



In re CBA (A Person Suffering from Mental Disorder) (Miscellaneous Application E009 of 2024) [2024] KEHC 12078 (KLR) (1 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION E009 OF 2024**

TA ODERA, J

OCTOBER 1, 2024

IN THE MATTER: ARTICLE 57 OF THE CONSTITUTION

AND

IN THE MATTER OF: SECTIONS 26 AND 28 OF THE MENTAL HEALTH ACT, CAP 248

AND

IN THE MATTER OF: CBA (A PERSON SUFFERING FROM MENTAL DISORDER)

AND

**IN THE MATTER OF: A PETITION FOR THE
APPOINTMENT OF A GURDIAN MANAGER FOR CBA**

IN THE MATTER OF

AKA 1ST APPLICANT

LGA 2ND APPLICANT

RULING

1. The Applicants herein namely AKA and LGA herein after referred to as the 1st and 2nd applicants respectively moved this court vide the Originating summons dated 10.7.24 (under section 26 and 28 of the *Mental Health Act* CAP 248 Section 1A, 1B, 3A and 63 of the *Civil Procedure Act* cap 21 Rule 32 of the *Civil Procedure Rules* and all other enabling provisions of Law) seeking for orders:
 1. Spent
 2.spent
 3. That this Honourable court be pleased to issue an order appointing the applicants as joint guardians' ad litem for CBA the subject herein.



2. That this Honourable court be pleased to issue an order compelling MTA to hand over the passport of the subject no. AKxxxxxxx to the guardian to travel to the USA for medical treatment.
3. That this Court does order OCS Kisii Central police station to help enforce (4) above if granted.
4. The application is based on the grounds that:
 - a. The subject suffers from dementia with cognitive capacity impairment, heart failure and is also pre-diabetic.
 - b. The subject is an octogenarian under Article 57 of the Constitution of Kenya and thus entitled to protection and care by the state and her family.
 - c. That section 26 of the Mental Health Act provides for perimeters for a person to move the court
 - d. That the applicant has been receiving treatment for the said conditions and is currently staying with her brother in-law and his wife in Nairobi and is temporarily under the care of the 1st applicant.
 - e. That the subject visited her daughter in the United Kingdom in the year 2023 and got lost in the park and also that in November 2023 applicant and the subject were at Junction Mall in Nairobi when the subject disappeared for 3 hours and was later traced seated in another location within the mall in Nairobi.
 - f. That the subject cannot take care of her personal affairs, making decisions and protecting her best interest. Also that consequently, she cannot reasonably protect herself from incidents of eldercare abuse, manipulation and neglect that are detrimental to her physical emotions, psychology wellbeing, dignity and can contribute to progression of the multiple illness that she is being treated for and negativity impact the quality of her life.
 - g. Also that the applicant has come to court in good faith and no prejudice would be occasioned if the application is allowed.
5. The application is based on the annexed affidavit of AKA who swore the same on her own behalf and on behalf of her co-applicant. She deponed that they are daughters to the subject who is 81 years old suffering from dementia, stage 4 Cancer and heart failure.
6. MAT the only son to the subject filed replying affidavit sworn on 16.7.24. He termed the contents of the originating summons and supporting affidavit herein as grossly inaccurate, misleading, false or otherwise misrepresentation of the true state of affairs. Also that he has 5 siblings who are all still alive i.e
 - i. JKK
 - ii. EBA
 - iii. AKA
 - iv. JMA
 - v. LGA
7. Further that Vide Kisii HCC Succession no. E001 of 2024, himself Jacqueline, Jacinta and Angela were appointed to petition for letters of administration of the estate of their late father Abuya Daudi Tamaro (deceased). He admitted that the subject has been suffering from breast cancer and a heart condition since the year 2013. Also that the subject has been under his care for about 16 years and there



has been no complaint of abuse, neglect or assault alleged by the applicants who forcefully took away the subject from his care. He told the court that though the subject is in her sunset years, she is capable of running her own affairs and all she needs is a loving and supportive family that would not use her ailment and or health to gain leverage in the intended succession cause. Further that the 1st applicant confirmed that he and his siblings have been taking care of the subject as per email “MAT 1”.

