



**In re KN (Subject) (Miscellaneous Application E103 of 2023)  
[2024] KEHC 3321 (KLR) (Civ) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION E103 OF 2023**

**SN RIECHI, J**

**APRIL 9, 2024**

**IN THE MATTER OF MENTAL HEALTH ACT CAP 248, LAWS OF KENYA**

**AND**

**IN THE MATTER OF KN**

**BETWEEN**

**W WA W ..... PETITIONER**

**AND**

**EWN ..... RESPONDENT**

**JUDGMENT**

1. Mr. KN (Subject) was born on 21.10.1941. He is now 80 years old. He was employed by the Colonial Government in 1962 and worked in the Public Sector until he took early retirement. He has 3 wives and several children. They are:

1. JWN

a. GW (Deceased)

b. EWK

c. TMK

d. MNK

2. JWN

a. W wa W



- b. EMK
- 3. EWN
  - a. ANK (Deceased)
  - b. GK
  - c. TK
  - d. JMK

Among his children is the Petitioner W wa W. In her Petition dated 8.5.2023, the Petition seeks the following orders:

- a. Spent
  - b. That the Honourable Court be pleased to appoint the Petitioner and a representative for each house as the Subject's guardians.
  - c. That the Subject's children from the 1<sup>st</sup> and 2<sup>nd</sup> family be granted reasonable access to the Subject namely, KN.
  - d. That this Honourable Court be pleased to grant such other relief as it may deem fit to grant in the circumstances.
  - e. That the costs of the Petition be borne by the Respondent.
- 2. The Petitioner named EW the 3<sup>rd</sup> wife of Subject as a respondent in this Petition. The Respondent filed a Replying Affidavit. She depones that the subject is her spouse of 40 years. She depones that she knows the subject and that he does not suffer from any mental illness and he is able to take care and manage his own affairs and estate.
  - 3. The court directed that this petition be canvassed by way of *viva voce* evidence. The Petitioner W wa W testified that she is 43 years old and married to TWM. The subject is her father and has 3 wives who are all alive. She testified that she filed this Petition because the subject has been having issues with memory. She has taken him for treatment by Doctor Mativo who diagnosed that he had dementia. He was also examined to Doctor Ndege and they both filed reports which showed that he had issues with memory. She also noticed that the subject would not remember bank transactions of his investments in real estate.
  - 4. On Cross examination by Mr. Mulomi for the Respondent, Petitioner confirmed that the subject stays with the respondent. She also confirmed that they have taken the subject together with the respondent to doctors for treatment. She confirms that she is seeking to be appointed guardian but does not seek to remove him from the respondent.
  - 5. EWN the Respondent adopted her affidavit as evidence in chief. She confirms that she is the 3<sup>rd</sup> wife of the subject who has 2 other wives who are estranged. On being cross examined by M/s Thongori for Petitioner the Respondent confirmed that the Petitioner has been coming to see the subject and together have taken him to several doctors. All the doctors give a diagnosis of dementia. She stated that she is a retired nurse and has noticed that he is forgetful and has short memory. She has seen reports by the doctor and agrees with their prognosis. He has been put on treatment but he refuses taking medication. On the latest visit the doctors said that dementia progresses over time and that he is now worse than he was in 2021. She confirmed to court she started noticing his forgetfulness in 2020 and it is progressing slowly.



