

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISC. APPLICATION NO.5 OF 2014

IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248

AND

IN THE MATTER OF CIVIL PROCEDURE RULES 2010

IN THE MATTER OF SILAS WANGA MASIBO AILING AND OF UNSOUND MIND

AND

**IN THE MATTER OF AN APPLICATION TO RECEIVE PROPERTY OF A PERSON OF
UN SOUND MIND**

EMILY NAFULA MAKHANU EX-PARTE APPLICANT

RULING

1. By a Notice of Motion dated 27th January, 2014, the Applicant Emily Nafula Makhanu applied under Section 26 (I) (a) (b) of the Mental Health Cap. 248 of the Laws of Kenya to be appointed a guardian ad litem of Silas Wanga Masibo whom she alleged was of unsound mind. She also sought to be allowed to access and receive properties belonging to the said Silas Wanga Masibo (hereafter “the Patient”) including monies held in account Nos.[particulars withheld] held Co-operative Bank, Bungoma Branch.
2. The grounds upon which the application was made were contained in the body of the Motion and the Affidavit in support of Emily Nafula Makhanu sworn on 27th January, 2014. these were that; the patient was of unsound mind within the meaning of the Mental Health Act; that the patient was unable to make decisions for himself; that she was the wife of the patient and needed to access the monies in the cited accounts to be able to take care of the minors who were children of the patient who numbered seven (7). She swore that since the patient became ill, she had been unable to provide for the family. She produced a letter from one B. M. Soita, Assistant Chief, Central Namwela sub-location confirming the foregoing. She also produced a letter from the Officer-in-charge, Kaptanai Dispensary, Sirisia, dated 30/08/2013 stating that the patient was suffering from mental illness.
3. Being not satisfied with the letter from Kaptanai Dispensary, Sirisia, on 6th March, 2014, I directed that the alleged patient be taken to Bungoma District Hospital for mental examination and directed the matter to be heard on 07th April, 2014. On the said 07th April, 2014 although the application was defective, being a motion and not a Petition in terms of the Mental Health Act Cap 248 Laws of Kenya, I decided to hear the matter through viva voce evidence. I heard a total of three witnesses.
4. PW1, Emily Nafula the Applicant told the Court that he is a wife of the patient having been married to him in 1994. That the patient lives with his brother one Fred Watiti at Namwela while she lives with the children at Chwele.
5. PW2, Isaac Mafufwa Sitati, the Chief of Namwela Location told the Court that the patient had three other wives who however were no longer living with him. That out of his previous marriages, he had 10 children apart from the seven (7) from the Applicant. That his son known as Davies had been assisting the patient who was now aged 61 years. He said that he knew the patient as he was both his cousin and a neighbour. That he had accompanied the patient to hospital where the patient was only adjudged to be suffering from depression. That the patient had retired from his employment because of depression. That

PW1, the Applicant contributed to the depression because she run away from the patient and eloped with another man at Namutokholo. That the Doctor had advised that the patient be moved to another environment that is less depressing.

6. The other witness who testified was Jafred Wataka, the father of the patient. He reiterated the evidence of PW2 and further stated that his son (patient) was not insane. But was only having stressful thoughts. He was of the view that Davies and Peninah, the children of the patient from the earlier marriages can take care of the patient. These children were in court and the court saw them.

7. After having considered the evidence and the medical report of Dr. Ombogi, the court made the following orders:-

- a) That the contents of the application by Emily Nafula dated 27/01/14 was misleading.
- b) That although the patient had not been adjudged insane in terms of the Mental Health Act, he has a mental condition which requires attention.
- c) That the patient needs to be taken care of both socially and financially.
- d) That the court would consider the evidence and make a suitable order under the Mental Act.

8. I have considered the evidence and the Medical Report of Dr. Ombongi dated 3rd April, 2014. I have considered the circumstances under which the depression of the patient occurred. Since the patient has other elder children who are willing to take care of him and who attended court at the hearing, further for the conduct of the Applicant, who failed to disclose material particulars in her application, I am minded to order as follows:-

- a) Silas Wanga Masibo is a patient with a mental condition that requires attention.
 - b) I appoint Peninah Naliaka the guardian of Silas Wanga Masibo – with power to receive and manage the patient's estate.
 - c) However, for purposes of operating the Accounts belonging to Silas Wanga Masibo held at Cooperative Bank, Bungoma Branch, namely [particulars withheld] and [particulars withheld], she shall operate the same JOINTLY with Davies Simiyu and Emily Nafula Makhanu.
 - d) The proceeds from the accounts set out in (c) above shall be applied as follows:-
 - i) Towards the medical expenses of the patient and his upkeep by his Guardian Penina Naliaka.
 - ii) The school fees of the patient's school going children.
 - iii) For the up-keep and maintenance for Emily Nafula Makhanu and her children.
 - iv) For the upkeep and maintenance of the patient's children who are below the age of 18.
 - v) May be invested in any investment that the guardian shall consider necessary and appropriate for future returns to meet the purposes set out in (i), (ii), (iii) and (iv) above.
 - vi) There is liberty to apply.
 - vii) Costs in the cause.
- It is so ordered.

DATED and DELIVERED at Bungoma this 26th day of May, 2014.

A.

MABEYA

JUDGE