8. He said that the subject is mentally sound and has capacity to know her surroundings her mental status as per email correspondence by the 1st applicant that the subject had insisted that she accounts for her money which had been forwarded to her and that he (Mogendi) be involved in the succession cause stated in the medical report and the petition (email extract “MAT 2”). He denied that the subject suffers from acute dementia as alleged in the medical report which he said was obtained without the knowledge of other family members. Mogendi further deponed that the report dated 29.4.24 is contradictory and unreliable as at page 6 it states that the patient consented to toxicity – “MAT 3”. He also told this court that the subject has severally including on 12.1.2024 travelled to Nairobi alone and even United Kingdom on one occasion as per a bundle of correspondence of the travel of the subject to Nairobi – “MAT 4”. Mogendi also told this court that the admission that the subject got lost while under the care of the applicants is a clear indication of irresponsibility on the part of the applicants. Also that no missing person’s report was made to police. He continued that he and his sisters Kemunto and Moraa have taken care of the subject who is 81 years old for 16 years without any report of her getting lost. He deponed that the subject has been vibrant and enjoying her life with her family as evidenced by correspondence to her sisters Kemunto and Moraa – “MAT 5” he denied that he is the one in custody of the passport of the subject and so he cannot produce it. He sought a 2nd mental assessment report in respect of the subject and that the subject be availed in court for examination and in the event that the court finds that it necessary to make the guardianship orders then the same people who were appointed to file succession cause for the estate of their father be appointed guardian’s ad litem herein. JKK and JMA daughters to the subject said they do not support the application as their mother is not mentally ill though they admitted that she is ailing and admitted that she needs help as she is aged 81 and is forgetful which is normal for a person of her age. They said that their mother had a good family support.
9. EBA also a daughter to the subject supported the application saying their mother is neglected and hence needs a guardian. They said the home environment is toxic for the mother.
10. This court examined the subject and she told this court that she prefers to stay at her home in Tabaka where her son stays and takes care of her as per their culture. He said that all her children do take care of her.

Submissions

11. Mr. Gichigo for the applicants submitted that they have shown that the subject is suffering from a mental infirmity which affects her decision making and thus there is need to appoint a guardian as per the reports dated 29.5.24 and 11.6.24. Further that the subject told the court that she is forgetful which is a sign of dementia.
12. Mr. Mwangi Ndegwa who is appearing together with Mr. Gichigo for the applicants submitted that the subject is a senior member of the society and entitled to live in dignity and free from abuse and to reasonable care from her family and state. Also that she has health requirements and that there is need to take her to USA for natural cancer treatment. Further that the culture which says that the subject should be taken care of by her son is inapplicable by virtue of Articles 57 & 2 of the constitution and sections 26 and 28 of the [Mental Health Act](#)



13. Miss Ochwal for Mogendi submitted that the issue herein is the welfare of the subject and that she is entitled to inherent dignity under Article 28 of the constitution. She appreciated that Article 57 provides for rights of the elderly persons. Also that it has been admitted that the subject is able to run her daily affair. And that one of the applicants lives in United Kingdom and Jacqueline lives in Kisii Kenya and works in a hospital and thus is better placed to take care of the subject. Also that the subject has a clear mind as evidenced by her examination in which she confirmed that all her children take care of her and that she wants to be at home in Tabaka. also that the interest of the subject is paramount and that it is not challenged that Mugendi lived with her for 16 years and has taken good care of her. Counsel submitted that the report dated 29.5.24 indicates that she answered questions posed to her and even gave an informed consent and at the same time it says she suffers from dementia.

Analysis And Determination

14. I have carefully considered the petition and originating summons the supporting affidavit of the petitioners/applicants and all the annexures attached to it and the issue for determination is whether this court should allow the application and grant guardianship orders of the subject to the applicant herein.
15. Section 2 of the *Mental Health Act* Cap 248 provides that:
- “A person suffering from mental disorder” means a person who is suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse.”
16. Section 26 of the *Mental Health Act* empowers the court to grant custody, management and guardianship orders The said section provides;
- “(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
 - c) 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.
 - d) Where upon inquiries 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 just 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.”



