



In re MWW (A Mentally Challenged Person) (Family Miscellaneous Civil Case E011 of 2024) [2025] KEHC 2277 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY MISCELLANEOUS CIVIL CASE E011 OF 2024
FN MUCHEMI, J
MARCH 6, 2025**

**IN THE MATTER OF AN APPLICATION UNDER SECTIONS 2, 26, 27 & 28 AND PART XII OF THE MENTAL HEALTH ACT (CAP 248) ORDER 32 RULE 15 OF THE CIVIL PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS OF THE LAW.AND
IN THE MATTER OF M.W.W. (A MENTALLY CHALLENGED PERSON)**

BETWEEN

FN APPLICANT

AND

NM RESPONDENT

JUDGMENT

Brief Facts

1. By a Petition dated 5th August 2024, the petitioner invoked Sections 26, 27 and 28 of the [Mental Health Act](#), Cap 248 Laws of Kenya and sought the following prayers:-
 - a. This Honourable Court be pleased to declare M.W.W (the subject) an adult, female, to be a person suffering from schizo-affective disorder and mentally incapacitated.
 - b. That upon prayer (a) above being granted, this Honourable Court be pleased to declare that M.W.W being such a person mentally incapacitated and/or a person suffering from mental disorder by reason of schizo-affective disorder is a person in need of care, protection and guardianship.
 - c. That upon prayers (a) and (b) above being granted, this Honourable Court be pleased to appoint the applicant herein as guardian for the said MWW.



- d. That upon Faith Njoki being appointed as the guardian of the said MWW, this Honourable Court to authorize the applicant to but not limited to manage and protect the properties of the said MWW currently comprising of:-
- I. Funds in Equity Bank, Thika Branch, Account No. 1760184203046 amounting to Kshs. 200,777/-
 - II. Funds in Equity Bank, Thika Branch, Account No. 0340384730940 amounting to USD 5,630.
 - III. Funds in M-PESA Account No. 0719459972 amounting to Kshs. 71,752.20/-.
 - IV. Funds in Family Bank Account No. 039000013445 amounting to USD 30,330.
 - V. ½ share of Plot No. Ngenda/Kimunyu/2760 which includes all the developments thereon.
- e. That the above funds/properties be utilized for the benefit and upkeep including but not limited to medication of the said MWW.
- f. That the subject, MWW having been forcibly and secretly removed from the custody and care of the petitioner by one Nduta Mukuria, this Honourable Court be pleased to issue orders freezing the above bank accounts being Equity Thika Branch Account Nos. 1760184203046 and 0340384730940, Family Bank Account No. 039000013445 and MPESA Account No. 0719459972 to preserve the funds therein.
- g. That this Honourable Court be pleased to issue orders compelling one Nduta Mukuria to grant the petitioner unlimited access to the subject, MWW to facilitate continuation of the subject's treatment and for socialization purposes.
2. The respondent opposed the petition and filed a Further Affidavit and Further Answer to Petition dated 18th October 2024.
3. The subject/interested party opposed the petition and filed a Reply to the petition dated 14th October 2024.
4. The matter proceeded by way of viva voce evidence.

The Subject/Interested Party's Case

5. The subject Margaret Wanjiru Wakaba testified that she is aged 63 years old and her daughter, the petitioner is 44 years old. Her daughter is the petitioner herein and is running a boutique in Thika town. The witness testified that the petitioner went to her house severally to take to her medicine although she was not supposed to do so. PW1 testified that she lives alone and does all the housework and cooking by herself. She further testified that she lived in the USA for 22 years and thereafter returned to the country. In the USA, the subject said she worked as a caregiver. She had home at Kenyatta road where he now live after returning to Kenya.
6. The witness testified that she takes medication for high blood pressure and anxiety which was diagnosed by a doctor at Nairobi Hospital. The witness further testified that she does not suffer from any mental disorder but just anxiety. Th witness said she suffered stress after working in the USA for about twelve (12) hours a day.

The subject further testified that her sister, Anne Nduta Mukuria lives in Kenyatta Road and she visits her once a week. PW1 further testified that her sister attends to her when she needs medicine.



