



In re Guardianship of BOM (A Person Suffering from Mental Disorder) (Miscellaneous Application E166 of 2023) [2025] KEHC 1708 (KLR) (Family) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1708 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E166 OF 2023
PM NYAUNDI, J
FEBRUARY 7, 2025
IN THE MATTER OF SECTIONS 26 (1) AND 29 OF THE MENTAL HEALTH ACT
AND
IN THE MATTER OF THE CIVIL PROCEDURE ACT, ORDER 15
AND
IN THE MATTER OF AN APPLICATION BY JWM AND JMM FOR
ORDERS OF CUSTODY, MANAGEMENT AND GUARDIANSHIP
OF BOM(A PERSON SUFFERING FROM MENTAL DISORDER)

IN THE MATTER OF

JWM 1ST APPLICANT

JMM 2ND APPLICANT

JUDGMENT

1. This Judgment relates to Petition and Cross Petition dated 9th August 2023 and 5th September 2023 respectively. In the Petition dated 9th August 2023, the Petitioners, JWM and JMM, seek the following orders-
 - a. That Mrs. BOM 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 JWM and JMM be appointed as guardians jointly and severally of Mrs. BOM and in respect of the estate of Mrs. BOM
 - c. That costs of this Petition be provided from the Estate of Mrs. BOM

The Petition is supported by the Affidavit of the 2nd Petitioner sworn on even date.



2. In the Cross Petition, the Respondents seek almost similar orders specifically that-
 - a. A declaration do issue adjudging Mrs. BOM as a person suffering from a mental health condition and in need of a guardian and caretaker pursuant to Section 26 of the [Mental Health Act](#) Cap 248 of the Laws of Kenya.
 - b. An order do issue appointing the 1st and 2nd Cross Petitioners JAM and SAM respectively, as guardians jointly and severally over Mrs. BOM as a person, as well as in respect of her estate.
 - c. An order of dismissal of the Petition dated 9th August 2023
 - d. The Costs consequent upon the Petition and Cross Petition be borne by the 1st and 2nd Respondents.
3. The matter proceeded by way of viva voce evidence.

Summary of the Petitioners' Evidence

4. PW1- The 2nd Petitioner, JMM, testified as the sole witness on behalf of both the Petitioners. He stated that he is a son to the Petitioner. The Court adopted his affidavit sworn in support of the Petition as his evidence in Chief. He states that he was taking care of the Subject until she was forcefully removed from her rural home by the respondents. His support to the Subject included facilitating access to medical treatment. He is aggrieved that since her removal, he has not been able to access her as the Respondents have also disconnected her phone.
5. He further contended that the 1st Respondent evicted him from the rural home in November 2023 and installed a guard thereby barring his access to the home. Although his paternity is challenged by the Respondents, he stated that in the Succession matter relating to the estate of the deceased husband of the Subject, Nom Okaro Muluka, he is recognised as a beneficiary to that estate alongside the Respondents.
6. He urges that the Subject should undergo an additional medical examination so as to determine her mental health. He concluded his testimony by indicating that he was agreeable to joint guardianship.
7. On cross examination he confirmed that he is younger than both Petitioners by more than 20 years. He conceded that by the time he was born they were old enough to have understood the circumstances of his birth. He was adamant however that the Subject and her deceased husband are his parents. He stated that he did not know Jennifer Egehiza whom it is alleged is his biological mother.
8. He stated that he has a wife and child, they have been married for one and a half years. The Co-Petitioner lives in Bungoma. He confirmed that he had not attached a medical report to his application. He stated that since the Subject needs support to take care of herself, he can pay a caretaker to take care of the subject, he need not handle her himself. He stated that any of the children of the subject is well suited to be her guardian and that the two respondents are not better than him.
9. He stated that he was not willing to undergo a DNA test as that would traumatize him. He denied that his interest in filing this Petition was to have access to the property belonging to the Subject. He is motivated by the need to protect the property of the Subject.
10. In re-examination, he reiterated that he was raised by the Subject and her deceased husband as their child. The issue of DNA testing only arose in February 2024. He stated, that his Co Petitioner was the primary care giver when the subject was at the rural home assisted by paid help.



11. He had contributed to the medical bill for the subject. Since the Respondents have blocked access to the rural home, he seeks that he be granted access to the home. The Respondents have been away from the Country and therefore he is best suited to take care of the Subject. The relationship between the siblings became strained when the Subject was removed from her rural home.
12. RW1- Judith Muluka, testified as the sole witness for the respondents. She and the 2nd Respondent are sisters and the biological children of the Subject. Her affidavit in support of the cross Petition, Affidavit in response to the Petition and supplementary affidavit admitted as evidence in Chief.
13. She removed the Subject from the rural home as her condition was deteriorating. She has employed care givers to take care of the subject. She suggested that the Petition is fueled by the desire by the Petitioner to have a share of the assets of the subject.
14. It is her view that the Petitioner is not well suited to take care of the Subject as he is not a biological son of the Subject. She contends that the Petitioner was informally adopted by the Subject and her deceased husband. She further contends that in recent times the 2nd Petitioner has not treated the subject well. Actions cited include selling a heifer and building on her land without her consent.
15. She submitted a medical report that shows among other illnesses the subject has Parkinson's disease and dementia.
16. In cross examination, she stated that she was surprised that the applicant had made this application as in the past he had reported that the subject had mistreated him. She opposes joint guardianship and does not object to the Petitioners having access to the subject. She is married and does not stay at the rural home. She visits frequently. She stated that although the subject has mental illness, she also has some lucid moments. She has made available medical report prepared in November 2023 that captures the current state of the health of the Subject.
17. In reexamination, she asserted that although married she is still a daughter to her mother. She stated that the Petition is not supported by a medical report and neither is there a prayer for joint guardianship.

