REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Petition 36 of 2009

IN THE MATTER OF MENTAL HEALTH ACT CAP. 248 OF THE LAWS OF KENYA

AND

IN THE MATTER OF K

K …… PETITIONER

(Petition for Guardianship of K and Management of his estate under section 26(1) and section 29 of Mental Health Act, Cap 258 of the Laws of Kenya)

K……..…… PETITIONER

VERSUS

K…… RESPONDENT

RULING

The chamber summons dated 2nd June, 2009 was filed along with Petition for guardianship of G.K.K. and Management of his estate under section 26(1) and section 29 of mental Health Act (Cap 248) (referred to as 'the Act').

The Petition from SKK, a son of the GKK avers, amongst other averments that GKK is a person suffering form mental disorder within the meaning of the Act and is a subject to be dealt with as provided under the Act.

It is also alleged in the Petition that the grounds of knowledge and belief of the mental disorder/incapacity of GKK are interalia founded on medical and psychiatrist report, submitted by Dr. VCA Okech on behalf of Dr. Pius A. Kigwama.

Relying thereon it is alleged that GKK is not capable of managing and administering his property, business matters, legal transactions and other dealings and affairs of similar kind as set out under the Act.

The prayers sought in the Petition are:-

1) The Petitioner therefore prays this Honourable Court for the following Orders.

a) That GKK is hereby adjudged to be a person suffering from a mental disorder under Section 26 of the Mental Health Act Cap 248 of the Laws of Kenya.

b) That Mohammed Muigai Advocates either by themselves or their appointed agent be and are hereby appointed as the Managers of GKK's estate which includes any such description of movable or immovable property, money, which included any such description of movable or immovable property, money, debts and legacies, power to execute, sign all deeds and instruments relating to or evidencing the title or right to any property or giving a right to receive any money or goods and to proceed to take over and/or institute any litigation and/or claims and also to include not only such property as has been originally in the possession or under the control of any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange whether immediately or otherwise.

c) That T.W.K, S.K.K and Bishop J.G.K be appointed as guardians jointly and severally in respect of GKK.

The Chamber Summons which is before the court and filed along with the Petition seeks similar interim orders pending hearing and determination of the Petition.

The application is supported on the grounds set forth therein and on the supporting affidavit sworn by the Petitioner/Applicant SKK on 2nd June, 2009.

The affidavit reiterates the averment that GKK is a person suffering from mental disorder within the meaning of the Act and has vast properties and assets which receive rental incomes which must be collected and monitored. I may mention here that the properties and assets as well as names of dependants/beneficiaries have been detailed in paragraphs 12 and 10 of the Petition respectively.

In view of the circumstances, SKK deponed in his affidavit that:-

"**it is just and fair that Mohamed Muigai Advocates be appointed to manage the estate and affairs of GKK to avoid intermeddling in his affairs in the interim period and that three named persons who are widow, son and daughter of the deceased from different houses be appointed as guardians <u>jointly and severally</u> in respect of GKK."**

The application is opposed and the grounds of opposition were filed on 9th June, 2009.

Before the interparte hearing commenced, it was agreed that this court shall hear and determine some grounds of opposition as preliminary objections.

The court heard the submissions from both sides and delivered its ruling on 10th July, 2009.

In the said Ruling the Court considered the requirements which should be fulfilled before a matter is brought before the court and after considering which, the court can exercise powers over persons and estates of persons suffering from mental disorder.

The ruling made is not challenged by any party and the relevant observations made therein are relied upon by both the counsel in their respective submissions. I shall refer to those observations as and when necessary in the later part of this Ruling. Suffice it shall be to state that I considered relevant provisions of the Act and specifically its preamble as well as sections 26 and 28 thereof.

Professor Mungai the learned Counsel for the Applicant stressed that the application before the court seeks only interim orders and he relied on two cases to show what are the governing principles for grant of such interim orders.

The first authority is ReF from the Court of Protection and Judgment was delivered by Judge Marshall QC. The Judgment was in exercise of Appellate Jurisdiction over the District Judge. I assume it is a

British case though no proper citation thereof is before the court. I may hasten to state that I do not doubt its authenticity. The case is referred as Case No. 11649371 and Judgment was delivered on 28th May, 2009.

The other case relied upon is from the High Court of Justice in Northern Ireland – Family Division. In the matter of BS. (Neutral Citation No. (2009) NI FAM 5). The Judgment was delivered on 18th February, 2009.

Prof. Mungai did indicate that both cases are persuasive authorities but I shall give due respect to observations made therein. It was contended by the Learned counsel that at the interim stage, the applicant is not required to show that GKK is totally without mental capacity.