7. PW1 testified that the petitioner wanted her to live with her in her home in Thika but the subject was unwilling for the reason that the petitioner is married with three children. The witness further testified that she relates well with the petitioner and used to visit her and her family in Thika when she returned to Kenya. However, the petitioner later took away the subject's passport, her phone, identity card, phone charger and documents for a certain case when the subject paid the petitioner a visit in her house.
8. The witness further testified that her bank account was blocked through a court order by the petitioner. As such, she depends on her sister for financial assistance. Here estimated expenditure is Kshs. 8,000/- per month for medication and other personal needs.
9. The subject testified that she and her sister have a joint account in Family Bank which she opened with her money from her USA bank account. She further stated that she is ready to have the account registered in her name solely for she is able to manage her finances.
10. It was the further evidence of the petitioner that in July 2024, the petitioner asked PW1 for Kshs. 400,000/- from her account but she gave her Kshs. 200,000/-. The witness further testified that she disagreed with the petitioner when she learnt that the subject and her sister Nduta have a joint account. The witness testified that the funds from her USA bank account was transferred to her Family Bank account in Kenya by her sister Nduta.
11. On cross examination, the witness testified that the petitioner used to go to her home with a lawyer and sometimes police officers to threaten her. The subject said that she stayed with the petitioner for only one month after returning to Kenya and that the two disagreed because she used to lock her inside the house. This happened about three times and the subject did not let her go anywhere.

The Petitioner's Case

12. The petitioner testified that the subject was her biological mother and the respondent was her aunty. She adopted the affidavit dated 5/08/2024 as her evidence and testified that the subject suffers from anxiety disorder since 2021 when it was found necessary for her to return home from the USA. The witness testified that the subject was taken to hospital by her niece, Wangeci. The subject worked as a caregiver and she would be absent from work when she was sick. Due to the anxiety problem, the family decided that the subject comes back to Kenya.
13. PW2 testified that she bought a home jointly with the respondent and the respondent who is a nurse offered to take care of the subject at their home at Mahiga on Kenyatta Road. The witness further testified that the subject used to go to Nairobi for medical check-ups and treatment. The witness further testified that the subject had later moved to her house. The subject used to withdraw her money through mobile banking. Further, the respondent travelled to USA to wire the subject's money as she has dual citizenship.
14. The witness testified that the respondent left the subject with another aunty at Syokimau for the period she was away. But when the petitioner went to visit, she noticed that the subject was uncomfortable in that home. The petitioner then decided to bring the subject to her home in Thika. The witness further testified that there was a cheque from the USA for the subject whereby the respondent advised the subject to open a joint account in the names of the subject and the respondent and deposit the cheque and her monies there in the joint account. The witness further testified that the subject has never been at peace and hardly attended bank appointments when she was staying at Mahiga with the respondent.
15. PW2 testified that she and the subject have never differed and that she told the subject about her financial needs just like any child would advise her mother. The witness further testified that she used



- to pay for the subject's hospital expenses and also for her maintenance but the respondent later took over without consulting her. The witness stated that she found the subject at Equity Bank withdrawing money to take to the respondent and thus she took the subject's identity card, passport and other important documents to prevent her from withdrawing her money for use by the respondent.
16. On cross examination, the witness testified that Dr. Kigamwa diagnosed the subject with schizophrenia and mental stress but stated that she did not have any medical report adjudging the subject as mentally incapacitated.
 17. The witness testified that the subject has been doing her own transactions but she seeks to take charge and prevent the subject's funds from being taken by the respondent and misused under the guise of treatment and caregiving. The witness further testified that she was not made aware that subject and the respondent operated a joint bank account. She further testified that the respondent took the subject and stayed with her in order to misappropriate her money.
 18. The witness stated that her aunt, the respondent is a nurse and had worked at Mathare Hospital before she went to the USA and therefore she cannot vouch for her as to having the expertise to diagnose mental illness in regard to her mother's condition.