Summary Of Smissions

18. The Petitioners' submissions are dated 16th September 2024. The following are the issues framed for determination
 - a. Whether the Court should declare Mrs. BOM as mentally incapacitated under Section 26 of the *Mental Health Act*.
 - b. Whether the Petitioners should be appointed as guardians and managers of the estate of Mrs. BOM.
19. Reference is made to the decision in re VWG (A person suffering from mental disorder) (Miscellaneous Application 12 of 2023) [2023] KEHC 24896 (KLR) and re N M K [2017] eKLR on factors that should guide the court when considering an application under Section 26 and 27 of the *Mental Health Act*.
20. The Petitioners submit that they have established that the Subject is suffering from mental illness and that therefore as was held in Re Estate of INM [2021] eKLR, this Court should find that on account of her deteriorating health the Subject should be found to be suffering from mental illness in need of appointment of a guardian and manager.
21. On their suitability, it is urged that the Petitioners are immediate family members of the Subject and have been actively involved in her care and welfare. Reference is made to the decision in Steven Kariuki



Kiriamburi & Another v Jane Gaturi Kiriamburi & 4 Others [2020] eKLR. It is submitted that the Subject is the registered proprietor of 3 parcels of land namely Title Number E/ WANGA/ ISONGO/ 869, E/ BUNYORE/ EBUSUNDI/2424 and BUTSOTSO/ ESUMEIYA/ 1263 that require to be safeguarded.

22. The Petitioners rely on the decision in Re SMO (A person suffering from mental disorder) (Application E10 of 2023) in which the Court bestowed guardianship on a son on account of the familial relationship. It is submitted that it is in the interests of the Subject that the orders be granted.
23. The Respondents submissions are dated 21st November 2024 and the following identified as the issues for determination
 - a. Whether a guardian ought to be appointed over the subject and to administer her property
 - b. Who has met the test of suitability to be appointed as such guardian over the subject as well as administer her property.
24. It is submitted that the evidence on record establishes that the Subject is suffering from mental illness and therefore a guardian ought to be appointed under Section 26 of the [Mental Health Act](#). It is submitted that the medical evidence on record supports the application, the reports are uncontroverted.
25. It is further submitted that the Petitioners are not suited to obtain the guardianship orders on account of their past conduct. On the flip side they urge that they are best placed as the Subject's condition has improved since they brought her to stay in Nairobi with the 1st Respondent. Further it is submitted that the Petitioners are not blood relatives of the Subject, but the respondents are.
26. Additionally, it is submitted that the refusal of the Petitioner to undergo a DNA test should weigh against him as the issue of his parentage is in question. Reference is made to the decision in re P G M [2019] eKLR wherein the Court found that a DNA Test would be the most conclusive way of determining the question of parentage.
27. Finally, it is submitted that the Petition was not filed with the consent of the other children of the subject and is therefore defective in that regard.

Analysis And Determination

28. Having regard to the pleadings herein and submissions filed along with the relevant law, I discern the issue for determination is whether it is in the best interests of the subject that she be declared a person suffering from mental illness and whether a guardian and manager should be appointed in respect of her person and estate.
29. On the 1st limb, whether the Subject is a person suffering from mental illness? Section 2 of the [Mental Health Act](#) provides that the Objects and purpose of the Act is to-
 - provide for the prevention of mental illness, to provide for the care, treatment and rehabilitation of persons with mental illness; to provide for procedures of admission, treatment and general management of persons with mental illness; and for connected purposes.



