



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**PETITION NUMBER 15 OF 2014**  
**IN THE MATTER OF THE MENTAL HEALTH ACT**  
**CAP 248, LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF V.M.L**  
**(A PERSON SUFFERING FROM MENTAL DISORDER)**  
**AND**  
**IN THE MATTER OF AN APPLICATION BY J.L.L AND H.P.L TO BE APPOINTED**  
**GUARDIANS**  
**OVER THE AFFAIRS AND MANAGERS OF THE ESTATE OF THE SAID V.M.L**  
**J.L.L.....1<sup>ST</sup> PETITIONER**  
**H.P.L.....2<sup>ND</sup> PETITIONER**  
**AND**  
**WALNET ENTERPRISES LIMITED.....INTERESTED PARTY**

**JUDGMENT**

By an amended petition dated 19<sup>th</sup> September, 2014 and filed in court on 24<sup>th</sup> October, 2014, the petitioners invoked **sections 26, 28(1) and (2) of the Mental Health Act, Chapter 248, Laws of Kenya** and sought the following prayers:-

“

*i. This Honourable Court to be pleased to appoint the Petitioners as Guardians of the affairs of V.M.L in accordance with the Mental Health Act with power to sign and file court documents, enter into a deed for family settlement and release on behalf of V.M.L and to carry out other incidental and general functions of V.M.L;*

***ii. This Honourable court be pleased to appoint the Petitioners as Managers of the estate of V.M.L in accordance with the Mental Health Act with special permission pursuant to section 27(1) (a) of the Mental Health Act to mortgage, charge, or transfer by sale, gift, surrender, exchange or otherwise any immoveable property of which the estate may consist; and***

***iii. The costs of this amended petition be borne by the Petitioners.”***

The petitioners are adults of sound mind who reside and work in Kenya while the interested party is a company duly registered as such under the provisions of the **Companies Act, Chapter 486** Laws of Kenya.

The petitioners are the sons of the subject, VML who is stated to have been born in 1940.

The basis of this petition is that VML has been diagnosed of a mental disorder; she said to have suffered a minor stroke in the year 2011 and subsequently suffered a brain haemorrhage in 2012. Her condition had deteriorated since then and at the time of lodging this petition she had been hospitalised at Nanyuki Cottage Hospital. The consultant physician attending VML at the hospital had certified her as suffering from Alzheimer’s disease which has incapacitated her ability to make rational judgments or decisions for her wellbeing; in the consultant’s opinion VML suffers from a mental disorder.

The petitioners state that in July, 2014, the subject and her only sibling K.H.O being joint registered proprietors of the petitioners’ family home known as **LR Nos. 5830/7 and 5954/2** agreed to sell this property to the interested party at a price of **Kshs. 1,050,000,000/=**; however, because of the subject’s illnesses and in particular, her mental disposition, she could not complete the contract hence the petition for special permission from this court to complete the transaction.

The petition was supported by the affidavits of the petitioners respectively sworn on 19<sup>th</sup> September, 2014; in their affidavits, the petitioners reiterated the contents of their petition that their mother’s mental condition has deteriorated since 2011 when she suffered a minor stroke and subsequently sustained a brain haemorrhage in the year 2012. The petitioners are also aware that in July, 2014, their mother and her brother entered into an agreement for sale to dispose of the family property which is currently registered in their joint names. The property is being sold to the interested party and the petitioners intend to use the proceeds (certainly part thereof) from the sale to cater for the expenses arising from VML’s treatment and care at Nanyuki Cottage hospital where she is currently admitted.

Besides the petitioners’ depositions, the consultant physician who is said to have been attending to VML testified under oath on the VML’s mental status. He testified that he had examined VML and made some findings which drove him to conclude that VML’s ability to make any logical decisions is completely lost as evidenced by her poor judgment. In order to appreciate the doctor’s opinion it is ideal to reproduce it here verbatim:-

***“4<sup>th</sup> September, 2014***

***RE: MEDICAL REPORT ON MRS VL***

***V is an elderly lady admitted at Nanyuki cottage hospital where she is undergoing medical care for Alzheimer’s disease. She was done for medical evaluation by me on the 3<sup>rd</sup> of September, 2014, regarding her ability to make sound judgment. Her mental state exam was therefore carried out with the following findings.***

***APPEARANCE: an elderly lady who though wearing a good hospital gown looks unkempt with food spillage on the same. She is however in good nutritional status.***

***ATTITUDE: V had a poor attitude throughout the session hardly paying any attention to the discussion.***

**BEHAVIOUR:** *She had bizarre mannerisms throughout the session including frequent walkouts while evaluation was still on. She too had some fine tremors on the extremities.*

**MOOD AND EFFECT:** *She had a euphoric mood associated with an incongruent affect.*

**SPEECH:** *had an incomprehensible speech laced with echolalia and palilalia.*

**THOUGHT PROCESS:** *had poverty of thought associated with thought preservation,*

**THOUGHT CONTENT:** *Had no delusions or phobias but had an obsessive compulsive behaviour.*

**PERCEPTION:** *Didn't have hallucinations or illusions*

**COGNITION:** *She was disoriented in place time and person, with poor attention and concentration. She also had both immediate and recent memory loss.*

**INSIGHT:** *Had no insight in her current situation.*

**JUDGMENT:** *This was completely impaired.*

**CONCLUSION:**

*Having evaluated this patient, the findings on mental exam are consistent with global mental impairment associated with Alzheimer's disease. Her ability to make any logical decisions for her well-being is completely lost as evidence by her poor judgment.*

**THEREFORE VL IS INCAPABLE OF MAKING ANY RATIONAL JUDGMENT OR DECISIONS FOR HER WELL BEING UNDER THE MEDICAL HEALTH ACT.**

**Signed:**

**Dr. Obilo Milton Achieng**

**CONSULTANT PHYSICIAN, PHYSICIAN CENTRE, NANYUKI"**

Dr. Obilo testified that he graduated from Moi University with a bachelor's degree in medicine in 1988 and obtained his masters degree from the University of Nairobi; he majored in internal medicine, a field in which he is currently a specialist physician and practising as such at Nanyuki town. Of all that the doctor said in his report, it his verdict on the VML's mental status that is more material to this petition.