6. This Court had the opportunity of hearing the subject KN on 28.2.2024. he was able to explain to court when he was born, where he had worked, his investments and pointed out that he was one of the first directors of Equity Bank. He left the Board of Equity for his son N who also left. He stated he had 3 firms and runs [Particulars Withheld] in Embu with the help of manager, staff and one of his daughters. He confirmed he is health and not suffering from any illness.
7. Doctor Sylvanus Wabwire a Physician Neurologist testified that he saw the subject at his office on 14.2.2021 with a history of Memory decline since 2017. He prepared his report which indicates that the subject has cognitive short term memory. Doctor Kinoti Ndege a neurologist first saw the subject on 14.12.2021 in company of the wife who informed him that subject was forgetful in particular information recently acquired. On examination he said the subject's long term memory was fine but had short term memory of events happening recently or presently. He saw him again on 19.4.2023 where he found he was alert but disoriented in time as he could not remember the date and time. He found that he would take care of himself. Upon examination he formed opinion that he can manage his daily living activities and does not need a care giver round the clock.
8. Counsel for the Petitioner and Respondent filed Written Submissions. M/s Thongori for the Petitioner submitted that Part XII of the [Mental Health Act](#) 2022 confers on the court to make orders pertaining to care and administration of the property of persons with Mental illness. Counsel submitted that the overall guiding principle guiding the court is the welfare and best interest of the subject. Counsel submits that the reports by Doctor Ndege and Doctor Wabwire all confirm that the subject suffers from short memory limiting his ability to carry out major transactions. Counsel urged the court to find out that the subject suffers from dementia which falls within the definition of mental illness.
9. On who should be appointed guardian of the subject, Counsel submits that the Petitioner and a representative of each of the wives of the subject should be appointed. Counsel submits that the Respondent will be unsuitable because she has not been taking the subject to follow up treatment, has isolated other family members, monitors visits by family members and has enabled subject to withdraw Ksh.27 million in last 2 years which cannot be accounted for by the subject.
10. Mr. Mulomi for the Respondent submitted on what he calls preliminary issues of jurisdiction, pleadings, offending section 26 and 27 of the [Mental Health Act](#) 2022. He urged this court that Section 2 of the [Mental Health Act](#) relating to appointment of guardians only relates to where such persons are minors. He submits that the Petitioner's prayer for guardianship of the subject is unfounded, ill-advised and cannot issue.
11. On whether the Subject suffers from Mental illness he submits that the medical reports show that his long term memory is intact but he suffers from dementia leading to short term memory challenges.
12. On who should be appointed to administer the Property of the subject he submitted that the Respondent and representatives of each of the 3 houses should be appointed.
13. This petition is premised on the provision of the [Mental Health Act](#) 2022. This is an act enacted to:
  - a) promote the mental health and well-being of all persons, including reducing the incidences of mental illness;
  - b) co-ordinate the prevention of mental illness, access to mental health care, treatment and rehabilitation services of persons with mental illness;
  - c) reduce the impact of mental illness, including the effects of stigma on individuals, family and the community;



- d) promote recovery from mental illness and enhance rehabilitation and integration of person with mental illness into the community;
- e) ensure that the rights of a person with mental illness is protected and safeguarded
- f) adopt a holistic approach to community-based mental health services; and
- g) promote the provision of mental health services in primary health facilities

Its objective is therefore to:

- a. provide the necessary resources for the provision of mental health care and treatment at National referral health facilities;
- b. collaborate with the county governments in—
  - (i) the development of the necessary physical and technological infrastructure for the care, rehabilitation and provision of health services to persons with mental illness;
  - (ii) expanding and strengthening community and family-based care and support systems for persons with mental illness;
  - (iii) expanding and strengthening community and family-based care and support systems for vulnerable persons;
- c. put in place mechanisms to ensure the rights of persons with mental illness are realized including mechanisms for outpatient comprehensive cover for mental health care and continued care for mental illness;
- d. adopt a comprehensive national strategy and plan of action and policies to promote the realization of the rights of persons with mental illness under Article 43 of the *Constitution* and put in place measures designed to improve the general welfare and treatment of persons with mental illness;
- e. develop standards to be maintained by mental health facilities including;
  - i. the number of qualified health professionals required to serve a mental health unit including the number of psychiatrists, psychologists, clinical officers who specialize in psychiatry, psychiatric nurses, counsellors, occupational therapists and allied health workers;
  - ii. the type and quantity of diagnostic and therapeutic equipment required by a mental health unit; and
  - iii. the medication and methods of care, rehabilitation and treatment to be administered to persons with mental illness;
- f. develop community-based programs for the continued care and rehabilitation of persons with mental illness;
- g. promote research, data collection, analysis and the sharing and dissemination of information on the welfare of persons with mental illness in the Republic;
- h. carry out sensitization programs on and promote access to information on the care and management of persons with mental illness;



- i. develop and implement strategies and programs to curb stigma related to mental health and mental health care and treatment; and
- j. implement programs and strategies to guarantee students access information on mental health, mental health care and treatment.