The Respondent's Case

19. The Respondent Nduta Mukuria, adopted her affidavit dated 15/8/2024, further affidavit dated 15/10/2024 as her evidence and her response to the petition dated 18th October 2024 as well.
20. The witness testified that the subject has no mental disorder and has not been treated for mental illness. Further that she was not aware of any medical report from any doctor on her sister's illness. The witness testified that she invited the subject to work in the USA with her because the petitioner was often insulting and abusing her. The respondent further testified that the subject worked at Jomo Kenyatta International Airport from where she was retrenched. The respondent then asked the petitioner to live with the subject but she declined. The witness testified that she raised the petitioner as her own child since her mother gave birth to child at her teenage age. Upon assuming responsibility of the petitioner, she gave her a place to stay in Eldoret. After the subject was retrenched, the respondent requested the petitioner to live with the subject but the petitioner refused to admit her own mother access to the respondent's house.
21. The witness testified that she had a good relationship with the subject over the years. The two jointly bought a house at Mahiga in Kenyatta Road for Kshs. 2.9 million. The witness further testified that the subject had not closed her bank accounts when she came back to Kenya she is the one who closed the subject's accounts. It is the petitioner who mov to clos the bank accounts including the joint on where the subject deposited the bulk of her savings.
22. The respondent further testified that the subject suffered from anxiety and stress due to demands made by the petitioner. She further stated that she took the subject to Nairobi Hospital where she was treated.
23. On cross examination, the witness testified that she had no problem with her sister in running the joint bank account and in Kenya they opened a joint bank account with the same money.
24. The witness stated that the subject sent her to the USA to go and close her bank accounts but the cheques issued were rejected in Kenya due to fraud cases . The witness further stated that she was asked to request the bank to wire the money from the USA to Family Bank. The cheques were deposited in the respondent's account in DCU Bank in the USA and later, the funds were transferred to their joint account in Family Bank. The witness further testified that all the funds transferred to Family Bank



belonged to the subject but she put her own money in the joint bank account though she cannot recall the amount he deposited.

25. Parties put in written submissions.

The Petitioner's Submissions.

26. The petitioner submits that from the medical reports from Kenyatta National Hospital dated 27/11/2024 and Thika Level 5 Hospital dated 13/1/2025, the subject is suffering from a mental disorder disabling her to make any binding decision. The petitioner submits that the subject is incapable of managing her personal affairs. It is evident that from the period the subject stayed with the petitioner that the petitioner would accompany the subject to hospital whenever there was a doctor's appointment. Furthermore, the petitioner submits that she would buy the prescribed medicines for the subject. The petitioner further submits that the subject is incapable of making decisions on how to manage her life savings and therefore the petitioner urges the court to appoint her as the guardian of the subject until the subject has recovered sufficiently enough to make binding decisions.
27. The petitioner submits that while she lived with the subject, she took care of her by feeding her, housing her and taking her to hospital for follow ups and catering for the same. The subject testified that she enjoyed very much the stay with the petitioner and interaction with the grandchildren. Further, the petitioner argues that during the time the subject stayed with her, none of the subject's money or estate was lost or misused, instead when the subject was forcefully taken away from her, she applied for the preservation of the subject's estate.
28. The petitioner submits that in appointing a suitable guardian, the overriding consideration should not be who is materially endowed than the other, rather the person who can uphold the interest of the subject.
29. The petitioner further submits that the respondent has never made any effort to file any application to be made the subject's guardian yet she was aware all that time that the subject is suffering from a mental illness from the time they were in the USA. The petitioner states that from the whatsapp conversations between her and the respondent, the respondent is very clear that the subject is ailing from sensitive mental problems. Furthermore, the respondent is a nurse by profession and had worked and cared for mentally challenged patients at Mathari Mental Hospital before she relocated to the USA hence she had the capacity to discern that the subject is mentally ill. However, with the said knowledge, the petitioner argues that the respondent has in all her affidavits averred that the subject is not mentally challenged. Thus she is guilty of concealment of that fact and all her evidence cannot be relied upon.
30. The petitioner argues that what can be deduced from the conduct of the respondent is that the motivation to have the subject at her side is to take advantage of the estate of the subject. The respondent has proven to be a person who cannot uphold the interest and welfare of the subject.
31. The petitioner submits that the respondent cannot comply with court orders as she did not give her access to the subject even after being served with the requisite orders to release the subject to her.

The Interested Party's Submissions

32. The interested party relies on Section 2 of the *Mental Health Act* and the cases of Re CWN (a person suffering from mental disorders) [2022] eKLR; Re JKM (a person suffering from mental incapacity) (Miscellaneous Case E108 of 2024) [2024] KEHC 6092 (KLR) and Re JK (a person suffering from mental disorder) (Miscellaneous Application E148 of 2022) [2023] KEHC 17401 (KLR) and submits that the petitioner has not proved evidence from a medical practitioner to show that the subject is



mentally incapacitated yet the law is very consistent that there must be a diagnosis by a qualified medical practitioner for anyone to be declared mentally challenged. The interested party submits that instead she has produced a report from a qualified mental health practitioner declaring her mentally fit.

