



REPUBLIC OF KENYA



**In re BKON (Subject) (Miscellaneous Application E067 of 2025)
[2025] KEHC 3638 (KLR) (Family) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E067 OF 2025
PM NYAUNDI, J
MARCH 21, 2025
IN THE MATTER OF MENTAL HEALTH ACT, CHAPTER 248 OF THE LAWS OF KENYA
AND
IN THE MATTER OF THE RIGHTS OF OLDER MEMBERS
OF SOCIETY UNDER ARTICLE 57 OF THE CONSTITUTION**

JUDGMENT

1. Vide Petition dated 13th March 2025, the Applicants herein GON seeks the following orders-
 1. That the Court to be pleased to declare Mrs. BKON as a person suffering from mental disorder as defined in the *Mental Health Act*, Cap. 248 of the Laws of Kenya.
 2. That the Court to appoint the Petitioner GON, the guardian of the Subject, the said Mrs. BKON.
 3. That the Court be also pleased to appoint GON, to be the Managers of the estate of the said Mrs. BKON
 4. That the costs of this application be borne by the estate of the said Mrs. BKON.
2. The Application proceeded by way of viva voce evidence. The Petitioner is the husband of the Subject. The health of the Subject has been declining over a period of 5 years. She has been diagnosed with Dementia and is currently admitted at the M P Shah Hospital. She has been released to go home for home-based care and the Subject requires to access her assets and estate so as to meet the financial needs of her treatment and urgently pay the medical bill owing at the MP Shah Hospital. He enumerated the assets, businesses and bank account of the Subject some of which are owned or operated jointly. It is his request That he have access to these to enable him manage the affairs of the subject who is currently incapacitated.



3. At the hearing of the Petition, the Applicant was in hospital ward at M P Shah with the Subject. The Court was able to observe That the Subject was in a hospital bed with nurses and was not responsive.
4. The Subject and the Petitioner have four adult children; AN, PN, TN and JNN.
5. Dr. Visha Patel, Chief Medical Officer was present in Court. He confirmed That the Patient is known to him and she was admitted to the hospital; and diagnosed to have subdural hematoma (blood clot in the brain). Her previous medical history indicated she had Alzheimer's disease That was being managed. The medical team evacuated the blood clot. Her brain functions were affected by the blood clot. She is yet to regain consciousness fully.
6. The Doctor noted That she may regain full functionality with time but it is not possible to predict how long she will take to recover. He stated That the subject requires assistance in the performance of her daily routines, such as feeding, bathing etc. The Hospital is ready to release her for home-based care.
7. The Children of the Petitioner were present in Court and the Court interviewed them. AN, is the eldest child of the Petitioner and step daughter of the subject. She confirmed That she has seen the Petition, understood it and was supportive.
8. PN was present in Court he is a child of the Petitioner and step son to the subject he confirmed That he has seen the Petition, understands it and supports it.
9. TN was present in Court. She is a daughter to the deceased and the Subject. She had reservations to the Petitioner being appointed manager of the estate and stated That her consent was limited to the Petitioner being granted access to the accounts to enable him secure funds to release the subject from hospital. She stated That the other matters regarding the management of the Subject can be discussed.
10. JNN was present in Court. He is a son to the Petitioner and the subject, he had seen the Petition and like Tabitha he was of the view That the power to manage be limited to the Applicant being able to have access to the account so as to secure the release of the subject from hospital.
11. At this juncture the Court inquired both from Senior Counsel Gibson Kamau Kuria and the Petitioner on whether they were prepared to accommodate the concerns of the two biological children of the subject.
12. Whereas the Petitioner did not object to Tabitha being appointed as Co Guardian he stated he would do so with 'heaviness of heart', as what was at issue was the care and management of his spouse and the assets in question were registered in their joint names.
13. The Petitioner also presented to Court the medical report dated 6th March 2025 prepared by Dr. (Mrs.) Grace Adira Achiya. In That report the Doctor concludes as follows-
 - the Patient has senile dementia, a chronic progressive neurodegenerative disorder
 - As a result of this illness, she is not cognitively and physically able to make independent life decisions including activities of daily living(ADLS)
 - She therefore requires assistance to perform her ADLD and cannot engage in any contracts as of nowAnd makes the following recommendations
 - The patient requires close nursing care on a 24-hour basis including physical therapy
 - She has to faithfully take her medication to manage her physical disorder