14. Section 2 a person with mental illness as:

A 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;

15. The procedure for an application under the act is provided by section 26 which provides:

An Application for administration

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 an 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.
3. A notice of the application under subsection (1) shall, in such manner as the court may direct, be served upon the—
  - a. person in respect of whom the application is made; or
  - b. where an application is made by a supporter to the representative of the person with mental illness.
4. Despite the provisions of subsection (3) the court may make an order for the service upon any other person to whom, in the opinion of the court, notice of the application should be given.
5. The court may waive the requirement for service under subsection (3)(a) if the court considers service impracticable, inexpedient or would be ineffectual.
6. The court may, in order to have a report of the mental capacity and condition of such person in relation to whom the application is made, require the person to present themselves at a place and time appointed by the court, for the—



- (a) court to examine the person; or
- (b) person to be examined by a qualified registered mental health practitioner.

16. The person who can make the application to court is provided by Section 3.

Section 2 defines representatives as from the petition, Responses and submissions the issues for determination in this petition are:

1. Whether the subject suffers from a mental illness
  2. If (1) is in affirmative who is to be appointed guardian/manager.
17. On the issue of which the subject suffers from a mental illness, the court in determining the same will rely on evidence by medical evidence, personal observation of the subject and evidence of care givers.
18. Dr. Silvannus D. Wabwire examined the subject and filed his report dated 19.2.2024. In his report he stated:

Neurological exam revealed a gentleman disoriented in time and place. He had normal cranial nerves, normal strength in the limbs and normal sensation,

He was noted to have difficulties with memory/ recall, concentration, disorientation and judgement which together with his presentation agree with a diagnosis of Dementia scoring 9/30 on the Montreal Cognitive Assessment test which suggests a moderately severe cognitive impairment.

Relevant baseline blood tests were normal,

An MRI of the Brain done in 2020 revealed bilateral temporal lobe atrophy,

He currently has significant short term memory challenges limiting his abilities to live and carry out transactions independently.

19. Dr. Kinoti Ndege first saw the subject on 14.12.2021 where the complaint was he forgets information he has recently acquired, including people he met, or appointments he makes. On examination he found his long-term memory fine and could be able to be fully independent. He placed his own treatment. He again saw him on 16.5.2023 for examination and prepared report dated 16.5.2023. At that time he found the Subject was alert but disrupted. MRI exams indicated that he had mild shrinkage of brain and on cognitive tests he scored 19 out of 30 an indication of mild dementia. In the score 30 out of 30 means the person has no dementia.
20. EWN the Respondent and 3<sup>rd</sup> wife of the Subject informed Court that she has been married to subject for 40 years. She is a retired nurse and stays with Subject. She stated that she and the Petitioner noticed the forgetfulness of the Subject and took him to Dr. Mativo for examination and treatment. They also took him to Dr. Ndege in 2021. She informed the Court that they decided to take him for treatment as she had noticed that the Subject was forgetting things. He was diagnosed to be suffering from dementia and given medications which he refused to take. She confirmed to court that his forgetfulness is becoming worse with time.
21. From the medical evidence of Dr. Ndege and Dr. Wabwire, the Subject is suffering from a condition called Dementia but mild in nature. The Respondent who stays with the Subject confirms that the condition which is exhibited by forgetfulness is deteriorating with time.