In F's case, the issue was whether he was capable to decide either to accept or reject Health Care Services. It was observed that evidence was needed to support the application and to find the correct test to be applied for the court to assume jurisdiction to make "Interim Orders and directions" under section 48 of the Mental Capacity Act, 2005. This court does note the difference in Title of the Act and further that in any event the provisions of that section are not before the Court.

Prof. Mungai relied on observations made in paragraph 44 of that Judgment. I may cite relevant portions of that paragraph.

"**The proper test for the engagement of s. 48 in the first instance is whether there is evidence giving good cause for concern that P may lack capacity in some relevant regard. Once that is raised as a serious possibility, the court then moves on the second stage to decide what actions, if any, it is in Plaintiff's best interest to take before final determination of his capacity can be made.**
……..

……. Exactly what directions may be appropriate will depend on the individual facts of the case, the circumstances of P, and the momentousness of the urgent decisions in questions, balanced against the principle that <u>Plaintiffs autonomy of decision making for himself is to be restricted as little as is consistent with his best interests</u>" (emphasis mine).

It was further observed that:- "**<u>gateway" test for the engagement of the court's power under sec. 48 must be lower than that of evidence sufficient, in itself, to rebut</u>** (Paragraph 37 of the Judgment). It was further observed that:-

"**it would be unfortunate if a conclusive specialist assessment came to be regarded as necessary before the court would accept jurisdiction at all"** (Paragraph 40).

In the matter of BS, I was invited to look at the legal Principles and conclusion.

In paragraph 42 of the said Judgment it is observed, if I can put it briefly, that there should be no interference with the exercise by the subject matter to the right to respect for her private life except when the interference complies with a pressing Social need and, in particular, that which is proportionable to the legitimate aims pursued.

In this case the subject matter was a person of 88 years of age, living in a nursing home and her arm which was badly fractured was not healed sufficiently to enable her to have full use of it again. She also inherited vast estate after the death of her rich husband.

The facts of that case show that the applicant has enumerated various illustrations of his mother's deteriorating condition including her inability to appreciate the present day value of money and forgetting to write cheques and forgetting appointments.

Considering all the facts which were presented before the court, the court after directing further details from the applicant as to transactions entered, made an order for further medical examination by an

independent medical expert.

On the principles outlined by these two authorities, it is contended that this court has similar powers under section 26 and 28 of the Act and this court ought to grant the orders sought for.

It is further stressed that the applicant is a son of GKK and has a right to see that his health and his estate are protected.

On the question of proportionality it is urged that GKK's right has to be recognized including his right of privacy and self-determination, but these rights may affect the rights of others recognized in law. The order sought as per submissions, is in his best interest.

The court was referred to the Annexure SKK 1- a letter written by GKK to Kenya Revenue Authority dated 15th January 2003 wherein he had stated that he had been diabetic since 1976, and since then his eye sight and general health had been bad. It was also stressed that the medical report of Dr VCA Okech also mentioned that "**he shows signs of early senile dementia as evidenced by slight impairment of his recall memory and abstract reasoning".**

Moreover, the report has also considered his diabetic condition for 35 years, that right eye is impaired and he walks with cane. It also states that he is well oriented in space and person but not in time. It is therefore stressed that the existence of dementia and impairment to recall memory and abstract reasoning makes a case for further examination.

It was finally submitted that in the interest of justice the orders prayed should be granted with the stress that by granting the same, no harm whatsoever would occasion to G.K.K. and if the same is not granted and at a later stage GKK is found to be a person suffering from disability as envisaged under The Act, both GKK's personal welfare and that of the applicant would have been compromised.

I was urged to note that the applicant has named the wife of GKK with whom he is living as well as an adult daughter from the third house to be appointed as managers jointly with him.

It was lastly emphasized that this petition is not a suit for properties but proper management thereof and for personal welfare of GKK. It is made in good faith and thus it was urged that the same be granted and the application of GKK be dismissed especially prayer no. 2 which is for the setting aside of the ex-parte order.

Because of the aforesaid prayer for dismissal of the application filed by GKK on 8th June, 2009, Mr. Oraro, the learned counsel for GKK began his submissions by emphasizing that what is before the court is applicant's Chamber Summons dated 2nd June, 2009 which sought specific prayers based on the grounds and affidavit in support and that no order to consolidate the two applications is made or agreed upon. Mr. Oraro also contended that to alter the said application with a prayer to grant further medical examination of GKK is not proper in view of the positive assertion made as regards on the mental status of GKK.

Replying on the medical report put forth by the applicant which was prepared by Dr. VCA Okech on behalf of Dr. Pius A. Kigamwa, it was submitted that the said report neither states that GKK is suffering from mental disorder under the Act nor does it state that he is incapable of managing his own estate.

