



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO. 297 OF 2011

In the matter of the Mental Health Act, Cap 248

AND

In the matter of B M K, Subject

VALENTINE KONGO.....PETITIONER

R U L I N G

This is a **petition** (wrongly filed as chamber summons) **dated 7th July, 2011** (made under **sections 26 and 28** of the **Mental Health Act, Cap. 248**) brought by **V K (Petitioner)**. It is in respect to one **B M K** (hereinafter called the **Subject**).

The petition seeks the main order that the Petitioner be appointed the “manager” of the Subject’s estate with powers-

1. To file a civil suit as next friend for damages for personal injuries suffered by the Subject in a road accident which occurred on 26th September, 2008 and which resulted in the Subject’s mental impairment.
2. To operate the Subject’s bank account No.(particulars withheld) in Standard Chartered Bank “and sign all necessary documents”, including cheques, withdrawal slips, loan or advance application forms, banker’s cheques, application forms, money transfer forms or any other relevant documents to facilitate payments for:
 - (a) treatment;

(b) house rent;

(c) food and sundry expenses;

(d) salary for nurse-aid and house-help; and

(e) filing suit.

The petition is made upon the following grounds appearing on the face hereof:-

1. That the Subject suffered a traumatic brain injury following a road traffic accident on 26th September, 2008 and cannot since then comprehend happenings around him.
2. That as a result of the brain injury the Subject does not have any “speech and language” and therefore cannot prosecute the claim he intends to file in court competently.
3. That the Subject is incapable of managing his own affairs, particularly to sign cheques and bank withdrawal slips, and he cannot recall his ATM Pin to enable him pay for his house rent, food and treatment.
4. That because of the brain injury he suffered, the Subject is now of unsound mind, and the order sought ought to be granted.

The petition is supported by the affidavit of the Petitioner to which some five (5) medical reports and other documents are annexed. There are also three supplementary affidavits, one sworn by the Petitioner and two by the Petitioner’s advocate.

On 28th July, 2011 I examined the Petitioner and the Subject’s eldest brother, **JK** under oath. On the same day I also closely examined the Patient, but not under Oath. I have also carefully considered the submissions of the Petitioner’s learned counsel.

The Petitioner is an elder sister of the Subject. Her testimony, as well as that of J K, is that the Subject is about 42 years old, is not married and has never been married, and has no children. At the time of the accident he was working with **K Ltd** as an electrical engineer.

The Subject’s marital status was also confirmed by his other two siblings who work outside Kenya. They are Dr. V K, PhD who works in Dar-es-Salaam, Tanzania, and C K K who works in Kigali, Rwanda. They each sent an e-mail (through the Petitioner’s advocate) to the court.

Part XII of the Mental Health Act (comprising **sections 26 to 39**) provides for judicial power over persons and estates of persons suffering from mental disorder.

Under **section 28(1)** of that Act, the High Court may upon application made to it by petition concerning any matter connected with a person suffering from mental disorder, or with his estate, make such order, subject to the Part, regarding such application as, in the circumstances of the case, the court may think fit.

Section 26(1) and **(3)** of the Act provide as follows:

“26. (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)

(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.”

As already pointed out, there are five (5) medical reports annexed to the supporting affidavit.

The first one is a neuropsychological report dated **8th December, 2008** by **Dr. Daksha Hirani**. This was about 2 months and 12 days after the accident on 26th September, 2008. The Subject had suffered a serious head/brain injury with significant impairment of cognitive (thinking skills) function. He also had significant visuo-perceptual impairment.

His reading ability was reasonable and his writing ability was intact and good. Regarding memory and attention, the report said that he had “severe memory impairment and comprehension.”

The Subject was unable to carry out mental calculations of mathematical problems.

The second medical report, by the same Dr. Daksha Hirani, is dated 13th July, 2009 and is tilted as a neuropsychological re-assessment report. His brother who lived with and assisted him, reported to Dr. Hirani that the Subject’s behaviour had improved over the months, though he still had anger out-bursts and sometimes experienced visual hallucinations.

