



In re SHK (The Subject) (Miscellaneous Civil Application E002 of 2024) [2025] KEHC 2092 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E002 OF 2024
RM MWONGO, J
FEBRUARY 6, 2025**

BETWEEN

JWK & ENH PETITIONER

AND

SHK 1ST INTERESTED PARTY

HAKH 2ND INTERESTED PARTY

JUDGMENT

1. The applicant filed this notice of motion dated 12th February, 2024 seeking the following orders:
 1. Spent
 2. That this Honourable Court be pleased to declare SHK (The Subject) as suffering from a mental disorder as defined in the Mental Health Act Cap 248 Laws of Kenya as a result of which, he lacks the requisite mental to manage his affairs.
 3. That the Petitioners/Applicants be jointly appointed as legal guardians of SHK.
 4. That the Applicants/Petitioners be appointed as joint managers under Section 28 of the Mental Health Act to manage the estate and affairs of the Subject.
2. The application is supported by the grounds on its face and the annexed Affidavit of JWK containing the following major averments:
 1. That SHK, of ID no.187XXXX was born in 1948 as evidenced by the copy of ID annexed as "JW1."
 2. That SHK was blessed with the following children in order of age: AKH, 4XX; ENH 41; JWK 39 (applicant).



3. That up to 2020, the Subject was in good health and personally managed all his properties and affairs without assistance.
 4. That around 2021, the Subject started experiencing occasional memory loss. At first, he would forget routine things like where he put the car keys or what he was supposed to do on a particular date.
 5. That the Subject was taken to Outspan Hospital in January 2023 where, on examination, he was diagnosed with Alzheimer's Dementia on 23rd January, 2023, which, unfortunately is a terminal neurodegenerative disease which worsens over time.
 6. That owing to the deteriorating memory, speech and general cognitive function, the Subject is unable to manage his affairs and properties and will not only need constant care and attention on a permanent basis but a manager of his properties.
 7. That it is noteworthy that on or about 2021, when the Subject's memory loss worsened, our elder brother, AKH took an unusual interest in his property and over the next two years, unilaterally confiscated the original titles to the following properties, all registered in the name of our father: Title No. Mutira/ Kirimunge/1XX, Title No. Mutira/ Kirimunge/1XX2, Title No. Mutira/ Kirimunge/5XX1, Title No. Mutira/ Kirimunge/ 5XX2, Title No. Kiine/ Sagana/ 1XXX, Title No. Mwerua/ Baricho/ 4XX0;
 8. That the said original titles were confiscated without the knowledge/consent of the Subject who, owing to his mental condition is unaware of the same and the Applicants are apprehensive that the same might be disposed of illegally.
 9. That to prevent the foregoing, I wish to take prompt preventive steps including seeking injunctive orders against the illegal dealing with/meddling with any the Subject's property. However, they cannot do so until duly authorized to do so by this Honourable court.
 10. That in the circumstances, it is in the interest of justice that this Court appoints myself and ENH as legal guardians of the Subject for purposes of managing his estate and/or affairs .
3. The Interested Party filed a Replying Affidavit on 20th February, 2024 containing the following major averments:
1. That the applicants abandoned the 1st interested party and parted ways since the year 2013 to date.
 2. That I, and close relatives have tried to reconcile the relationship between the applicants and the 1st interested parties but the same has become a toll order.
 3. That on 9th December 2023, the 1st interested party had called for a meeting at home and requested for all his children to attend whereby the applicants intentionally failed to attend.
 4. That the 1st interested party expressed his wishes on how he would share his properties and the same was witnessed by some of the clan elders.
 5. That on 31st January, 2024, I accompanied the 1st interested party to outspan hospital for his health check-up, whereby the doctor detected an impression of Alzheimers dementia and was put to medication.
 6. That the medication had a negative effect on the 1st interested party and the doctor advised that he ceases from using the same.



7. That, the applicants move to file a petition claiming that the 1st respondent is suffering from a mental disorder is unfortunate, disrespectful and ill motivated.
8. That the applicants are only afraid of the 1st respondent's move to share his properties during his lifetime.
9. That the 1st respondent is cognizant of his surroundings and has requested me on many occasions to accompany him to inspect his properties from time to time.
4. The applicant on 4th March, 2024 deposed to a supplementary affidavit and denied the averments in the Replying Affidavit.
5. Only the applicant filed written submissions as directed by the court.