The pleadings in the petition has specifically given the full lists of GKK's wife and children as well as his properties and estate. (See paragraphs 10, 11, 12, 16 and 17 of the petition). With these averments, the court is asked to adjudge GKK as a person suffering from mental disorder.

Mr. Oraro further emphasized that the prayers made in the petition and those made in the chamber summons are the same. He took an issue on the prayers to appoint firm of the advocates appearing for the applicant as manager of the assets and properties of GKK and relied upon provisions of Sec. 23 (2) of the Act which stipulates that where there is no known relative or other suitable person a Public Trustee be appointed manager of the estate. It was in short contended that the court should only deal with the

application dated 2nd June, 2009 and grounds of oppositions filed against that application.

Mr. Oraro stressed that this Court made a Ruling on the preliminary objection raised by GKK and has clearly determined the aspects of '**threshold'** or the '**gateway'** for seeking orders under the Act.

He emphasized on observations made on typed page 14 of the said Ruling – namely

"***All the actions by the relevant authorities and applications to be made either seeking admission for the persons in Mental Hospital or seeking order under Part XII should be directed towards the care and welfare of the persons and preservation of their estates against wastage or plunder by greed of relatives or others.***

In view of the aforesaid observations made, I tend to agree that the petitioner while bringing in a petition for orders under Sec. 26 of The Act, has to show to the court, by providing medical reports to substantiate the averments made in the petition. The petitioner, when he comes before the court, has to show *prima facie* that the person against whom the orders are sought is a person suffering from mental disorder so as to be incapable of coping with the ordinary demands of life and the orders sought is for the welfare of the person concerned."

It is submitted that the applicant has not satisfied the Court as per the criteria observed in my Ruling.

Mr. Oraro submitted that even in England, where The Statutory provisions as regards '**threshold'** may be different, the precondition that one must satisfy the court that the subject matter is suffering from mental disorder is recognised. To support this contention, a case of Re S (FG) (Mental Health Patient) (1973) ALL E.R. Ch. D. 273 was cited. At page 274 it was observed by the court:-

"***The functions of the judge under this part of this Act shall be exercisable where, after considering medical evidence, he is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs, and the person to whom the judge is so satisfied, is in this part of this Act is referred to as a patient."***

Mr. Oraro then distinguihed the two authorities cited by Prof. Mungai. I have dwelled in detail the facts and judicial observations made in those two cases. I do not thus intend to reiterate them. What Mr. Oraro submitted was that GKK is living with the family and emphasized that before the court there was no prayer for further medical examination but to the contrary there is a definite assertion that GKK is a person suffering from mental disorder which is of a very serious nature and unless an Act of Parliament confers such power, the court should be vary in granting orders asked for. The cases must be heard and determined on the basis of pleadings and then the Court was referred to Court of Appeal's judgment in **Civil Appeal No. 5 and 48 of 2002 (consolidated) between Anthony Francis T/A A. F. Warenan –vs- two others, (And) Kenya Post Office Savings Bank** (unreported) namely:-

"***Having done so, we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings."***

In view of the above submissions, Mr. Oraro prayed for dismissal of the application.

In rejoinder Prof. Mungai contended that the Notice of Motion of 8th June, 2009 and grounds of oppositions were simultaneously filed. In the application a prayer to set aside the interim ex-parte order

was made. The issue of jurisdiction as alleged in his application and grounds were heard. Thus the two applications became one or fused by necessity and cannot be heard in isolation.

It was further contended that the orders sought are of temporary nature to be operative only till the petition is heard by evidence to be adduced.

Thus the weight of proof required at those two stages is totally different.

The court thus was invited to avoid taking narrow or pedantic view of the law and grant the orders.

No one can carry any doubt that the matter is involved and also, if I may venture to say, unprecedented. I do not say unprecedented in the sense of applications under The Act having been made. There were many which have been filed and determined in the past, but no other judicial officer has been presented with the issues and submissions which have been so made before this court.

Thus with utmost humility I shall endeavour to decide the application on the facts and profound submissions made before me.

I shall first of all deal with the authorities cited before me. I would not reiterate the facts of the cases, but shall emphasize on some relevant facts and principles of law.

I have sufficiently dealt with the provisions of sections 26 and 28 of the Act in my earlier Ruling delivered on 10th July, 2009.

Secs. 26 (1) and (2) give the court power to make orders for management of the estate and guardianship of a person suffering from mental disorder. Sec. 26 (3) specifically stipulates that if a person is capable of managing himself and not dangerous to himself or to others etc, no order for guardianship can be made against him, but if he is found to be incapable of managing his affairs then, a manager to manage his estate can be made. It may be opportune to cite sections 26 and 28 of The Act:

26. (1) The court may make orders-

(a) for the management of the estate of any person suffering from mental order; and

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

28. (1) The 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 this Part, regarding such application as, in the circumstance of the case, the court may think fit.

