



**G & 2 others v M & 3 others (Miscellaneous Application E010 of 2023)
[2024] KEHC 11635 (KLR) (Family) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E010 OF 2023
PM NYAUNDI, J
SEPTEMBER 20, 2024
IN THE MATTER OF THE MENTAL HEALTH ACT
AND
IN THE MATTER OF AN APPLICATION FOR CUSTODY, MANAGEMENT
AND GUARDIANSHIP IN RESPECT OF THE ESTATE OF JGM UNDER
THE MENTAL HEALTH ACT, CAP 248 OF THE LAWS OF KENYA.**

BETWEEN

**MNG 1ST PETITIONER
EWG 2ND PETITIONER
MWG 3RD PETITIONER**

AND

**MWM 1ST RESPONDENT
VWM 2ND RESPONDENT
MKM 3RD RESPONDENT
MWM 4TH RESPONDENT**

JUDGMENT

1. Vide Petition dated 18th January 2023 presented under Section 2, 26, 27, 28 and 29 of the [Mental Health Act](#), the Petitioners seek to be appointed guardian of the Subject herein, whom they submit has a mental illness. The Petitioners are the wife and daughters of the Subject. At the time of presenting the Petition the Subject was in the custody of the Respondents who are the mother and sisters of the Subject. The Petition is supported by the Affidavit of MNG, the 1st Petitioner sworn on 18th January 2023.



2. Apart from the 2nd and 3rd Petitioners, the marriage between the subject and the Petitioner was blessed with 3 other children, namely, FKG, JWG and VWG all of whom have consented to the Petitioners presenting the Petition.
3. The Petitioners seek the following orders-
 - a. That JGM, the patient be is hereby adjudged to be a person suffering from a mental disorder as provided for under Section 26 of the [Mental Health Act](#) Cap 248 Laws of Kenya.
 - b. That MNG, EWG And MWG be and are hereby appointed as Managers of the Estate of JG which includes any such description of moveable or immovable property, money, debts and legacies, powers 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 proceeds to take over and or/ institute any litigation or claim(s) and also to include not only such property as has been originally in the possession or under the control of any person but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion whether immediately or otherwise.
 - c. That MNG, EWG And MWG be appointed as guardians of JGM
 - d. That an order be and is hereby issued directing the Respondent to restore JGM (the Patient) to his matrimonial home at [Particulars withheld] Nairobi to be under the custody, care , control and guardianship of the Applicants and his immediate family.
 - e. That an order of injunction to issue restraining MWM, VWM, MKM and MWM2 whether by themselves, their agents or any other person restraining them against arbitral interference of the Estate of the Patient, JGM and to restrain them either by themselves their agents and servants or any other person from interfering with the custody, care control and any guardianship of the patient's financial or business interest, the family business, patient's bank accounts and the physical custody of the patient.
 - f. That an order do issue compelling the Respondents herein to render a true account of the Patient's Business conducted at Intersect Hardware Services including the bank account of the Business whether existing or new and to provide a statement of account of the family business including income, expenditure and book balances held from 21st September 2022 to such a date as the Court may direct.
 - g. That costs of this Petition be borne by the Respondents.
4. The Petition is opposed and the 3rd respondent has sworn two affidavits dated 3rd May 2023 and 16th April 2024.
5. The Court proceeded to hear the substantive Petition as the orders sought in the Notice of Motion if granted would dispose of the substantive Petition. The matter proceeded by way of viva voce evidence.

Summary Of The Petitioners' Case

6. PW1- MNG She is the wife of the Subject. The marriage was solemnised under Kikuyu Customary law in 1983. They have 5 surviving adult children. The Petitioner is a retired teacher and since her retirement has been working with the Subject in family businesses, including Intersect Hardware Services.
7. Since 2004 the subject has suffered bouts of poor health. She relates this to the loss of one of their daughters in that year. In 2004 he was diagnosed with Diabetes. Owing to the deterioration in health,