It is apparent from the doctor's report that VML is suffering from a mental disorder from which she is unlikely to recover. The law governing the custody of patients such as VML, their guardianship and the management or disposal of their estates is the **Mental Health Act, Cap 248. Section 26** of that Act provides:-

**26. 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) Where upon 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.**

In the face of the evidence that VML is suffering from a mental disorder, a medical condition contemplated under **section 26 of the Act**, and is thus incapable of managing her own affairs and due to this condition there is a likelihood that she may act in a manner that offends public decency, I am satisfied that the petitioners have made out a case for their appointment as the guardians of VML and managers of her estate.

The petitioners and the doctor told the court that VML is admitted in hospital and in the doctor's opinion, her deteriorating condition is irreversible. I understood the petitioners to say that for as long as VML is alive she will remain under specialised care and treatment and they therefore intent to dispose of the patient's estate to cater for the expenses that would ordinarily come along with such care and treatment. The powers of a manager appointed under **section 26** of the Act in dealing with the property of a person who because of a mental disorder is incapable of managing his or her own affairs are provided for in **section 27 of the Act**. **Section 27(1) (i) (a)** is particular that the manager so appointed may alienate or dispose of the estate through any of the prescribed means including selling it in the manner proposed by the petitioners but subject to a special authorisation from the court; it provides as follows:-

#### **27. Power of manager in respect of estate**

**(1) Where a manager is appointed under this Part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper regard being had to the nature of the property whether movable or immovable, of which the estate may consist:-**

**Provided that—**

**(i) a manager so appointed shall not, without the special permission of the court—**

**(a) mortgage, charge or transfer by sale, gift, surrender, exchange or otherwise any immovable property of which the estate may consist;**

**(b) ...**

**(c) ...**

**(ii) ...**

**(2) ...**

**(3) ....**

**(4)...**

**Section 26** which has been quoted hereinbefore and **section 29** of the Act suggest that one of the reasons

why it may be necessary to dispose of the property of a person suffering from a mental disorder is to apply the proceeds thereof for the maintenance of the patient. The petitioners in this petition want to dispose of the family property for this purpose and in view of these provisions as read with **section 28** of the Act, their intentions are quite legitimate.

As matter of fact VML herself was party to the contract for sale of this property at the initial stages of the transaction and it is apparent from the petition that she had even executed the agreement of sale; what is not clear is whether at the time of executing the agreement disposing of her property in July, 2014 VML was in contemplation of her future maintenance needs and if so whether she was in complete control of her faculties at the time. I could not find a possible answer from the doctor's evidence or even the petitioners' because according to their evidence VML condition started deteriorating way back in the year 2012 if not 2011. Considering, however, that I have already found that VML is medically certified to be suffering from a mental disorder, nothing much turns on this question as far as the determination of this petition is concerned and I would do well if I left it to the contracting parties.

From the available evidence, it suffices to say that the petitioners' quest to sell VML's property for the specified purpose is consistent with the law and I do not see any reason why they should not be authorised to do so. It is noted, however, that the property is being sold for **Kshs. 1,050,000,000/=** which sum is colossal by any standards. Although no evidence was proffered on the costs or expenses that the petitioners have incurred or are likely to incur on VML's treatment and general maintenance I highly doubt that these needs will require such a tidy sum. It would be appropriate, and I so order, that out of the total proceeds from the sale of the family property the petitioners shall apply only such a sum as is necessary for the treatment and maintenance of VML. The rest of the money or VML's share thereof (considering that the property is jointly owned) shall be kept in an interest earning bank account in the joint names of the petitioners on behalf of and for the benefit of VML. This order is informed by the provisions of **subsection (4) of section 27** which states:-

***(4) For the purposes of this Act and the Penal Code (Cap. 63), a manager shall be deemed to be a trustee under any other law for the time being in force.***

This provision of the law creates a trust relationship between the petitioners and VML and thus the property vested in them in the circumstances of this petition can only be held on behalf of and for the benefit of the *cestui que trust* who in this case is VML.

For the foregoing reasons I would allow the petition amended on 23<sup>rd</sup> day of October, 2014 and for avoidance of doubt I hereby make the following specific orders:-

1. The petitioners are hereby appointed the guardians of VML and the managers of the affairs of her estate.
2. The petitioners are granted special permission to sell the property known as **LR Nos. 5830/7 and 5954/2 currently** registered in the joint names of VML and K.H.O provided that:-
  - a. The proceeds of the sale shall be kept in an interest earning account in a reputable bank or financial institution in the joint names of the petitioners or in the joint names of the petitioners and K.H.O; and
  - b. Only such sums as are necessary for the treatment and maintenance of VML shall be withdrawn from the account aforesaid in 2(b) above and applied for that purpose.
  - c. The petitioners shall file in this court quarterly returns of the status of VML's estate and the first quarter for this purpose shall commence on the first day of the completion of the sale.
3. Parties are at liberty to apply

4. The costs of the petition shall be borne by the petitioners.

**Signed, dated and delivered in open court this 29<sup>th</sup> day of May, 2015.**

Ngaah Jairus

**JUDGE**