After considering the submissions, I made the earlier Ruling. A portion of the Ruling relied upon is cited herein before.

Even Prof Mungai agreed that the terms of the Ruling is not different to the authorities cited by him.

In 'F' case, it is clear that the issue before the court was to decide on the question of further medical treatment. The fact that she was mentally impaired was not an issue and was an admitted fact. In the

circumstances, the order sought for was granted by the court. Moreover, specific provisions of the English Act conferred power on the court to take steps pending determination.

Admittedly, the facts in the said case and those of the present case are poles apart.

The second case of BS, involved similar prayers that are made in the present case.

However, the facts of the two cases are very much different. In the case of BS, the applicants had alleged that he was concerned for some time as to confusion and loss of short term memory of the subject matter, deteriorating condition including an inability to appreciate the present day value of money and forgetting to write cheques and forgetting appointments. Some illustrations are enumerated in the Judgment.

The court then observed that "**it is for the protection of her rights in that if she is incapable of managing her own affairs then her property rights should be protected."**

As against the aforesaid facts, before me is an unsubstantiated assertion by the applicant that GKK is a person suffering from a mental disorder within the meaning of the Act and his knowledge and belief of the mental disorder/incapacity of GKK are inter alia founded on medical/psychiatrist report submitted by Dr. VCA Okech on behalf of Dr. Pius A. Kingwama. I must note that the said medical report was made after GKK's submissions to undergo the check up voluntary and that GKK was so evaluated after more than six years since he wrote a letter to Kenya Revenue Authority.

This petition was filed pursuant to the Medical evaluation which was aimed at testing the physical and mental capacity/ability or otherwise of GKK. Apart from diabetic condition and blindness in his right eye, he was found to be normal in his physical condition.

He was found to be well oriented in space and person but not in time in that he knew he was in hospital but could not remember the date, month or the exact year but knows his name, date of birth and identified the people he had come with.

On mental status examination, it would be fair if I cite the same in detail.

Mental Status Examination: ***I found a pleasant elderly gentleman with whom it was easy to establish rapport. He was well kept in dressing a calm throughout the interview.***

Mood: ***Euthymic, good.***

Speech: ***coherent, normal in volume and flow of ideas.***

Perception: ***He had no hallucinations.***

Concentration: ***Fair – he was able to hold and sustain a conversation.***

Judgment: ***Good – he was able to correctly answer that if he got caught up in a burning house with his family, he would make every effort to get them out of danger, to a safe place.***

Intelligence: ***Average.***

Abstract reasoning: ***Found it difficult to remember his exact age, though he could remember his birth date-slight impairment.***

Memory recall: ***slight impairment***

Recent: Fair

Remote: fair – he could remember his birth date and his previous political activities.

Insight: present

Professional opinion and conclusion: GKK is a 78 year old male on treatment for diabetes. Currently he shows signs of early senile dementia as evidenced by slight impairment of his recall memory and abstract reasoning. He is able to carry out the activities of daily living, has good judgment and average intelligence. He exhibits adequate mental capacity to continue playing an active role in his company."

Against these facts presented by the applicant, he has failed to show any incident or any act of GKK which could either impair his physical condition or impair his estate to his own or his dependants' detriment.

On the contrary, GKK has been shown to be capable to carry out the activities of daily living, has ***good judgment and average intelligence. He exhibits adequate mental capacity to continue playing any active role in his company.***

With these facts, it shall be totally unfair even to ask for another medical test only after 5 months of the said Report or to grant any interim order of appointment of any guardian or any Manager as prayed in the application before me. I reiterate my observations made in the earlier Ruling that "***the court shall be very wavy of making an order which can go to the extent of deprivation of a person's liberty and property."***

I do agree with the observations made in the case of BS that "**Any interference must be necessary in a democratic society which introduces the principles of proportionality."** The applicant has not shown any cause where I would interfere with the fundamental rights of GKK enshrined in our Constitution.

In other words, no threshold is put forth so that the applicant can be allowed my discretion under 'gateway' principle.

I do not think, by observing as before, I am applying too high a test. I am, with utmost humility, exercising discretion which the court has been given in all kinds of civil proceedings, namely, an applicant must satisfy the court prima facie that he deserves the grant of interim orders prayed for.

It is my opinion that the applicant has failed to show me that he deserves that discretion.

In the premises, I direct that the application dated 2nd June, 2009 is dismissed.

I shall not make any order on costs.

Dated, Signed and **delivered** at Nairobi this **1st** day of **December 2009.**

K. H. RAWAL

JUDGE

1.12.2009