



In re AWK (A Person Suffering from Mental Disorder) (Family Miscellaneous Civil Case E227 of 2021) [2024] KEHC 8012 (KLR) (Family) (21 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8012 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY MISCELLANEOUS CIVIL CASE E227 OF 2021
PM NYAUNDI, J
JUNE 21, 2024
IN THE MATTER OF AWK
IN THE MATTER OF THE ADMINISTRATION OF
THE ESTATE OF A PERSON OF UNSOUND MIND
AND
IN THE MATTER OF THE MENTAL HEALTH ACT, NO. 10 OF 1989
AND
IN THE MATTER OF AWK(A PERSON SUFFERING FROM MENTAL DISORDER)
IN THE MATTER OF
DR. SNK PETITIONER

JUDGMENT

1. Before this court is the Petition dated 6th December 2021 in which the Petitioner Dr. SNK seeks the following orders; -
 - a. That AWK , be adjudged to be a person suffering from mental disorder.
 - b. That the Petitioner, Dr. SNK be appointed as guardian of her mother AWK .
 - c. That the Petitioner either by herself or her appointed agent be and is hereby appointed as the manager of AWK 's estate which includes any such description of movable or 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 any property or giving a right to receive any money or goods and carry on, proceed to take over and/or institute any litigation and/or claims and to recover any such property as it may have been lost into the possession or under the control of any person and also to recover any property into or for which such



property has been converted or exchanged, and to further recover anything acquired howsoever by such conversion or exchange.

- d. That the Honourable court be pleased to grant to the Petitioner access to any bank account in the name of AWK for the purpose of maintaining her.
 - e. Costs be in the cause.
2. The Petition was supported by the Affidavit of even date sworn by the Petitioner. The matter was canvassed by way of viva voce evidence.
 3. In her evidence the Petitioner stated that the subject is her mother. She further stated that she takes care of the subject including honouring her medical appointments. In addition, she told the court that the subject suffers from dementia and the situation is deteriorating. It is her evidence that the subject cannot manage her own affairs and therefore, she needs a manager. She testified that there has been misappropriation of funds from the subject's account. She told the court that majority of her siblings support her appointment as a guardian. She produced a medical report dated 14/3/2023.
 4. During cross examination, she stated that she does not live with the subject lives on her own with a care giver. That the subject started her treatment around 2017. She confirmed that she and her siblings initiated CMCC/ E10805/ 21 against her mother and the Respondent. The matter relates to a property that is owned by a company that has family members as directors. She was not clear the circumstances under which her mother was enjoined in the suit.
 5. The relationship between the Petitioner and the Respondent is acrimonious. The Respondent had assaulted her in the past.
 6. The Court interviewed the Subject, AWK who was present in Court. She introduced herself as Mrs. K. She recognized the Petitioner as her daughter. She recognized her other children who were present in Court. She stated that she was aware in Court and that the application had been explained to her. She stated that she was aware that the order would allow the Petitioner to operate her account.
 7. The Respondent had procured 2 vehicles which he had transferred into the name of the subject. She and her siblings were using the vehicles belonging to the Subject. She contends that they use the vehicles for the benefit of the subject.
 8. The Respondent is a son to the Subject. He is opposed to the petition. He lives next to the subject in Runda. He has lived with the subject 1996 because most of his siblings are out of the Country. He does not agree that the Subject has mental illness as alleged. She is aware of the events around her as she constantly asks about her cars and her money. He stated that he has been denied access to the subject. His siblings do not consult him on anything regarding the subject. There is a suit in court concerning collection of rent but he still gets notifications when rent is paid. He escorts the subject to the bank to withdraw money.
 9. During cross examination, he stated that rent collection is managed by agents who were appointed by the subject. Some tenants paid him rent but he forwarded them to the subject. He proposed that his brother Philip should be appointed as administrator of the estate of the subject.

Summary of Submissions

10. At the close of the trial both parties filed their written submissions. The Petitioner identified 4 issues for determination, namely-