Applicant's Submissions

6. On whether the subject suffers from mental illness, the applicant's Supporting Affidavit dated 12th February, 2024, annexed a Medical Report dated 31st January, 2024 from Outspan Hospital wherein, Dr. Gichohi Waniohi diagnosed the subject with Alzheimer's Dementia. The doctor noted that it is a progressive neuro-degenerative disease characterised inter alia by loss of memory and other mental functions, a fact admitted by the 2nd Interested Party and his witnesses on 31st July 2024.
7. The medical diagnosis is that the subject is likely to suffer total memory loss owing to the progressive nature of the disease. Hence the subject is unable to take care of not only his affairs but those of his estate while still alive. As a result he should be protected through a guardianship order (See In re Application on Behalf of Peter Ng'ang'a Muturi (Petition E072 of 2024) [2024] KEHC 10407 (KLR) (Family) (23 August 2024) (Judgment))
8. As to whether the Applicants are fit to be appointed as guardians/managers of the subject's affairs and estate, the applicants rely on Section 26(1) of the Act. An application for management and administration of the estate of a person with mental illness may be made to the court by a supporter of the subject, duly appointed as such under section 31 of the Act or the representative of the subject where no supporter has been appointed.
9. Here, the subject did not appoint a supporter under section 31 of the Act hence the application could only be made by a representative who, under section 2 includes his adult children.
10. The Applicants have produced birth certificates annexed as 'JW2' to their supporting affidavit showing that they are the subject's 2nd and 3rd born children aged 39 and 41 years respectively. Both are thus qualified representatives of the subject with capacity to seek guardianship orders over his affairs and estate and we invite this court to hold as such.
11. On whether the Applicants will utilize their powers for the benefit of the subject the applicants filed this application seeking guardianship orders on their justifiable apprehension that their elder brother would take advantage of the subject's mental incapacity and deal with and/or dispose of part or the whole of his estate.
12. As proof of the foregoing apprehension, the 2nd Interested party admittedly confiscated all the original titles to the subject's properties listed under paragraph 10 of the applicants' Supporting Affidavit while alleging, without an iota of proof that he did so with the subject's consent and/or the knowledge of his siblings, who are the Applicants. In contrast, the Applicants both of whom are earn a comfortable living have no covert interest in any part of the subject's estate other than to protect, preserve and



manage the same on his behalf owing to his failing mental health and to prevent any opportunistic and unilateral attempts to dispose of the same during his lifetime.

13. The applicants, in order to foster accountability, are not opposed to having the 2nd Interested Party appointed as a joint representative/guardian of the subject's estate pursuant to section 27(2) of the Act. If so appointed, the applicants undertake to manage the subject's estate in pursuance of the duties set out under section 28 of the Act and provide both the court and public trustee with an inventory of the subject's entire estate within six months of appointment pursuant to section 29 of the Act.
14. As indicated there were no submissions by the respondents.

Issues for determination

15. The issues for determination are:
 1. Whether the subject should be declared as suffering from mental disorder.
 2. Whether the applicants should be appointed as guardian to the subject.

Analysis and Determination

16. By their Notice of Motion the applicants seek to be appointed as guardians and managers of the affairs and estate of SHK, the subject. They have provided medical evidence to the effect that owing to his illness, the subject can no longer manage his or his estate's affairs.

Whether the subject should be declared as suffering from mental disorder pursuant to the [Mental Health Act, Cap 248](#)

17. The [Mental Health Act](#) provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons. Section 2 of the Act defines "person suffering from mental disorder" as follows:

"person suffering from mental disorder" means a person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse."