30. To bring the application under the ambit of the law it is necessary to show that the Subject is suffering from a mental illness within the meaning of Section 2 of the Act which states-
- “person with mental illness” means a person diagnosed by a qualified mental health practitioner to be suffering from mental illness, and includes—
- (a) a person diagnosed with alcohol or substance use disorder; and
 - (b) a person with suicidal ideation or behaviour;
31. Both parties agree that the mother is critically ill and in need of guardianship. Medical evidence availed to the court puts it beyond doubt that the subject is incapacitated on account of her illness and there is need of a guardianship order. The latest medical report is that dated 28th November 2023 prepared by Dr. Herman O Okea based at the Aga Khan Hospital. The report indicates-
- Her last neurology clinic visit was on 31st October 2023 where she was found to be fully oriented in time, place and person, was verbally interactive and has started feeding orally. Her memory, judgment, planning and decision making had greatly improved to pre-illness baseline, rendering her to be cognitively independent.
- ...Follow up: She requires long term neurological, psychological, physiotherapy, speech and language therapy and Occupational therapy clinical follow up.
32. Earlier report made by the same Doctor on 16th May 2023, stated that the Subject suffered from inter alia; Progressive supra nuclear palsy- parkinsonism syndrome and unspecified dementia without behavioural disturbance. The Court also directed that the subject be availed in Court on the 25th November 2024. The Court was observed that the Subject was in a hospital bed sedated and unresponsive.
33. On account of the foregoing I find that the subject is indeed suffering from a mental illness under Section 26 of the *Mental Health Act* in need of a guardian.
34. On the 2nd limb, who should be appointed as Guardian. The parties have correctly cited the law that preference will be given to the relative of the Subject. In this instance the parties who describe themselves as Children of the deceased are not agreed on who between them should be the guardian.
35. Push has come to shove and the parties have decided to expose the family skeletons. The 2nd Petitioner casts aspersions on the paternity of the 2nd Respondent, contending that she is not a child of the deceased husband of the Subject.
36. It is not contested that the 1st Petitioner is a step daughter. The 2nd Petitioner’s maternity is challenged by the Respondents/ Cross Petitioners. They have invited him to take a DNA test, he has declined to do so saying the same would be traumatic. He has elected to augment the evidence of the birth certificate with that of an affidavit sworn by Reverend Jairus Maina Muluka. That affidavit only speaks to the paternity of the 2nd Petitioner and not as to who his mother is.
37. It is conceded that the 1st and 2nd Respondents are the biological children of the Subject. For the 1st and 2nd Petitioner to rank at par or prior to the 2nd Respondent they must demonstrate that the Subject is their biological mother. This best evidence will be through a DNA Maternity test. In *BAY v ABG & another (Civil Appeal E019 of 2021)*, the Court stated that DNA was the best way of determining paternity where the same is contested. The 2nd Petitioner has however declined to take the test.



38. From the evidence it is evident that the 2nd Petitioner has been raised and treated as a child of the Subject and her deceased spouse. This is evident from the fact that he was included as a beneficiary in the estate of the husband of the subject. The issue however is whether it has been established that he is a biological son to the Subject in order for him to be at par with the 2 respondents in terms of suitability to be the guardian of the Subject. It is my finding that it has not been established that the 2nd Petitioner is the biological son of the Subject.
39. Owing to the strained relationship between the Petitioners and Cross Petitioners, I do not consider this to be a suitable case for joint guardianship.
40. There are allegations against the 1st Respondent with regard to the treatment of the Subject and the 2nd Respondent with allegations that she has a historically strained relationship with the Subject. This in my view have been sufficiently responded to. It is not uncommon for parents and children to have a difference of opinion and therefore strained relationship with parents. The threshold that has to be crossed however is a demonstration that the past conduct of the applicant is so grave that there is a likelihood of harm to the subject as the applicant cannot be trusted to act in the interests of the subject.
41. The 1st Respondent has explained to my satisfaction that in seeking treatment for the subject she has consulted and been open to the views of the other children of the subject.
42. At this stage the Subject is critically ill and in need of support in the performance of very intimate functions such as bathing and dressing. Since her daughters are willing to take care of her, I find that it would be in the best interests of the subject to be taken care of by the respondents. The duties of the guardian go beyond that of physical care and are actually more to do with the Guardian demonstrating that they have a track record of acting in the interests of the Subject, so that they can be trusted with making decisions to safeguard her health and wealth.
43. Based on the reasoning above I find that in the circumstances the Respondents are better suited to act as the guardians and manager of the estate of the subject.
44. In conclusion, the Petition partially succeeds and I enter judgment for the Cross Petition with the following orders-
 - a. BOM is hereby declared as suffering from a mental disorder under Section 26 of the *Mental Health Act* (Cap 248).
 - b. JAM and SAM are hereby appointed under section 27 of the *Mental Health Act* as the Guardians of BOM
 - c. JAM and SAM are hereby appointed manager of the estate of BOM under Section 28 of *Mental Health Act* to manage her estate including any such description of moveable 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.
 - d. Pursuant to this appointment JAM And SAM shall deliver to court and the public Trustee, within 6 months, an inventory of the property belonging BOM.
 - e. In accordance with Section 27(4) of the *Mental Health Act*, 2022 the Guardians shall cause within 30 days the publication of notice in the Gazette, informing the public of their appointment as the manager of the estate BOM



- f. As Managers of the Estate of BOM, JAM and SAM may dispose of the property only with the sanction of the court.
- g. The Guardians so appointed shall agree with the Petitioners on mode of access to the Subject.
- h. The matter will be mentioned before court on 8th May, 2025 to confirm compliance.
- i. Costs to be met out of the Estate of the Subject.

It is so ordered

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
7TH DAY OF FEBRUARY, 2025.**

.....

P. NYAUNDI

JUDGE

In the presence of:

Noel Court Assistant

..... for the Applicant

..... for the Respondent