- she accompanied the deceased to India in April 2022 when he sought treatment there. They returned on 18th May 2022. While in India he was treated/ examined for prostate cancer, Dementia, Diabetes Mellitus and Frozen Left Shoulder.
8. During this period, she observed erratic behaviour on the part of the Subject, including making substantial withdrawals from his account which he could not account for and also taking a loan which apparently when questioned he could not recollect.
 9. In September 2022, the Respondents picked the subject from his matrimonial home and at the time of the hearing of the application he was with the 1st Respondent. At the same time the Respondents blocked the access of the Petitioners to the business which she contends is a family business and has therefore occasioned her hardship.
 10. It is her evidence that the actions of the Respondents are not in the best interests of the subject and further as the wife and children of the deceased they are best placed to take care of the subject in his current state of poor health.
 11. Further in the current state of affairs the businesses and estate of the Subject is likely to go to waste.
 12. On cross examination she stated that over the years she has accompanied the Subject for his medical check-ups and therefore she is familiar with the doctors and the ailments they were treating him for. Prior to travelling to India, she did not think he was very ill. When travelling to India she informed her children but not the Respondents, the Subject informed his family of the travel.
 13. She confirmed that while in India she requested the 2nd Respondent for money to help meet the costs of the treatment. She testified that he was diagnosed with frozen shoulder and went into theatre for surgery. She confirmed that the report indicating he had dementia was dated 27th May 2022 and they had travelled back on 22nd May 2022. From September 2022 she sees him at the shop, she does not go to her mother-in-law's house where he is staying.
 14. It was after the return from India that he added his 2 daughters as signatories to his account. He introduced them at the bank. She confirmed that she declined to accompany her sisters-in-law when they started taking the subject to hospital after they returned from India.

Summary Of The Respondents' Case

15. RW1 MKM, she is a sister to the subject and while the Subject is staying with her mother she more or less is managing his treatment. Including taking him for Doctors appointments, supervising his meal schedule etc.
16. The Subject and the Petitioner are not living together. Their action of having the Subject stay with the 1st Respondent (his mother) was triggered when the subject reported to the mother that unless they stepped in, his wife would harm him. He reported that he felt threatened by the 1st Petitioner and her daughters.
17. In her view the 1st Petitioner was not properly managing the treatment of the subject. Her assessment is since the Respondents took over the care of the subject he has improved significantly and is now able to manage his businesses.
18. She submits that if the court determines that the subject needs a guardian it should be her and the 1st Respondent (his mother). In Cross examination she confirmed that the 1st Petitioner is the wife of the Subject and the relationship between the two was cordial until the Subject asked for help. She took



issue with the 1st Petitioner as she was not forthcoming with information when they travelled to India. They were in the dark as to the treatment the Subject sought.

19. She also formed the view that the 1st Petitioner was not being candid, for instance she felt the Petitioner had lied that the Subject underwent surgery when he had not. And she also exaggerated the condition of the subject. The 1st Petitioner had mentioned to her that she had given up. She therefore would visit their home and administered the medication and vitamins. She was categorical that the 1st Petitioner does not have the best interests of the subject at heart. After the intervention of her advocate the Subject was able to access his SACCO account.
20. When questioned by the Court the witness stated ‘In my assessment my brother needs support. My mother and I are best placed to take care of him.’
21. The Subject was present in Court and the Court interviewed him with a view of gauging whether he understood the nature of the proceedings. He stated his name and stated he has a hardware shop. He knows Mary Nduta and stated she is from ‘there.’ He did not appear to recognise EW and was incoherent when asked to identify MM, (the 3rd Petitioner).
22. He recognised MWM (the 1st Petitioner) as his mother and VWM as from his home. He stated that MWM and MKM are from home.
23. He stated that he was aware he was in Court. When the Court asked the 1st Petitioner to stand he recognised her and stated ‘Huyu ni wetu’. He said the same of EW and VWM. When the 1st Respondent stood he said ‘this is my mother’. He identified MKM as his Cousin. He stated that MWM is his daughter.
24. At the close of their respective cases. The Court invited the parties to file submissions.

Summary Of The Petitioners’ Submissions

25. The Petitioners define the following as the issues for determination-
 - a. Whether the subject JGM, suffers from a mental disorder as provided under Section 26 of the *Mental Health Act*, Cap 248 of the Laws of Kenya.
 - b. Whether the Petitioners should be appointed as the managers of the estate of the subject, as well as guardians of the subject JGM as sought in the Application
 - c. What consequential orders is the Court entitled to make
 - d. Who is to bear the cost of these proceedings?
26. On the 1st issue, the Petitioners submit that once the Court finds that the Subject is incapable of managing his affairs, the law requires that a guardian be appointed, reference is made to the decision in K v K [2009] eKLR. It is their submission that while in India the Subject was diagnosed with Dementia. It is further submitted that on return to Kenya he continued to be treated for Dementia. It is contended that the Respondents have not controverted this evidence and in fact have acknowledged that the Subject requires assistance to manage his affairs.
27. On the 2nd Issue, it is submitted that the Respondents are actuated by ill motives and in fact are seeking to have control of the subject’s businesses. Which is in poor taste and therefore they are not suited to be appointed as Managers or guardians of the state of the subject. On the other hand, it is submitted that the Petitioners as Spouse and Children are best placed to be guardians and managers.



28. On consequential orders the Petitioner invokes Section 28 of the *Mental Health Act* in support of their prayers for injunctive orders.

