the court, in respect of the subject. A real estate agency to manage the rental premises owned by the subject was also appointed by mutual agreement of the legal guardians. None of these persons were simultaneously appointed as managers of the estate of the subject's estate in the manner anticipated in Section 26 (1) a and Section 27 of the Mental Health Act.

12. In my opinion, much of the controversy generated by the present application arises from the assumption that the legal guardians are simultaneously the duly appointed managers of the estate of the subject. While it is possible under the Act for the two roles to be conflated and combined in one person, in this case no such order has been made in respect of the legal guardians.

13. In the circumstances, whether justifiable or not, there can be no basis for this court allowing large sums of money to be released from the estate of the subject to the legal guardians whether separately or severally, for the stated purpose of investment in construction or development.

14. Besides, the court has not been provided with an inventory of the assets of the estate in order to consider whether such an investment is prudent: nobody can tell how long the subject will require maintenance, including medical care, or whether his medical costs and care may involve higher

expenditure in the future.

15. An order for the development expenditure as sought by the two co-guardians must not only firstly preceded by their formal appointment as managers by this court, but also secondly, a well grounded application. In the circumstances I decline the prayer for the release of Kshs 5 million for the proposed development of the estate of the subject.

16. With regard to the request for maintenance, of the subject, there is no dispute that this is necessary. There is no contention regarding the sums sought as monthly maintenance for the subject. This court is empowered under Section 28, 29 and 30 of the Act to make appropriate orders for the maintenance of a subject.

17. I do order therefore that a sum of no more than Shs 300,000/= be withdrawn from the account number 07278.....(withheld) at the Barclays Bank Naivasha, on a monthly basis for the maintenance of the subject. Parties are at liberty to apply as necessary by way of formal applications rather than approaching the court by way of mention as happened in this instance. Parties to bear own costs.

Delivered and signed at Naivasha this **29th** day of **July, 2016**.

In the presence of:

For 1st Petitioner Mr. Mburu for Mr. Kimani

For 2nd Petitioner

For Respondent : Mr. Waigwa

Court Assistant : Barasa

C. W. MEOLI

JUDGE