17. Section 27 provides for powers of a managers of the estate of a patient while Section 28 of the same Act provides for management of the subject's estate.
18. I have perused the supporting affidavit and the replying affidavit of Mogendi and the medical reports and there is no doubt that that the patient is suffering from chronic stage 4 breast cancer, she is also pre-diabetic and has dementia. What is disputed is whether she has acute dementia as per medical reports dated 9.11.23 by Dr. Sokhi and the radiology report dated 12.1.24 from Aga Khan Hospital and Dr. Mansoor Saleeh dated 29.5.24 are clear that the subject suffers dementia.
19. Dr Mansoor in the report under Assessment plan said he discussed the effects of toxicity including its benefits with the patient and she understood and Dr. Aketch in her report dated found that the subject has mental incapacity and thus unable to manage her affairs and recommended that she be granted guardianship “ She agreed with the daughter Angela who told her that that was a victim of adult care abuse from her son Mogendi. This is strange as in all the medical reports filed herein Angela went to the Doctors alone with the mother and the other siblings and especially Mogendi was not given a chance to respond to the said allegations in the presence of the subject and the doctors. The issue of who should be granted guardianship of a subject is upon the family and if they do not agree then the court decides. This court conducted an examination of the subject in the presence of counsel and her children and I noted that she understood her surroundings and she could recall her family members, her church and she said she referred to stay at her home in Tabaka where her son is taking care of her. Also that all her children take care of her. Looking at her I noted that she was well kempt and oriented. She said that at times she forgets. I take judicial notice that forgetfulness is a sign of dementia and that acute dementia is not permanent. I find that the situation of the subject is not permanently acute as suggested as when this court examined the patient she was able to express her wishes well and also asked why she is in court. She however admitted at times she is forgetful. I find that the patient is suffering from mild dementia and thus has mental incapacity under section 2 of the [Mental Health Act](#) and thus unable to manage his affairs.
20. On whether Applicants should be appointed as guardian/ manager to the patient’s estate. They say are daughters to the subject. All the children to the subject attended court and it has emerged that this is a divided family with sibling rivalry. The applicants and Evelyne are on one side while the Jacqueline, Jacinta and Mogendi are on the other side. The applicants accuse Mogendi of not taking good care of their mother and neglecting her. This is denied and Mogendi told this court that his sisters want to take advantage of the situation and have an upper hand in the estate of their father. Dr Mansoor in the report under Assessment plan said he discussed the effects of toxicity including its benefits with the patient and she understood and Dr. Aketch in her report dated found that the subject has mental incapacity and thus unable to manage her affairs and recommended that her to “be granted guardianship”. She agreed with the daughter Angela who told her that there was a victim of adult care abuse from her son Mogendi. This is strange as in all the medical reports filed herein Angela went to the Doctors alone with the mother and the other siblings and especially Mogendi was not given a chance to respond to the said allegations in the presence of the subject and the doctors. The issue of who should be granted guardianship of a subject is upon the family and if they do not agree then the court decides. This court conducted an examination of the subject in the presence of counsel and her children and I noted that she understood her surroundings and she could recall her family members, her church and she said she referred to stay at her home in Tabaka where her son is taking care of her. Also that all her children take care of her. I keenly observed her and noted that she was well kempt and oriented. She said that at times she forgets which is not disputed. She was coherent, remembered where her home is, the number of children she has, her church expressed her wishes well and also asked why she is in court. I find that the situation of the subject herein is not permanently acute as suggested due to the above observations. I



find that the patient is suffering from mild dementia and thus has mental incapacity under section 2 of the *Mental Health Act* and thus unable to manage her affairs.

21. This family was also embroiled in a citation dispute in Succession Cause no. E001 of 2024 in the matter of the Estate of who is the father to the parties herein and husband to the subject. This court directed that: -

- i. JKK
- ii. MTA
- iii. AKA
- iv. JMA

Do file a succession cause of the estate of their father. For good order, I will appoint the said 4 children of the subject to be her joint guardians. They are expected to work together in the best interest of the subject by managing her estate efficiently, honestly and for her benefit.

22. The guardians' ad litem to hire a full time caretaker to take care of the subject in her home in Tabaka as per her wish.

23. The issues of treatment of the applicant in High Court probate and administration cause no. E006 of 2024 the parties herein entered into a consent on 9.9.24 the following terms". The family has agreed that:

- a. Land parcel no. Nyaribari/. Mwembe/ B/Boguria /3652 and Central Kitutu /Daraja Mbili/1309 be sold for the sole purpose of paying medical Bills and maintenance of Selina Bonareri Abuya the widow to the deceased.
- b. That the said maintenance shall be guided by the budget provided in Annexure 8 of the supporting Affidavit of AKA in the instant application.
- c. AKA do open an account and be the sole signatory of the said account where the proceeds of the sale of the land parcels Nyaribari/ Mwembe/ B/Boguria /3652 and central Kitutu /Daraja Mbili/1309 shall be deposited.
- d. AKA does provide a monthly financial report of how the said funds shall be spent.
- e. That in the event Selina Bonareri Abuya shall be staying with any of the family members, the said family member shall withdraw funds form the said account and shall also provide the family with the report of how the said funds were spent."

24. The guardians shall in their wisdom make the decision of treatment of the subject in USA considering the aforesaid consent and subject to availability of funds for the same.

25. On the issue of the passport of the subject, the petitioners alleged that Mogendi had it and he disputed the same. It has not been established that Mogendi has the said passport as alleged. If the passport cannot be traced, then the guardians are at liberty to re-apply for another passport to facilitate her travel if need be.

26. Each child and grandchild of the subject has equal rights to visit and spend quality time with her.

27. It is so ordered.

28. File is closed.



T.A ODERA

JUDGE

1.10.24

DELIVERED IN OPEN COURT AT KISII ON THIS 1ST DAY OF OCTOBER 2024 IN THE PRESENCE OF: -

Munywoki: Hold brief for Mwangi Ndegwa for the Applicant

Mulisa for Respondent.

Court Assistant: Oigo

T.A ODERA

JUDGE