This time round Dr. Hirani found that unlike before, the Subject was able to reliably state his name, date of birth, age, and month. He was also oriented to place, a significant improvement.

His visual acuity was now satisfactory though he still had visuo-perceptual impairment.

Regarding language and literacy, the Subject was able to comprehend complex sentences, thus showing much attention than before. His numerical ability had also improved and he was now able to carry out mental calculations of mathematical problems. He reliably recognised different denominations of coins.

The other 3 medical reports are, respectively, dated 6th July, 2010, 9th July, 2010, and 15th October, 2010. They all show that the Subject had steadily improved over time. The last medical report by Doctor C.K. Musau gives a summary of the Subject’s treatment. After the accident he was admitted at **Machakos General Hospital**. He was then transferred to **The Nairobi Hospital** where he was admitted on 26th September, 2008 and discharged on 4th November, 2008.

He was subsequently admitted at **Chiromo Lane Mental Hospital** on 8th November, 2008 where he was until 22nd December, 2008 when he was transferred to **Bustani**, a psychiatrist rehabilitation centre. He remained there until 14th April, 2009 when he was discharged home for preparations to be taken to India.

On 19th April, 2010, he was admitted to the **National Institute of Mental Health and Neurosciences** in

India for rehabilitation until 9th July, 2010. There he was under a multi-disciplinary team consisting of a neuropsychologist, a psychiatrist, a speech therapist an ontologist and a physiotherapist.

Dr. Musau noted that by the time the Subject was discharged from India he had made significant improvement in frontal lobe functions. He further noted that he still had poor memory and was continuing on the home-based retraining programmed as advised in India. He was also continuing with medication and had not been able to resume his duties at Kengen Ltd.

That was on 15th October, 2010, about 10 months ago. There is no current medical report to verify the Subject's current state.

As already noted, on 28th July, 2011 I examined the Subject in court. I found him to be lucid and articulate. He appeared to fully understand all the questions that I asked him. He readily answered questions, sometimes with some reflection where appropriate. It is necessary for me to reproduce his full statement in court. He stated:

“My name is B M K I work with (particulars withheld) as an electrical engineer. I joined Kengen in 1999. My current salary is KShs. 117,000/00 gross per month.

My late father was called E K M. My late mother was called PW. I have 2 brothers and 2 living sisters.

(i) J M K

(ii) C K K

(iii) M M

(iv) V T K

In September, 2008 I had an accident along the Nairobi-Mombasa highway. I was driving my own motor vehicle. I had a collision with another motor vehicle. I was injured on the right side of my face around the mouth and the right shoulder.

I was hospitalised for 1 1/2 months and then discharged under medication. I then proceeded on a long sick-leave. I resumed duty last month but I am unable to perform certain duties, like going up power pylons.

I am now 42 years old. I am not married. I have never married. I do not have any children. I intend to marry one of these days. I am able to transact with my bank. I withdraw money at the counter as and when the need arises. I do not operate a cheque book, but if I wanted to I could. I can write and read as need arises.

I am unable to do a few physical things like wash my own clothes. Mentally I am able to make

decisions on my own. I am able to analyse any situation and make decisions thereon. I understand the present proceedings are about. But I am able to make my own decisions. I am able to go to the bank and withdraw money. I am able to give instructions if I want something done for me. I resumed working last month. I will continue to handle my own affairs. I will call for assistance from my brother as and when I need it.”

The words of the Subject speak for themselves. It appears to me that since he was last assessed by a doctor, he has made tremendous improvement. He has even resumed work and is apparently able to perform, except for climbing electricity pylons.

He is able to manage himself and his own affairs, including financial matters. In my considered view he does not need any person to manage his affairs or estate for him. Whatever assistance he might need to perform physical activities, he will himself seek it from his siblings and/or friends.

In the circumstances, I must refuse this petition. It is hereby dismissed with no orders to costs.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF AUGUST, 2011

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2011.