

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION N0.4 OF 2014

PAUL THUO GIKONYO.....1STPETTITIONER

GRACE WANJIKU GIKONYO.....2NDPETITIONER

MARGARET WAMBUI NJUGUNA.....3RD PETITIONER

VERSUS

CAROL MWIHAKI GIKONYO.....1ST RESPONDENT

DAVID MBUGUA GIKONYO.....2NDRESPONDENT

RULING

Simon Gikonyo Ndirangu, the subject of these proceedings under the **Mental Health Act**, is an old man aged 84 years. He owns substantial property in Nairobi and its environs. According to the Petitioners, the said properties accrue rental income of approximately Kshs.2 million per month. A dispute has arisen between the Petitioners and the Respondents (the children of the deceased) in regard to how these properties are to be managed. This is because the subject has been diagnosed with Alzheimer’s Dementia. According to a medical report dated 21st March 2013 prepared by Prof. Paul Kioy, a neuro-surgeon:

“He [the subject] suffers from Alzheimer’s Dementia which has significantly incapacitated his decision making and general intellectual performance. In this situation he is incapable of looking after himself and is dependent on his family for all activities of daily living. He is therefore incapable of executing any intellectual activity or decision. He will not be expected to get better at all beyond his current state and will indeed get worse. He will therefore of necessity have to delegate all his responsibilities. He continues to be under our care and further evaluation and reports can be provided periodically and on request.”

Apart from this debilitating ailment, the subject suffers from other illness common with people of his age. He is medically attended to by many doctors including, Dr. Gikonyo and Dr. Gudka. The Petitioners’ complain that the Respondents, particularly the 1st Respondent, have not taken good care of the subject. The Petitioners are apprehensive that unless the court intervenes and gives directions in regard to the manner in which the subject shall be attended to medically, the subject would be in danger of being subjected to neglect. In particular, the Petitioners stated that the 1st Respondent had denied them access to see the subject. The Petitioners therefore want the court to make orders that would, firstly, provide for the well-being of the subject, and secondly, protect the properties of the subject from wastage. In response to the Petitioners’ concern, the 1st Respondent swore a replying affidavit in opposition to the application by the Petitioners. The 1st Respondent denied the assertion by the Petitioners to the effect that she had neglected the subject. She deponed that since she took over the care of the subject, she had taken good care of the subject together with his wife Mary Wangui Kuria. She narrated how she had medically taken care of the subject by taking him to hospital when required. She had also ensured that the subject is taken care of at home by employing two (2) servants who constantly keep watch over him. As regard the management of the properties of the subject, the 1st Respondent deponed that she stepped in when it became apparent that the Petitioners, especially the 1st Petitioner, was mismanaging the properties without giving account. It was for that reason that the 1st Respondent was of the view that the application lacked merit and should be disallowed.

During the hearing of the application, this court gave direction to the effect that the only issue that would be considered, in the first instance, is in regard to who should be appointed to be the guardian of the subject and secondly who should be appointed to manage the estate of the subject as provided under **Section 26** of the **Mental Health Act**. There is no dispute that the subject is a person suffering from mental disability. The medical report by Prof. Kioy is categorical: the subject lacks mental capacity to take care of himself and his affairs. There is a dispute between the Petitioners and the 1st Respondent in regard to who should be appointed to be the guardian of the subject during this period of his mental incapacity. The Petitioners have argued that they are the right persons to take care of the subject because they had previously taken care of him before the 1st Respondent came into the scene after relocating from the United States of America.

On her part, it was the 1st Respondent's case that she was the right person to take care of the subject. In this regard, she was supported by the wife of the subject Mary Wangui Kuria who stated that she was satisfied with the manner in which the 1st Respondent was taking care of the subject. Upon evaluating the rival facts of this application, it became apparent to the court that the persons who shall be appointed to be the guardians of the subject shall be his wife, Mary Wangui Kuria and the 1st Respondent, Carol Mwihaki Gikonyo. During the hearing of the application, the court had the opportunity to see the subject. The subject appeared well taken care of. He was well groomed. He kept close to his wife. He was constantly in communication with his wife. She kept reassuring him and generally making him comfortable. It was obvious to the court that the subject was not in a mental situation to take care of himself. It is important and imperative that the subject be kept in a familiar environment that he is used to. This court cannot remove the subject from the environment that he has comfortably lived in the recent past. It would be cruel for this court to remove the subject from the care of his wife. The concerns raised by the Petitioners in regard to the subject's care, in the opinion of the court, will be addressed by this court giving the Petitioners the right to access the subject once every week. If the Petitioners shall be dissatisfied with the manner in which the subject is being treated, they shall be at liberty to apply to the court for appropriate orders.

In the premises therefore, this court appoints Mary Wangui Kuria and Carol Mwihaki Gikonyo to be the guardians of the subject under **Section 26(1)(b)** of the **Mental Health Act**. The two (2) shall be incharge of the day to day care of the subject. They shall also be incharge of his health care. They are appointed his primary care-givers. The 1st and 2nd Petitioners shall have unimpeded access to the subject on each Wednesday between 9.00a.m. and 5.00p.m. The 2nd Respondent shall have unhindered access to the subject on Saturdays between 9.00a.m. and 5.00 p.m. The guardians shall present to the Deputy Registrar of the court monthly reports on the health status of the subject until further orders of this court. Such report shall be filed on or before the 30th of each month beginning 30th September 2014.

As regard the management of the estate of the subject, this court temporarily appoints Mary Wangui Kuria and Carol Mwihaki Gikonyo to manage the said estate. They shall do so pending the hearing and determination of the application filed by the Petitioners seeking orders from the court on who shall be entitled to administer the estate of the subject. The court will hear the application on **3rd September 2014** during the High Court vacation. Before the hearing of the application, both the Petitioners and the Respondents are ordered to provide the court with an inventory of all the properties of the subject, including the particulars of each property, and the rental incomes received from each property. This information will enable the court to make an appropriate order in regard to how the estate of the subject shall be managed. Either party shall be at liberty to apply. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JULY 2014

L. KIMARU

JUDGE