Determination

14. The provisions of the *Mental Health Act* require That individuals who suffer from mental illness are well cared for and their estates are properly handled. The *Mental Health Act*, at Section 26 provides That:
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. Where there is no known relative or other suitable person, the court may order That the Public Trustee be appointed manager of the estate and guardian of any such person.
 3. Whereupon 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.
15. In *Re N M K* [2017] eKLR considered what should guide the court when applying Section 26 and 27 of the *Mental Health Act* and held as follows:
- In considering an application brought under sections 26 and 27 of the *Mental Health Act*, the Court is guided by three main factors: There must be medical evidence warranting the determination by the Court That the Subject suffers from mental disorder; The person to be appointed to be either a Guardian or Manager must be fit to be so appointed; The Court must be satisfied That a proposed Manager will utilize her powers for the benefit and welfare of the Subject.
16. Similarly, in *re Estate VFM (Patient)* [2020] eKLR, the court held That:
- For the court to grant the application for appointment of a manager of the estate and guardian to the patient, the Petitioner/Applicant is duty bound to prove That:
- a) There exists medical proof by show of evidence confirming That the subject suffers from mental disorder.
 - b) The petitioner/Applicant seeking to be appointed as manager or guardian must be legally fit to be so appointed.
 - c) That due to the subject's mental disorder, he or she is incapable of managing his/her own affairs independently and responsibly.
 - d) That the proposed manager/guardian will manage the subject's property effectively and efficiently for the benefit of the estate and welfare of the subject.
17. It is not in dispute That in her current condition, the Subject is incapable of managing her affairs. The issue for determination is who should be appointed her Guardian and the Manager of her estate in



light of the reservations expressed by her 2 children. It is common ground That the Petitioner is the husband of the subject and the father of the 4 children who appeared in Court. Two of the Children, T and J suggest That the Court limit the orders to the Petitioner accessing funds so as to release the Subject from hospital and then allow for the family to consult on the broader issue of management of the assets of the subject.

18. The Petitioner submits That as a spouse of the Subject he is motivated by her best interests and there is no basis for joint guardianship. He submits That in any event, his Counsel has set out the limits of his power as guardian and manager over the estate of the subject and the legal safeguards to protect the interests of the subject.
19. At the outset of the hearing SC Kamau Kuria, Counsel for the applicant, set out the governing law regarding persons who have mental illness. He correctly stated That Article 57 of *the Constitution* of Kenya requires the Court to safeguard the right of the subject to live in dignity and respect and be free from abuse. When read alongside Article 159 of *the constitution* and particularly Article 159 (2)(b), which requires That justice shall not be delayed, I am persuaded That the law requires That in cases of this nature, the Court must move with speed to issue orders That are in the best interests of the subject.
20. The Subject is critically ill, it is not known how long she will take to recover. The family needs to be facilitated to ensure That she has the best available care That will hopefully contribute to her recovery. They do not need this court to defer for a moment longer than is necessary a decision on how the issues relating to the subject will be managed.
21. It is generally accepted That as far as next of kin is concerned spouses will rank prior to children. In *G & 2 others v M & 3 others (Miscellaneous Application E010 of 2023)* [2024] KEHC 11635 (KLR) (Family) (20 September 2024) (Judgment) I expressed myself as follows-

".....They are the nuclear family. The marriage vows require spouses to stick together through adversity such as sickness. Spouses are not fair-weather acquaintances. The spouse herein is willing and prepared to take care of her spouse."
22. It will be in the best interests of the Subject to have the Petitioner appointed as the sole Guardian. On the scope of the appointment, I will grant the prayers in the Petition as prayed. I do not feel That given the legal safeguards to prevent wastage of the estate, there is utility in giving the Subject another appointment with the Court. It is in her interest That steps to ensure she is taken care of in her hour of need are set in motion. The Court will pursuant to Section 27 of the Act maintain a watchful eye. In any event, any party who feels That the best interests of the subject are compromised at any stage is at liberty to apply to Court to review its orders.
23. In the circumstances the Petition dated 13th March, 2025 is allowed and with the following orders:
 - a. BKON is hereby declared as suffering from a mental disorder under Section 26 of the *Mental Health Act* (Cap 248).
 - b. GON is hereby appointed under section 27 of the *Mental Health Act* as the Guardian of BKON
 - c. GON is hereby appointed manager of the estate of BKON under Section 28 of *Mental Health Act* to manage her estate including any such description of moveable or immoveable 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 GON shall deliver to Court and the Public Trustee, within 6 months, an inventory of the property belonging BKON.



e. In accordance with Section 27(4) of the *Mental Health Act*, 2022 the Petitioner shall cause within 30 days the publication of notice in the Gazette, informing the public of his appointment as the manager of the estate of BKON.

f. As Manager of the Estate of BKON the Petitioner may dispose/ deal with the property of the Subject only with the sanction of the Court.

g. The matter will be mentioned before court on 17th July, 2025 to confirm compliance.

h. Costs to be met out of the Estate of the Subject.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

P. NYAUNDI

JUDGE

In the presence of:

Kamau Kuria Senior Counsel for Petitioner

Kanja Court Assistant

