



**In re Estate of BNM (Miscellaneous Application Probate & Administration
E004 of 2023) [2023] KEHC 3234 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION E004 OF 2023**

RM MWONGO, J

APRIL 18, 2023

**IN THE MATTER OF ADMINISTRATION OF THE ESTATE
OF BNM ALIAS KM (A PERSON OF UNSOUND MIND)**

AND

IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248 OF THE LAWS OF KENYA

IN THE MATTER OF

LWG APPLICANT

RULING

1. This is an *ex parte* application in which LW sues on behalf of BNM (the subject). The basis of the application is that the subject is stated to be of unsound mind, and was diagnosed with acute schizophrenia over fifty years ago.
2. The applicant prays that the court do appoint her, LW, as the guardian of BNM alias KM for purposes of prosecuting Kerugoya Chief Magistrate's ELC Case No 129 of 2019.
3. The grounds of her application are that Land Ref No Mutira/Kiaga/xx was registered in the name of the Subject, but was fraudulently transferred to a third party. The Subject being of unsound mind for many years was incapable of effecting the said transfer.
4. A suit was then instituted in Embu High Court Civil Case No 130 of 2005 by Humphrey Gituku Mburia, the then guardian of the subject, but the said guardian died during the pendency of the suit.
5. The suit was later transferred to the Chief Magistrate's Court Kerugoya, as ELC No 129 of 2019. The said suit cannot proceed until a new guardian is appointed for the subject and to prosecute the suit.
6. In her supporting affidavit dated March 13, 2023, the applicant avers that she is the sister-in-law to the subject; that the deceased guardian was the brother of the subject; that since she first met the subject he has been in the same condition of incapacity as he is now, and that the subject has no other relatives.



7. She further avers that the subject lives with her.
8. In the further supporting affidavit, the applicant exhibited a chief's letter dated 17.3.2023 confirming that the subject has been under the care of the applicant who has been of unsound mind for a long time, and that the subject is the brother to the applicant's husband.
9. Also attached as exhibits in the applicant's affidavits were; the subject identity card No. xxxx; letter from the Ministry of Health Nyeri, dated May 31, 2005 in which the Provincial Psychiatrist Dr. A.S Gatang'i has indicated that the subject was found to be suffering from "chronic mental illness" that is unable to enter into any transactions".
10. In addition, there is attached letter from Karatina Sub-County Hospital, Dr S Musau, on which he concludes that the subject:

"Is not fit to stand trial, (and is not able to make informed decisions and thus cannot enter into contract by himself".
11. Section 2 of the Act defines "person suffering from 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 psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse."
12. Section 26 provides 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 of the guardian of any such person.
13. It is clear from the doctor's reports that the subject is suffering from a mental disorder as per section 2 of the Mental Health Act and further that due to a medical condition contemplated under Section 26 of the Act, he is incapable of managing his own affairs or standing trial. The doctor's report is thus conclusive on the mental status of the subject. No evidence to the contrary has been produced.

Whether the applicant should be appointed as guardian to the subject

14. The applicant seeks to be appointed the guardian of BNM alias KM (subject of unsound mind) for the purposes of prosecuting Kerugoya Chief Magistrate ELC Case No 129 of 2019.
15. In re EKW [2019] eKLR it was stated:

Section 26 of the Mental Health Act falls under part XII

"Judicial powers over persons and Estates of person's suffering from mental illness".



It provides for the orders a court may make for the management of the estate of any person suffering from mental disorder and for the guardianship of that person by any near relative/ any other suitable person.

16. *In re AFO* [2022] eKLR Muchemi J held:

I have perused the report by Dr Pius Kigamwa who examined the subject and confirmed that he has no testamentary capacity as well as the other treatment records annexed to the application. I am of the considered view that the applicant has satisfied this court that the subject is incapable of conducting his defence

Conclusion

17. In light of the position of the law, and given the letter of the Chief confirming the applicant's relationship with the subject and that he is being taken care of by her; and in light of the doctor's letter, the court is satisfied that the subject requires management and is suitable for a guardianship order.

18. Accordingly, the subject is formally declared to be suffering from mental illness in terms of the *Mental Health Act*. He is hereby assigned into the guardianship of the applicant forthwith.

Orders accordingly.

DATED AT KERUGOYA THIS 18TH DAY OF APRIL, 2023.

RICHARD MWONGO

JUDGE

In the presence of:

Munene holding brief for Mwangi K for Applicant

Court Assistant, Murage