- i. Whether the subject should be declared as suffering from mental disorder pursuant to the [mental health Act](#), Cap 248
 - ii. Whether the Petitioner has satisfied this Court that she is suitable to be appointed as guardian of the Subject as well as manager of the assets of the Subject
 - iii. Whether the Respondent's actions amount to improper interference
 - iv. Whether the Respondent's application dated 26th April 2022 is merited?
11. On the 1st issue, the Petitioner relies on the decisions *In Re MWM (a Person suffering from Mental Disorder)* [2017] eKLR and *JWN v MWK* [2020] eKLR where the subject having been found to be suffering from a mental illness, the Petitioners were appointed managers of the Subject's Estate.
 12. On the 2nd Issue, the Petitioner submits that as a biological child of the subject she is best suited to be the legal guardian of the subject.
 13. On the 3rd issue it is submitted that the Respondent has continued to meddle with the affairs of the subject and he should be restrained from these actions.
 14. Finally the Applicant prays that the Application dated 24th April 2022 should be dismissed.
 15. In the Respondent's written submissions he identifies the following issues for determination.
 - i. A response to the Submissions by the Petitioner
 - ii. The sensitivity of the subject matter of the suit herein
 - iii. The mental state of the subject, AWK
 - iv. In addition and or in the alternative to issue (c) above, the legal guardianship of AWK.
 16. It is submitted that the Petition must fail as not all the children of the Subject have been notified of the application and accordingly have not given their consent. Reliance is placed on the decision *in Re Estate of INM* [2021] eKLR.
 17. It is further submitted that it has not been established to the required standard that the Subject is suffering from a mental incapacity. Reference is made to her lucidness in court and the fact that she answered the questions addressed to her by Court. Reference is made to the decision in *Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri* [2011] eKLR and *MMM v AMK* [2016] eKLR and the 2 stage test.
 18. The Respondent takes issue with the fact that the doctor was called not to testify and relies on the decision in *Kenneth Nyaga Mwige & 2 others v Austin Kiguta* [2015] eKLR for the submission on the placing of documents on the court record. Further reliance is placed on the decision in *Christopher Nadru Kagina v Esther Mbandi Kagina & Anor* [2016] eKLR regarding the need to cross examine and verify the evidence of expert witnesses along with Section 48 of the [Evidence Act](#).
 19. Section 48 of the [Evidence Act](#) was further expounded upon in the case of *Jane Nyokabi Githiri (Suing as the Administrator of the Estate of Stephen Githiri Babu) v Fusion Capital Limited & 2 Others* [2021] eKLR and it is submitted that the medical evidence submitted herein did not meet the threshold of expert evidence. The Respondent also refers to the decisions *In the matter of Gerishon Kirima* [2009] eKLR and *In Re Estate of INM* [2021] eKLR on the quality of medical evidence that meets the threshold.



20. It is submitted that the Petitioner is not an ideal choice given her conduct. It is on record that she has filed a suit against the Subject, she is using the property of the Subject without legal authority and she is generally an acrimonious person and is hostile towards the respondent. In addition, the fact that she has excluded one of the children of the subject demonstrates that she is not as candid as she could be.
21. Her history has contaminated her hands and she is therefore undeserving of the orders she seeks. Reference is made to the decisions *John Njue Nyaga v Nicholas Njiru Nyaga & Another* [2013] eKLR and *Esther Nugari Gachomo v Equity Bank* [2019] eKLR.
22. The Respondent submits that he is better suited to be appointed as the guardian of the subject.

Analysis and Determination

23. Having analysed the pleadings herein, submissions filed and the relevant law, I discern the following as the issues for determination
 - i. Whether the Subject should be declared as a person suffering from a mental disorder under Section 26 of the *Mental Health Act* (Cap 248).
 - ii. If the answer to a) above is in the affirmative, who should be appointed her guardian and manager of her estate
 - iii. Who should pay the costs of the suit
24. Section 2 of the *Mental Health Act* defines a person suffering from a 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 a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.
25. Section 26 of the *Mental Health Act*, Cap 248 provides for the circumstances in which a Court may make orders for the management and maintenance of a Patient (Subject) as follows: -

“Order 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 and 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.” [own emphasis]