33. The interested party submits that if she were to be declared mentally challenged, the best person to have the custody and maintenance of her and her estate would be the respondent. She submits that she has lived with the respondent for over two decades in a foreign country and that she has never taken from her but instead helps her in times of need. The respondent has also been a nurse for many years including at Mathare Hospital which is known for treating persons with mental problems. The interested party further submits that she was adamant that she does not wish to live with the petitioner whose only interest is her money.
34. The interested party relies on Section 26 of the [Mental Health Act](#) and the cases of Re RAO (The Subject) (Miscellaneous Civil Appeal E091 of 2022); Re NMK [2017] eKLR and Re Estate of GNM (Family Miscellaneous Application E013 of 2023) and submits that when it comes to guardianship, the Act does not give priority to any persons but leaves it to the discretion of the court to choose the best suited person who the subject states is the respondent.

The Respondent's Submissions

35. The respondent submits that the subject is mentally fit to take care of her affairs pursuant to the medical report dated 13th August 2024 by Dr. Omar. The respondent relies on Section 107 and 108 of the [Evidence Act](#) and the case of In Re CWM (a person suffering from mental disorder) [2022] eKLR and submits that it is upon the petitioner to prove that the subject is mentally incapacitated and that she is incapable of managing her affairs. The respondent argues that the medical report dated 24th July 2024 produced by the petitioner does not indicate anywhere that the subject is mentally incapacitated. Further, the respondent submits that the subject has never been under the strict care of anybody, she has been working until her retirement, continues to carry on with her business and does daily business by herself. The respondent argues that the petitioner mischievously moved by the money saved by the subject and has chosen to mislead the court so as to get the orders that allow her to access the money.

Issues for determination

36. The main issues for determination are as follows:-
 - a. Whether the subject should be declared as suffering from mental disorder pursuant to the [Mental Health Act](#), Cap 248.
 - b. Whether the petitioner should be appointed as guardian to the subject as well as manager of the Estate of the subject.

The Law

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

37. 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.
38. 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.”

39. Section 26 provides for custody, management and guardianship

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 of the guardian of any such 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 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.
40. The court issued directions on 24th October 2024 to the effect that the subject to be taken to Kenyatta National Hospital and Mathare Mental Hospital and that those medical reports be produced in court. Pursuant to the Principal Judge’s circular dated 4th July 2023, the court gave further directions on 20th November 2024 to the effect that the subject be taken first to a psychiatrist at Thika District hospital before examination at Kenyatta National Hospital. The medical report from Thika Level 5 Hospital dated 13th January 2025 indicates that the subject is currently mentally stable while on medication. It is noted that the medical report by two consultants namely Dr. I. Kanyanya, a consultant psychiatrist and Dr. Nduku Kiko, a consultant physician/endocrinologist from Kenyatta National Hospital dated 27th November 2024 sharply differed from the report from Thika Level 5 hospital. The report states that the subject appeared to be still recovering from a more severe mental disorder other than anxiety disorder probably major depressive disorder with psychotic symptoms. The doctors further indicated that the medication the subject was taking appeared to have reduced the symptoms she had earlier, especially the auditory hallucinations. The doctors concluded that the subject was not fit to make binding decisions at the time.
41. The court has two reports that are at variance with each other on the condition of the subject. The history of the report of Thika Level 5 hospital is that the subject was reactive to the current civil court dispute. This history contradicts the evidence of both the petitioner and the respondent who both stated that the subject has been suffering from different ailments. The petitioner called it mental disorder while the respondent called it ill health which forced the subject to relocate to Kenya. In her evidence, the respondent referred to the condition as acute stress.
- It is therefore correct as stated in the report that the subject was suffering mental anguish/disturbance due to this case before the court.
42. A report annexed to the petition dated 24/07/2024 by Dr. Pius Kigamwa diagnosed the subject to be suffering from Schizo – Affective disorder. The report from Thika Level 5 hospital stands alone as compared to the rest of the evidence in this case.



The report from Kenyatta National hospital was done about 40 days after the Thika Level 5 report. It was done by two consultants who gave vivid details of their examination and interview on several areas. The conclusion was that the subject was still recovering from a more severe, mental disorder other than anxiety disorder, probably Major Depressive Disorder whose symptoms of hallucinations had reduced due to medication. The finding was that the subject is not fit to make binding decisions at that time. The report was signed by the two consultants on 5th December 2024.