18. The application was filed pursuant to sections 26,27 and 28 of the [Mental Health Act](#), Cap 248 of the laws of Kenya, hereinafter, the Act. The applicants argue that the subject having not appointed a supporter under section 31 of the Act, he requires a legal guardian to manage his estate during his life given his medical condition.
19. The medical report availed clearly shows that the subject was examined at Outspan Hospital in January 2023, and diagnosed with Alzheimer's Dementia on 23rd January, 2023. The doctor's report indicates that unfortunately the subject's ailment is a terminal neurodegenerative disease which worsens over time. That owing to the deteriorating memory, speech and general cognitive function, he is unable to manage his affairs and properties and will not only need constant care and attention on a permanent basis but a manager of his properties.



20. Section 26 of the *Mental Health Act*, which deals with the care, guardianship and management of a subject's estate provides:
- “ 1. An application for an order for the management and administration of the estate of a person with mental illness may be made to the court, in the following order of priority, by:
 - (a) a supporter of the person with mental illness; or
 - (b) the representative of the person where the person with mental illness has not appointed a supporter.
 2. An application under subsection (1) shall be submitted together with affidavit setting out:
 - a. the grounds upon which the application is made;
 - b. the full particulars as to the property and relatives of the person to whom it relates; and
 - c. a certified true copy of the admission or treatment and particulars in respect of person duly admitted as a person with mental illness.”
21. It is trite law that this court has power to appoint guardian and managers of the estate while the court has discretion as to who to appoint. The criteria for selection is based on proximity of the applicant to the subject. (See *In re Application on Behalf of Peter Ng'ang'a Muturi (Petition E072 of 2024) [2024] KEHC 10407 (KLR) (Family) (23 August 2024) (Judgment)*)
22. The petitioners urge the Court to appoint Joyce Wanjiru and ENH as legal guardians of SHK for purposes of managing his estate and/or affairs.
23. On his part the 2nd respondent deposes that the applicants move to file a petition claiming that the 1st respondent is suffering from a mental disorder is unfortunate, disrespectful and ill motivated. Further, he asserts that the applicants are only afraid of the subjects potential move to share his properties during his lifetime.
24. There is no dispute, however, concerning the accuracy of the medical report. Accordingly, there is no basis for the court not to declare the subject as a person suffering from mental disorder.

Whether the applicants should be appointed as guardian to the subject

25. The Applicants have asked the court to appoint them as joint guardians of the subject's estate. In addition, they are not opposed to having the 2nd Interested Party appointed as a joint guardian for purposes only managing the subject's estate during his life time. Additionally, the applicants are ready and willing to abide by any orders of this court to ensure accountability in their duties.
26. The court noted that the subject was fit, healthy and neat. However, his memory was appeared impaired, in that he seemed to have memory lapses and was confused. Thus, the subject appeared to be unable to manage his affairs and that of his estate independently. The Court is of the view, on the strength of the medical report, to appoint a legal guardian to help manage the subject's affairs.



27. In re BWG (Mental) [2021] eKLR the court (Muchemi J) allowed an application for legal guardianship for a subject who suffered from acute dementia and hypertension, and held:

“I am satisfied that the applicant has established that the subject is unable to manage her affairs both physically and mentally and that she suffers from acute dementia, hypertension and other ailments. Being a daughter of the subject, the applicant is a close relative thus satisfying the requirement of the *Mental Health Act*. She is also mentally, physically and financially able to provide for her mother and to take care of her.”

Conclusion and disposition

28. In light of the foregoing discussion this Court has concluded that there is no basis for the court not to declare the subject as a person suffering from mental disorder; and that the applicants are lawfully entitled to be appointed as the subject’s legal guardians to help him manage his estate.
29. The court has also noted that the applicants do not object to the 2nd respondent being appointed as a co-guardian and estate manager.
30. Accordingly, the Court hereby declares the subject to be a person suffering from mental disorder.
31. Further the Court hereby appoints the applicants to be the joint legal guardians of the subject. In addition, the applicants and the and the 2nd respondent are jointly appointed to manage the estate and affairs of the subject.
32. It is so ordered

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 6TH DAY OF FEBRUARY, 2025

R MWONGO

JUDGE

Delivered in the presence of:

1. Ms. Nzuki holding brief for Nyaga for 1st & 2nd Interested Parties/Respondent
2. Janjo for the Petitioner
3. Francis Munyao - Court Assistant

