



**In re Application for Guardianship of WG (Miscellaneous Cause E050 of 2022)
[2024] KEHC 12427 (KLR) (Family) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS CAUSE E050 OF 2022
H NAMISI, J
OCTOBER 17, 2024
IN THE MATTER OF THE MENTAL HEALTH ACT, CAP 248 LAWS OF KENYA
AND
IN THE MATTER OF PERSONS WITH DISABILITIES ACT
AND
IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP OF WARREN GATONYE**

BETWEEN

LKG 1ST APPLICANT

GWN 2ND APPLICANT

AND

JM RESPONDENT

RULING

1. Before the court is the Notice of Motion dated 26 June 2023 seeking the following orders, inter alia:
 - i. This Honourable Court be pleased to set aside and/or vacate and/or review the Orders of this Court made on 15 July 2022 appointing John Mugwe as the manager and legal guardian of the Subject namely, Warren Gatonye;
 - ii. This Honorable Court be pleased to appoint Luis Kimani Gatonye and Grace Wangui Ngaari as the managers and legal guardians of the Subject namely, Warren Gatonye



2. The Application is supported by an Affidavit sworn by the Applicants and premised on the grounds on the face of the Application. In response to the Application, the Respondent filed a Replying Affidavit dated 8 September 2024.

Background

3. The Ward was born to Mary Mendi Mugwe, who died on 12 April 2020. The Ward suffers from cerebral palsy. Due to that condition, he is unable to stand or walk and needs constant medical and nursing care and cannot manage his own affairs.
4. The Respondent filed an Originating Summons dated 28 February 2022 seeking to be appointed as the legal guardian in respect of the Ward. To the Application, the Respondent attached a copy of the Persons with Disability Medical Assessment Report dated 28 April 2021 and the National Council for Persons with Disability Card issued on 21 May 2021. The Respondent also filed a letter from the Chief, Kangemi Location dated 31 March 2022 confirming that the Ward suffers from cerebral palsy.
5. The Originating Summons was heard and judgement delivered on 23 June 2022, appointing the Respondent as legal guardian of the Ward. From the Supporting Affidavit and the Replying Affidavit, it is clear that the Ward remained in the custody of his grandmother, Caroline Muthoni Mugwe, who later passed away on 7th July 2023.

The Present Application

6. The present Application dated 26 June 2023 was filed a few days before Catherine Mugwe's demise. The gist of the Application is that the Applicants, who are husband and wife, seek to be appointed as managers and legal guardians of the Ward herein, who is their nephew. The Respondent is a brother to the 1st Applicant. The only other surviving sibling is Mbire Ruenji Muthee. The Applicants averred that the Ward has never been in the care and custody of the Respondent.
7. The Applicants further averred the Respondent herein and Mary Mendi Mugwe (Deceased), mother to the Ward, had a strained relationship when the deceased was alive. It is their claim that the only reason that the Respondent moved to court to obtain guardianship orders over the Ward herein was the intention to manage the estate of Mary M. Mugwe (Deceased). On the strength of the guardianship orders, the Respondent filed Succession Cause No. E410 of 2023. He also caused the transfer of a parcel of land known as Dagoretti/Kangemi/T.56 from their mother, Catherine Muthoni Mugwe, to himself, in a bid to disinherit his siblings.
8. It is the Applicants' averment that when the Respondent filed the application for guardianship, he failed to disclose to the Court that the Ward was actually in the custody of his grandmother, now deceased. Further, that the Respondent failed to serve the application on all interested parties, thus denying them an opportunity to respond to the Petition.
9. In his Replying Affidavit, the Respondent averred that he filed the application for guardianship with the full blessing of his mother, and in consultation with other members of the family. In denying the allegations by the Applicants, the Respondent has enumerated some of the developments and/or advancements made by the Respondent on behalf of the Ward. These include application for the national identity card, registration as person living with disability, securing a special wheel chair for the Ward, purchase of a special seat, application for birth certificate and payments for the National Hospital Insurance Fund.
10. In response to the allegation that the Respondent is trying to disinherit his siblings, the Respondent has attached a Land Control Board Consent Application Form dated 7th April 2021, in support of his



avertment that their mother, Catherine Mugwe, voluntarily appeared before the Land Control Board for purposes of transferring the said property to the Respondent. What is notable is that the said transfer took place even before the Respondent filed the application for guardianship.

