



REPUBLIC OF KENYA



KENYA LAW
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**In re FRA (Miscellaneous Cause E033 of 2024)
[2024] KEHC 12335 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CAUSE E033 OF 2024**

G MUTAI, J

OCTOBER 11, 2024

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

AND

IN THE MATTER OF FRA (A PERSON WITH MENTAL ILLNESS)

AND

IN THE MATTER OF THE PETITION BY SAM

JUDGMENT

1. The applicant, Ms SAM , is the daughter of Ms FRA . Ms FRA is 73 years old. She is blessed with four living children: SAM , a daughter born on 5th October 1974; MAM , a son born on 2nd February 1976; NAM , a daughter born on 23rd November 1980; and LAM , a daughter born on 7th June 1987. Ms. FRA is a widow. Her husband died in 2010. She had one other child who is now deceased.

The Notice of Motion dated 16th September 2024

2. Vide a Notice of Motion dated 16th September 2024, the applicant, Subra Ali Mohamed (hereafter “SAM ”), sought the following orders:-
 1. Spent; and
 2. The Court would be pleased to appoint the applicant as guardian to FRA .
 3. The grounds upon which the application is based is that FRA (hereafter “F” or the “Patient”) was diagnosed with dementia on January 18, 2021. The doctor who made the diagnosis indicated that there was a possibility that the patient could develop depression. The report further stated that due to her condition, FRA was unable to comprehend her surroundings and cater to her personal needs.



4. SAM deposed that she and her siblings had been providing home-based care to F since 2019 and that she wholly depends on her and her sister NAM a. She has been accessing the funds in F's bank account No. 200000xxxx, held at HFC Kenya, using her ATM card to take care of F. The card expired in December 2023. Since then, she has not been able to access the account, and as a result, SAM has been constrained financially, making her unable to adequately manage the personal and medical needs of the patient. It has also been difficult for her to provide for her urgent and unforeseen needs.
5. She deposed that her application has the support of her siblings, who had consented. She prayed that the application be granted so that she could access F's account.
6. She attached to the application the medical report prepared by Dr. Omar J Aly, a consultant psychiatrist.

Hearing of the Case

7. The case was heard on 30th September 2024, at 230pm in open Court. The patient was brought to Court per the directions I issued in chambers on 18th September 2024. The first witness was SAM . SAM is the applicant. She adopted her supporting affidavit as her witness statement. She testified that their mother was unwell and in need of medical care. Due to her mother's condition, he needed care, which was draining her. There was, therefore, a need for money. She prayed for her appointment as the mother's guardian ad litem, and manager so that she could access her account.
8. The second witness was NAM . NAM a, like her sister, resides in Likoni. She testified that she is a businesswoman. She also testified that, together with her sister SAM , she takes care of her mother. Her mother needs medical attention as she can't take care of herself. NAM a supported the application and stated that she signed a consent dated 7th June 2024 in expression of her support.
9. The last witness was Dr Omar Juma Aly. Dr Aly is a consultant psychiatrist whose surgery is at Ambala House, Mombasa. He produced his report dated 20th May 2024. The report stated that F has dementia.

Observations Made by the Court During the Hearing

10. The Court observed the conduct of FRA , an elderly person. During the Court session, she chewed gum, unconcerned with her surroundings. When the Court addressed her, she refused to respond. The Court was convinced that she had severe mental illness.

Analysis

11. I have considered the pleadings, the documentary evidence, and the oral testimonies of the witnesses. In my view, the issues I need to determine are:-
 1. Does the patient suffer from mental illness? and
 2. If so, what order should be issued?

The Applicable Law

12. Appointment of a manager of the estate of a person with mental illness is made under section 27 of the [*Mental Health Act*](#), as amended in 2022. A manager's duty is to safeguard the property of the Patient. The appointment of a Manager must be published in the Kenya Gazette (section 27(4) of the said Act).



Any person with probable cause may object to the appointment within 14 days of the publication of the notice. Section 28 (4) of the said Act provides that:-

“a manager shall perform the manager’s duty under this Act responsibly, taking into account the best interests of the estate of the person suffering from mental illness.”

13. Under the *Mental Health Act*, the application for administration may be made by a “supporter” or “representative” of the person with mental illness, in that order. Although SAM is not a “supporter” of the patient, as she wasn’t appointed in writing, it is my finding that being her daughter, she is his “representative” within the meaning of the Act and, therefore, has the locus to file the instant Miscellaneous Cause.

Analysis of the Facts and the Law

14. In re CWN (a person suffering from mental disorders) [2022]eKLR the Court stated that:-

“The Petitioners have sought to be declared as guardians and managers of the patient. To merit the above orders the petitioners must adduce evidence sufficient to satisfy the Court, firstly that the patient is a person suffering from a mental disorder under the *Mental Health Act* and secondly that the patient is incapable of managing her own affairs.”

15. I would add that the third test is whether the application is in the patient's best interest. People with mental illnesses have diminished capacities to manage their affairs, analogous to that of children. Therefore, the court must ensure the application was filed in the patient's interest. In addition, the orders issued by the Court must aim to achieve the said goal.
16. The evidence adduced shows that FRA has dementia with the possibility of depression. Her condition is incurable. Given the finding of Dr Omar J Aly, a well-regarded psychiatrist, it is my view that the patient suffers from a mental illness.
17. SAM averred that the patient requires help in her day-to-day functions. That of her sister, NAM a corroborated her evidence. F cannot engage in any meaningful economic activity and requires the services of a minder. Treatment of mental illness is costly, and it is evident to me that SAM and NAM are struggling to pay for her treatment and care. Since F has a bank account with funds, a manager must be appointed to access the account. Therefore, the applicant's appointment as the patient's guardian ad litem and manager of her estate will be in her best interest.
18. The manager/guardian ad litem will ensure that she receives the most appropriate care possible, that her estate is not wasted or lost, and that her interests are protected.
19. I noted during the hearing that the nuclear family members supported the application.

Determination

20. I am satisfied, based on the evidence adduced, that F suffers from dementia with the possibility of depression. Dementia is a mental illness. There is, therefore, a case for the appointment of the applicant as the guardian ad litem of the patient, FRA and the manager of her estate. In the circumstances, I order as follows:-
 1. The applicant, SAM, be and is hereby appointed as the guardian ad litem of the patient FRA and also the manager of her estate;



2. SAM is hereby authorised to manage the patient's estate, in particular, by taking over and operating F's bank account No. 200000xxxx, held at HFC Kenya, and to renew the ATM card, but shall not have the power to sell, charge or otherwise alienate her immovable property without the leave of the Court;
3. Pursuant to section 27(4) of the *Mental Health Act*, the appointment of the manager/guardian ad litem shall be published in the Kenya Gazette;
4. The manager/guardian ad litem shall file the inventory and statement of account of the estate of the patient within six months from the date of her appointment; and
5. I make no orders as to costs.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF OCTOBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Kongere, for the applicant; and

Arthur - Court Assistant.