26. In her evidence the Petitioner alleges that the health of the subject begun declining in 2017. She has been receiving treatment and her mental health status has been assessed by Dr. Prof. Dilraj Sokhi who in the medical report dated 14th March 2023 observed as follows-
- “.... she has progressive memory decline, and my clinical assessment supported by investigations confirms she has Alzheimer’s disease. This is a relentless progressive incurable neurodegenerative brain disorder.
- At my last assessment with the family, she scored 9/30 on the Montreal Cognitive Assessment. One year ago, it was 11/30. This is despite optimal medical therapy.
- The family are well placed to take over her affairs, including financial and health wise, of Mrs. K as she no longer has the cognitive capacity to make her own decisions”
27. The Respondent challenges these findings and states that the Subject is mentally sound. His stance is not supported by a medical opinion. The medical report was produced by the Petitioner in Court and its production was not challenged by the Respondent. Having allowed the Petitioner to produce the report the Respondent cannot now attack the report in submissions. The only way to counter the medical report that was presented before Court was by another medical report.
28. Further the Subject was present in Court, when interviewed by the Court, she confirmed that she understood the nature of the Application in Court and that she consents to the Petitioner being appointed a guardian over her.
29. On account of the foregoing it is my finding that the Subject has a mental illness namely, Alzheimer’s disease that renders her in need of assistance in managing her affairs.
30. The 2nd question, having determined that the subject suffers from mental illness is who should be appointed the guardian and manager of her estate. Both the Petitioner and the Respondent have offered themselves as suitable guardians.
31. Both the Petitioner and the Respondent are in breach of the law, to the extent that they have purported to exercise authority over the subject’s property without being appointed guardian or manager. I also take cognizance of the fact that it is not denied that one of the children of the Subject, namely Philip Gitau was not incorporated into these proceedings. I have looked at the mental health act and to my understanding the failure to incorporate Philip Gitau in these proceedings does not render them defective. In any event the Act does allow Philip Gitau to move the Court in the event he wishes to revoke the appointment of any guardian or manager appointed.
32. The question I have to ask myself in determining who shall be the guardian of the Subject is whether the soft under belly of the Petitioner and the Respondent makes them unsuitable to be the guardian of the subject.
33. Having determined that the Subject is a person in need of support so as to manage her affairs, the Court has the onerous task of ensuring that the person appointed to act as guardian is one who will safeguard the interests of the subject.
34. From the outset it is my finding that given the toxic nature of the relationship between the Petitioner and the Respondent it is not possible to appoint them to be the joint guardians of the Subject. The



other children of the Subject have expressed support to the appointment of the Petitioner. It is the Respondent who opposes the appointment of the Petitioner. It is the Children of the subject who are best placed to decide on who the guardian of the subject should be. The subject herself intimated that she consented to the appointment of the Petitioner.

35. The *Mental Health Act* has adequate provisions on the guardianship and management of a person found to be suffering a mental disorder and his/her estate so as to safeguard their interests. For instance, Section 27, cited above, provides for powers of such a guardian and manager.
36. The duty of the manager of an estate of a person found to be suffering from mental disorder was recognized by the court in *Steven Kariuki Kiriamburi & another v Jane Gaturi Kiriamburi & 4 others* [2020] eKLR. In that case the court went further to state that:

“Once the order for appointment is granted, a trust relationship is created between the applicant and the subject and thus the subject’s estate that may be vested in him will only be held on behalf of and for the benefit of the subject. In any event, the trustees will not be able to dispose of the property without court’s authority as provided for under Section 27 of the *act*. In addition, Section 33(1) of the *Act* requires the manager or guardian provide an inventory and annual accounts of the subject’s estate.”
37. Where the guardian or manager appointed is lax in performing their duty the law makes provision for this to be brought to the attention of the Court and appropriate orders made. On matters guardianship of the Subject and management of her estate once she has been found to be a person with mental illness there cannot be a vacuum. Having found that it has been proved that the Subject is incapable of managing her estate, the petition dated 6th December 2021 succeeds in the following terms;
 - i. A declaration hereby issues that AWK, the subject, is a person suffering from Mental Disorder, within the meaning of Section 2 of the *Mental Health Act* Cap 248 of the Laws of Kenya.
 - ii. An order hereby issues that SNK, the Petitioner herein, shall have full custody and management over AWK and is appointed as Guardian and Manager over AWK and her estate as provided under Section 27 of the *Mental Health Act* Cap 248 Laws of Kenya.
 - iii. SNK, is hereby appointed manager of the estate of AWK under Section 28 of *Mental Health Act* to manage her estate including any such description of moveable or 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.
 - iv. As Manager of the Estate of AWK the Applicant may dispose of the property only with the sanction of the court.
 - v. Pursuant to this appointment the Petitioner shall deliver to court and the public Trustee, within 6 months, an inventory of the property belonging AWK .
 - vi. In accordance with Section 27(4) of the *Mental Health Act*, 2022 the Applicant shall cause within 30 days the publication of notice in the Gazette, informing the public of her appointment as the manager of the estate AWK . The matter will be mentioned before court on Mention on 25th July 2024 to confirm compliance.
 - vii. Further The petitioner shall file bi-annual returns of the status of Subject’s estate effective 31st December 2024.
 - viii. Costs to be met out of the Estate of the Subject.



DELIVERED SIGNED & DATED AT NAIROBI THIS 21ST DAY OF JUNE, 2024.

P. NYAUNDI

JUDGE

In the presence of:-

Fardosa Court Assistant

