



In re FMM (A Mentally Incapacitated Person) (Miscellaneous Application E052 of 2023) [2024] KEHC 1575 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1575 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

MISCELLANEOUS APPLICATION E052 OF 2023

FN MUCHEMI, J

FEBRUARY 15, 2024

IN THE MATTER OF SECTION 26 & 28 OF THE MENTAL HEALTH ACT (CAP 248) LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION OF APPOINTMENT OF A GUARDIAN AD LITEM AND MANAGER

AND

IN THE MATTER OF F.M.M (A MENTALLY INCAPACITATED PERSON)

IN THE MATTER OF

MK PETITIONER

AND

FMM SUBJECT

JUDGMENT

1. By a Petition dated November 20, 2023, the Petitioner invoked Section 26 of the *Mental Health Act*, cap 248 Laws of Kenya and sought the following prayers:-
 - a. That F.M.M. be adjudged to be suffering mental health and requires assistance, care and support for her wellbeing;
 - b. This Honourable Court be pleased to grant custody and management over the affairs of the subject F. M. M.
 - c. That the petitioner be appointed as guardian and manager of the estate of F.M.M. which includes any such description of movable and 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 substitute 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.

2. The Petitioner is an adult of sound mind who resides and works in Kenya and a daughter to F.M.M. (“the subject”).
3. It is the petitioner’s case that F.M.M was involved in a road traffic accident on October 16, 2023 and as a result she suffered severe sequelae of head injuries which include right frontal and temporal intracerebral haemorrhage; sub arachnoid haemorrhage; cerebral oedema; temporal bone fracture; right zygomatic arch fracture and scalp injury. On November 8, 2023, Dr. Muoki James assessed the subject and found that the head injuries caused her to experience memory loss and disorientation and therefore she requires assistance for all her daily activities.
4. The petitioner states that she has since been living with the subject and providing her with all her basic needs as well as managing all her finances in a proper manner. The petitioner further urges the court to grant her guardianship and management of the subject’s estate to enable her file a civil suit and seek compensation against the registered owner of motor vehicle registration number KCX 4XXB.
5. The petition was further supported by an affidavit sworn by the son of the subject one WOA who has deposed that the subject was involved in a road traffic accident on 16th October 2023 along Thika Garrissa road at Metrofile. The deponent further states that as a result of the accident, the subject suffered a sequelae of head injuries which have caused her memory loss and disorientation as assessed by Dr. Muoki James on 8th November 2023. As a result, the subject has to be taken care of on her daily needs and assistance in her daily activities. The deponent further urges the court to appoint the petitioner as guardian and manage of the estate of the subject to enable her file a civil suit for purposes of compensation against the registered owner of motor vehicle registration number KCX 4XXB.

Issues for determination

6. The main issues for determination:-
 - a. Whether the subject should be declared as suffering from mental disorder pursuant to the *Mental Health Act*, cap 248 to the extent that she cannot manage herself and her necessary engagements in life.
 - b. Whether the petitioner should be appointed as guardian and 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.

7. 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.



8. 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.”

9. 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.

10. According to the Medical Report by Dr. Muoki James K. dated 8/11/2023, the subject was involved in a road traffic accident on 16th October 2023 whereas she suffered severe head injuries including right frontal and temporal intracerebral haemorrhage; sub arachnoid haemorrhage; cerebral oedema; temporal bone fracture; right zygomatic arch fracture and scalp injury. The doctor assessed the injuries at 50% permanent disability and concluded that the resultant injuries has led the subject to suffer memory loss and disorientation. The doctor further assessed that the injuries have significantly impacted her ability to communicate and to manage her affairs and as such she needed assistance in all of her daily activities. Dr. Muoki James K. is an orthopaedic and trauma surgeon who is currently practicing in Nairobi in his clinic.

11. It is apparent from the doctor’s report that the subject is suffering from a mental disorder as per Section 2 of the Mental Act and further a medical condition contemplated under Section 26 of the Act and is thus incapable of managing her own affairs. This court examined the subject during the hearing of this petition and confirmed that she suffered from loss of memory and was not aware of her environment. As such, it is my considered opinion that the subject needs a guardian to manage her affairs as well as her property.

Whether the petitioner should be appointed as guardian ad litem to the subject.

12. 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.

13. The petitioner has stated that she is a daughter of the subject and that she resides with the subject and assists her with her daily activities. The brother to the petitioner, one WOA has deposed an affidavit



confirming that his mother was involved in an accident and as a result suffered head injuries which have caused her to lose her memory and left her disorientated. The petitioner and her brother both state that the petitioner desires to file a civil suit and seek compensation against the registered owner of motor vehicle registration number KCX 4XXB who hit the subject. The deponent has no objection to the petitioner being appointed guardian and manager of the estate of the subject. Furthermore, the petitioner testified that her siblings earn meagre income and have no objection to providing upkeep of the subject as the petitioner lives and takes care of the subject. The subject also testified and confirmed that her children do casual jobs and assist her meet some of her expenses. She further confirmed that she lived with the petitioner and urged the court to allow the petitioner to continue taking care of her. The Petitioner has demonstrated that she is a responsible person having already taken charge of taking care of her mother and also in filing this petition.

14. In this regard, there is no evidence or document on record challenging the granting of prayers sought in the petition. I am thus of the opinion that the petitioner has satisfied the court that she has the capacity to be appointed the guardian and manager of her mother as well as her properties.
15. I find that the petition is merited and allow it in the following terms:-
 - a. That the subject is hereby declared to be suffering memory loss and as such incapable of managing herself and her affairs.
 - b. That the petitioner is hereby appointed as guardian and manager of the subject F. M. M.
 - c. That the petitioner shall manage the properties, debts and any legacies of the subject in the interest of the subject's family as well as take up any necessary legal needs of the subject including filing of any civil proceedings.
16. That there shall be no order as to costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF FEBRUARY 2024.

F. MUCHEMI

JUDGE