Analysis And Determination

29. Upon careful consideration of the pleadings and submissions filed herein and the relevant law, I find the following as the issues for determination-
- a. Whether the Subject suffers from a mental disorder requiring appointment of a guardian and manager of his estate
 - b. If the answer to a) above is in the affirmative who is best placed to be appointed as guardian and/ or manager
 - c. Who should pay costs herein
30. The court 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.

31. 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.
32. The issue for determination is whether the Subject has a mental illness. It is the Petitioner's case that the Subject suffers from dementia. Section 2 of the *Mental Health Act* defines "person suffering from mental disorder" to mean 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;
33. The *Mental Health Act* does not provide definitions of the various mental illness as the diagnosis is left to medical practitioners. The online law Dictionary defines Dementia to be 'A form of insanity resulting from degeneration or disorder of the brain (ideo- pathic or traumatic, but not congenital) and characterized by general mental weakness and decrepitude, forgetfulness, loss of coherence, and total inability to reason, but not accompanied by delusions or uncontrollable impulses'. Evidently therefore,



- dementia is a mental illness. The question is whether it has been established that the Subject suffers from it.
34. The answer to that, is that the Petitioners have established that the Subject has dementia. This was diagnosed in India during the visit that the 1st Petitioner accompanied the Subject. The Respondent seek to make much ado about the date of the report but have not challenged the medical diagnosis by the Doctor in that report. The finding of the Doctor in India is buttressed by the actions and behaviour of the subject.
35. As indicated the Court had an opportunity to interview the Subject and observed the Subject is not well. The 3rd Respondent on being interviewed by the Court confirmed that the Subject does require support. Further no medical evidence was availed to controvert the evidence of the Petitioners on the mental status of Subject. In the circumstances I find that the Subject is a person suffering from a mental illness and in accordance with Section 26 of the Act, the Court is required to appoint a guardian and manager in respect of his Estate.
36. The 2nd Issue is who should be appointed Guardian and or manager. It is not contested that the Petitioners are the wife and Children of the deceased. 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. The sisters- in law, and mother think they can do a better job, they may be right but they have to cede to the wife and children. I am not satisfied that the Petitioners pose any risk to the Subject necessitating the separation.
37. In the circumstances I find that the Spouse and Children of the Subject are best placed to be his guardian and manager of his estate.
38. The Petitioners seek that the Court issue injunctive orders aimed at barring the Respondents from interfering with the care and custody of the subject and also to not meddle with his affairs and property. The position at law is that with the appointment of the Petitioners as guardian and manager of the estate those restrictions automatically follow and as such the orders will actually be superfluous as upon appointment as guardian and manager the Petitioners are vested with the authority to restrain any person they consider an interloper.
39. The Petitioners seek that the Court direct that the Respondents provide an account of the Patient's business conducted at Intersect Hardware services including the bank account of the Business whether existing or new and to provide a statement of account of the family business including income, expenditure and book balances held from 21st September 2022 to such date as the court may determine.
40. The Object of the Act is set out in Section 2 of the Act to be-
- ...to provide for the prevention of mental illness, to provide for the care, treatment and rehabilitation of persons with mental illness; to provide for procedures of admission, treatment and general management of persons with mental illness; and for connected persons.
41. This delineates the jurisdiction of the Court in applications made under the Act. It does not extend to calling for accounts as proposed by the Petitioners. The Petitioners as the Guardian and manager are at liberty to initiate action to protect the property of the subject as they deem necessary. The dispute over the property must be separated from the orders that this court may grant under the [Mental Health Act](#).
42. Having regard to the best interests of the Subject, I make the following order-



- a. JGM (the Subject) is hereby adjudged to be suffering from mental disorder pursuant to Section 26 of the *Mental Health Act*, Cap 248 Laws of Kenya.
- b. The Petitioners, MNG, EWG AND MWG are hereby appointed as Guardian and Manager of the Estate of JGM . Pursuant thereto the Respondents shall forthwith release the Subject to the Petitioners so that they retain custody of him.
- c. Pursuant to this appointment the Petitioners shall deliver to court and the public Trustee, within 6 months, an inventory of the property belonging JGM
- d. In accordance with Section 27(4) of the *Mental Health Act*,2022 the Petitioners shall cause within 30 days the publication of notice in the Gazette, informing the public of their appointment as the manager of the estate of JGM
- e. As Manager of the Estate of JGM the Petitioners may dispose of the property only with the sanction of the court.
- f. The matter will be mentioned before court on 27th February 2025 to confirm compliance

43. No order as to costs

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

P M NYAUNDI

JUDGE

In the presence of:

..... ..Advocates for the Petitioners

..... ..Advocates for the Respondent

Fardosa Court Assistant