21. Mental Illness are health conditions which is reflected by changing emotions, thinking or behavior. Mental illness take many forms. Some are mild and only interfere in limited ways with daily life. Other Mental conditions are so severe that they may need care in hospital or assistance of a care-giver. In relation to the subject, it is evident that though he suffers from dementia which is a mental illness, the same is mild and limited to forgetfulness. It has not prevented him from taking care of his daily actions. He is capable of managing himself with daily activities. He is not dangerous to himself or to others or likely to act in a manner offensive to Public decency. His dementia however affects his ability to manage complex activities including complex business decisions and activities.
22. Where a court during its enquiry finds that the Subject suffers from mental illness which is mild as to enable him take care of his daily activities, but is unable due to the illness to manage efficiently the activities of his estate, the court can make orders for management of the estate. This is necessary to prevent waste and mismanagement and safeguard the assets. This is from the realization that not all mental illnesses reach the statutory threshold of impairing one's ability to take care of himself. Where it is shown that the said person needs a guardian or manager to help manage the estate, the Court will make the orders. The Subject when he appeared in court took the court through his employment and businesses he has built over the years. Clearly he has invested in diverse fields as farming and hospitality industry. This over 70 years' investment should be shielded from waste and mismanagement by appointment of managers to assist him.
23. Section 27 of the Act Provisions:
  1. The court may make such an order as it considers necessary for the administration and management of the estate of any person with mental illness including—
    - a) an order making provision for the maintenance of the person;
    - b) an order making provision for the maintenance of members of the person's immediate family who are dependent upon the person; and
    - c) an order making provision for the payment of the person's debts
  2. The court may appoint a manager of the estate of a person with mental illness for the purposes of safeguarding the property of that person.
  3. The court may for the purposes of section (1), appoint the supporter or the representative of the person with mental illness as the manager of the estate of the person under subsection (2).
  4. The court shall, by notice in the Gazette, inform the public of the appointment of a person as the manager of the estate of a person who is suffering from mental illness.
  5. Within fourteen days of the Gazette Notice under subsection (4), any person may lodge an objection to the person appointed as manager.
24. The Court once it makes a decision to appoint a manager, it can appoint a supporter or representatives. In this case the Subject has not appointed a supporter. The court can only therefore appoint a representative. A representative is defined in Section 2 as:

Section 2 of the Act defines "representative" to mean:-

  - a. a spouse of that person, or if unable or unwilling;
  - b. the child of that person, where such child has attained the age of eighteen years, or if unable or unwilling;



- c. a parent of that person, or if unable or unwilling;
  - d. a relative of that person, or if unable or unwilling; or
  - e. a person under whose care or charge the person with mental illness is;
25. I have considered the Subject's faith in members of his family in running his business. I also note that the Subject has wives and therefore houses. The respondent who stays with the subject proposed that in order to foster family unity and harmony, each of the houses should have a representative in the management.
26. Noting that the Subject is still able to take care of himself and his wealth of knowledge in the business and industry, I hereby appoint the following jointly as managers:
- 1. KN - Subject
  - 2. EW – 3<sup>rd</sup> house
  - 3. W wa W – from 2<sup>nd</sup> house
  - 4. EW – from 1<sup>st</sup> house
27. The duties of a manager are as stipulated in Section 28 of the Act which Provides:
28. Duties of a manager
- 1. Where a manager is appointed under this Part, the court may, upon considering the nature of the property whether movable or immovable, and subject to subsection (2), make such orders as the court may consider necessary for the management of the estate by the manager.
  - 2. The manager shall not, without the approval of the court—
    - a. mortgage, charge or transfer by sale, gift, surrender or exchange any immovable property of which the estate may consist;
    - b. lease any such property for a term exceeding five years; or
    - c. invest in any securities other than those authorized under the *Trustee Act*.
  - 3. A manager shall not invest any funds or property belonging to the estate managed under this section:
    - a. in any company or undertaking in which the manager has an interest; or
    - b. in the purchase of immovable property under the authority of section 4(1)(d) of the *Trustee Act* without prior consent of the court.
  - 4. A manager shall perform the manager's duty under this Act responsibly taking into account the best interests of the estate of the person who is suffering from mental illness.
  - 4. Every conveyance or other instrument made pursuant to an order of the court under this Part shall be valid.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF APRIL, 2024.**

**S. N. RIECHI**



**JUDGE**