11. The Respondent averred that he has no objection to having joint custody of the Ward together with his brother, the 1st Applicant herein.
12. Parties canvassed the application by way of written submissions dated 14th August 2024 and 10th September 2024.

Analysis and Determination

13. The Application herein is made pursuant to the provisions of Order 45 (1) of the [Civil Procedure Rules](#), which provides as follows:

Any person considering himself aggrieved –

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within his knowledge or could be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.

14. The Applicants relied on the case of [Zablon Mokuwa -vs- Solomon M. Choti & 3 Others](#) [2016] eKLR to buttress the point that review may be sought in instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury. On his part, the Respondent relied on the case of [Republic vs Public Procurement Administrative Review Board & 2 Others](#) [2018] eKLR.
15. In the case of [Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others](#) (2021) eKLR, Mativo J stated:-

“The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India [15] stated: -

“the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”



16. In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

“In *Nyamogo & Nyamogo v Kogo* [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.” (emphasis mine)

17. In the instant case, the Applicants seek a review/setting aside/vacating of the orders of 15 July 2022 on the basis that the Application, the Ward of the said orders, was made clandestinely, without the knowledge of and/or consultation with the Applicants. The second argument presented is that the Respondent was not in custody of the Ward at the time that the order was made.

18. Section 26 of the *Mental Health Act* states that:

- 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) Whereupon 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

19. With respect to an application for administration and management of the estate of a person with mental illness, Section 26 (2) of the *Act* provides that the application shall be submitted together with an Affidavit setting out: (i) the grounds upon which the application is made; (ii) the full particulars as to the property and relatives of the person to whom it relates; and (iii) a certified true copy of the admission or treatment particulars in respect of person duly admitted as a person with mental illness. (emphasis mine) This means that for an application to succeed, the three requirements must be met.



20. In the case of *Re: NMK* [2017] eKLR, in considering what should guide the court when applying sections 26 and 27 of the *Act*, the Court 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:

- i. There must be medical evidence warranting the determination by the Court that the Ward suffers from mental disorder;
- ii. The person to be appointed to be either a Guardian or Manager must be fit to be so appointed;
- (iii) The Court must be satisfied that a proposed Manager will utilize her powers for the benefit and welfare of the Ward.”

21. 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:

- i. There exists medical proof by show of evidence confirming that the Ward suffers from mental disorder.
- ii. The petitioner/Applicant seeking to be appointed as manager or guardian must be legally fit to be so appointed.
- iii. That due to the Ward’s mental disorder, he or she is incapable of managing his/her own affairs independently and responsibly.
- iv. That the proposed manager/guardian will manage the Ward’s property effectively and efficiently for the benefit of the estate and welfare of the Ward.”

22. The above factors were all considered by the Court at the point of determining the Respondent’s application for appointment as manager and legal guardian of the Ward. Looking at the Application herein and submissions, I see no concrete reason presented by the Applicants for reviewing or setting aside the orders. There are no concerns raised about the Ward’s wellbeing, physically or otherwise. As stated in the *Alpha Fine Foods Ltd case* (*supra*) a review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier. One cannot apply for a review and/or setting aside an order simply because the Court, while determining an application and based on the evidence presented before it at that particular time, made a certain decision that the applicant(s) does not agree with. That is the subject of appeal.

23. If anything, in this instance, the Respondent has shown that he has diligently discharged his duties as the Manager/Guardian of the Ward, as provided under section 28 of the *Act*. It is not unfathomable that a legal guardian may not necessarily have actual custody of the Ward, depending on the circumstances.

24. I note that the Respondent has extended an olive branch to his sibling, and offered to be joint manager along with the 1st Applicant. In light of this gesture, I vary the orders of 23rd June 2022 as follows:

- i. John Mugwe and Luis Kimani Gatonye are hereby appointed as joint managers and legal guardians of the Ward, namely Warren Gatonye.
- ii. There shall be no orders as to costs



DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF 2024

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

Ms. Ngeresa for the Applicants

N/A for the Respondent

