



REPUBLIC OF KENYA



**In re WKM (Subject) (Miscellaneous Application E138 of 2023)
[2023] KEHC 22202 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E138 OF 2023**

F WANGARI, J

JULY 7, 2023

**IN THE MATTER OF SECTION 26 (1) (A) AND (B), 28 (1) AND (2) OF THE MENTAL
HEALTH ACT, CAP 248 OF THE LAWS OF KENYA AND IN THE MATTER OF: WILSON
KASYOKI MUTIZO (SUBJECT) A PERSON SUFFERING FROM MENTAL HEALTH
DISORDER AND IN THE MATTER OF: AN APPLICATION FOR LEGAL GUARDIANSHIP**

IN THE MATTER OF

JWN PETITIONER

RULING

1. This ruling relates to an application dated July 1, 2021 which sought for orders as summarized herein under;
 - a. That the Subject be adjudged to be suffering from a mental disorder as defined by the *Mental Health Act*, cap 248 of the Laws of Kenya
 - b. That the petitioner be appointed as the Legal Guardian to the Subject
 - c. That the petitioner be appointed as the manager to the Subject's estate.
 - d. That the petitioner be allowed to access the Subject's accounts at ABSA and Mwalimu Sacco
2. The application was filed ex-parte and under certificate of urgency. After perusing through the application, supporting affidavit and the annexures thereto, directions were given that the petition be disposed off by way of viva voce evidence.
3. In her evidence, the petitioner stated that she is the wife to the Subject. An affidavit in support of the same was produced as an exhibit. They have 4 children, two of whom are minors and the other two have attained the age of majority. She produced the letter of consent from her two adult children for purposes of instituting the proceedings before this court.



4. The petitioner further gave evidence that the Subject was suffering from dementia and was totally dependent on her and rest of the family for his primary care. She sought to be appointed as the guardian to the husband. She further sought to have access to the Subject's bank account at ABSA Bank and Mwalimu Sacco for purposes of catering for the medical care and physiotherapy and related expenses which amounted to an estimate figure of Ksh. 70,000.

Analysis

5. I have considered the application, annexures and the oral evidence tendered, and the issue for determination is whether the Petitioner should be granted the guardianship and management orders as prayed I the application.

6. Section 2 of the *Mental Health Act* cap 248 provides as follows;

“A person suffering from mental disorder” means a person who has been found to be 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.”

7. On empowering the court to grant orders as sought by the applicant, section 26 of the *Mental Health Act* cap 248 provides as hereunder;

“(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.”

8. In making reference to section 26 and 27 of the *Mental Health Act*, Charles Kariuki J in the case of *Re SWM (Patient)* [2022] eKLR stated as follows;

“The court *in Re N M K* [2017] eKLR considered what should guide the court when applying Section 26 and 27 of cap 248. The 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.”

Similarly, *in re Estate VFM (Patient)* [2020] eKLR, the court held that:

- a) 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:
- b) There exists medical proof by show of evidence confirming that the subject suffers from mental disorder.
- c) The petitioner/applicant seeking to be appointed as manager or guardian must be legally fit to be so appointed.
- d) That due to the subject’s mental disorder, he or she is incapable of managing his/her own affairs independently and responsibly.
- e) 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.

The court in *in Re N M K* [*supra*] stated that the overall guiding principle in applying all these factors must be the welfare and best interests of the subject.”

9. In this case, the petitioner produced medical records in support of the fact that the husband has got no mental capacity to run his own affairs. She produced a Medical Report in Confidence by Dr. Juzar Hooker, a Consulting Neurologist at Aga Khan University Hospital dated November 15, 2021 in support of her evidence.
10. Even though the Subject was not produced in court as it was submitted on oath that having suffered from dementia, he was totally dependent on his family for 24 hr care. I am satisfied that the Subject suffers from a mental disorder as defined under section 2 of the *Mental Health Act*.
11. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The application dated 29th / May 2023 is allowed as prayed

Orders accordingly.

Dated, signed and delivered at Mombasa this 7th day of July, 2023.

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F. WANGARI

JUDGE

In the presence of;

Kinuva Advocate h/b for Ogejoh Advocate for the Petitioner