43. In my considered view, the report by the two consultants is superior in quality than that of Thika Level 5 hospital. Furthermore, it has captured the history of the subject's mental and physical condition in a detailed manner. This court will therefore adopt the report of the consultants dated 5th December 2024.
44. Consequently, the medical report supports the petitioner's case that the subject suffers from a mental disorder as prescribed under Section 2 and 2b of the [Mental Health Act](#) which renders her incapable of running and managing her own affairs.

Whether the petitioner should be appointed as guardian to the subject as well as manager of the Estate of the subject.

45. As noted above, Section 26 of the Act gives court the power to make an order regarding management of the estate of any person suffering from mental disorder to any relative or any person suitable but giving preference to a relative.
46. The court in *Re N.M.K [2017] eKLR* considered what should guide a court when applying Section 26 and 27 of the Act and stated:-

In considering an application brought under Sections 26 and 27 of the [Mental Health Act](#), the court is guided by three main factors:-

- a. There must be medical evidence warranting the determination by the court that the subject suffers from mental disorder;
- b. The person to be appointed to be either guardian or manager must be fit to be so appointed;
- c. The court must be satisfied that a proposed manager will utilize her powers for the benefit and welfare of the subject.

The overriding principles in applying all these factors is that the welfare and best interests of the subject must be the overall guiding principle.

47. Similarly in *Re Estate of V.F.M (Patient) [2020] eKLR* the court held:-

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.
48. The subject told the court that she lives in her own home but is jointly owned by the respondent and herself. The respondent said she is also staying in her own house and denied that she lives together with the subject. The respondent said she checks on the subject regularly. The subject said she is able to maintain herself from her funds in her bank accounts. She holds one account jointly with the respondent as Family Bank, Thika Branch which hold the bulk of the subjects savings made in the U.S.A. The other bank accounts are held in the subject's name.
49. The petitioner is the daughter of the subject. On return from the U.S.A. and at the time the respondent had travelled abroad to close the subject's accounts, the petitioner lived with her mother in her house in Thika. She said they lived well and in peace for a month but the petitioner took away her personal documents including identity card, title deed, passport and her mobile phone which annoyed the subject. For that reason and due to the fact that the petitioner is married with three children, the subject said she was unwilling to stay at the petitioner's home. The respondent told the court that she has always taken care of the subject and provided for her in times of need. But the petitioner has always been interested in getting money from the subject which she sometimes demands. From this evidence, it is evident that the respondent relates well with the subject who is her younger sister. As for the petitioner who is a daughter and only child of the subject, they have had an estranged relationship with the mother.
50. It is quite a task to balance between the competing interest of the parties at the same time, act in the best interest of the subject who is in need of care and protection. In this delicate balance, the respondent who has been very close to the subject for many years as the two lived in the U.S.A, this court cannot ignore the part she has played in the past in caring for the welfare of the subject. However, it is important to note that the respondent was adamant that the subject does not suffer from a mental disorder and can take care of herself and manage her own affairs. As the respondent held that hard line position, she did not cross-petition to be appointed a guardian but strongly opposed the petition. The respondent was later proved wrong by the report of two consultants who found that the subject was incapable of making binding decisions. It is also noted that the respondent disobeyed the temporary orders given by the court at the commencement of the suit. She had been directed to hand-over the subject to the petitioner and later to produce the subject in court which orders she disobeyed. However, the parties agreed to abandon the application for contempt against the respondent and moved to hearing of the petitioner. As such, the respondent did not demonstrate character of a law-binding citizen.
51. However, as I have said in the foregoing paragraphs, the relationship of the parties to the subject and the role played in the life of the subject by the respondent cannot be ignored.
52. Consequently, I hereby take into consideration the best interests of the subject in that in her current mental condition, she requires the assistance of a guardian to manage her affairs until such a time that she recovers from the mental disorder.
53. I hereby allow this petition in the following terms: -
- a. That the petitioner Faith Njoki and the respondent Nduta Mukuria are hereby appointed as guardians of the subject. Margaret Wanjiru to manage her personal, financial affairs as well as to manage her moveable and immovable property.
- b. That the funds in bank accounts of the subject shall be used to provide maintenance and medical needs of the subject as well as in regard to other needs of the subject which may arise from time to time.



- c. That the subject shall continue to reside in her home at Mahiga along Kenyatta road and that the petitioner shall have unlimited access to the said home to facilitate execution of her duties as a co-guardian of the subject.

54. This being a family matter, each party shall bear their own costs of this petition.

55. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

