



REPUBLIC OF KENYA



**In re AYHA (Miscellaneous Application E111 of 2024)  
[2024] KEHC 14165 (KLR) (Family) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14165 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY**

**MISCELLANEOUS APPLICATION E111 OF 2024**

**SN RIECHI, J**

**NOVEMBER 7, 2024**

**IN THE MATTER OF AN APPLICATION/PETITION UNDER  
SECTIONS 2,26,27,28 OF THE MENTAL HEALTH ACT CAP 248**

**IN THE MATTER OF AYHA**

**BETWEEN**

**BASHIR YUSSUF HAJI ..... PETITIONER**

**AND**

**ABDULATWIF YUSUF HAJI ABDI ..... SUBJECT**

**JUDGMENT**

1. Before this Court is an application dated 28th May 2024 in which the petitioner is seeking orders;
  - i. That the honourable be pleased to appoint the applicant as the legal guardian to the subject herein suffering mental disorder.
  - ii. That the honourable court be pleased to appoint the applicant as the manager of the estate of the subject suffering from mental disorder.
  - iii. The costs of the application be on the cause.
2. The application is premised on the grounds on face of it as follows;
  - i. That the subject has been afflicted with Down Syndrome since birth with limited intellectual ability and as such he cannot make informed decision concerning his own life and affairs.
  - ii. That the subject has always been under the care of others needing assistance in his daily activities.



- iii. That the applicant is related to the subject by virtue of being his biological brother.
  - iv. That their biological father Haji Yusuf died intestate on 26<sup>th</sup> July 1989.
  - v. That the family has started the process of succession in order to dispose of the estate of the deceased, which comprises of a property in Garissa Title Number XXXX 1/20 and the consent of the subject is required thereof.
  - vi. That the subject cannot, by virtue of his mental incapacity consent to the said application and it is therefore prudent to appoint an administrator to assist him in managing his affairs.
3. The application is also supported by an affidavit sworn by the applicant on even date in which he reiterated the averments in the grounds of the application. The applicant deponed further that the subject has been afflicted with Down Syndrome since birth. He averred the subject has undergone medical treatment and the doctor confirmed his diagnosis as evidenced by a copy of medical report marked "BYJ2" attached to the application. The applicant averred further that they are processing for grant of letters of administration in respect of their father's estate but the subject is unable to consent to the same or understand to the nature of the application and it is therefore prudent to appoint a guardian.
  4. The matter was canvassed by way of viva voce evidence on the online platform. Dr. Janbibi Yusuf Mohamed testified that he is Psychiatrist and he works at Post Ractz sub-county hospital and his registration number is A9471. He testified that he examined the subject and diagnosed the subject with down syndrome with intellectual disability. He cannot care for himself due to the disability and would need a guardian. He testified he prepared medical report dated 14.5.2024.
  5. The Petitioner BYH testified he knows the subject and he is his brother. He is about 60 years old. He is not married and their parents are not alive. He stated the subject is his step-brother. His mother's name is H. H has four children namely; H (deceased), S, A, Z (deceased). The Petitioner testified the subject stays with S who takes care of him. He testified he stays in Nairobi. The subject does not have any property. He testified he wants to be appointed and be responsible and take care of him. HNW testified that she knows the subject and he is her husband.
  6. SH testified that the subject is over 50 years old and he was born in 1966. The mother is HS and she is deceased. She testified he is 64 years old and she has four children and was married but divorced. She testified further she is not working and she resides in Mombasa. She testified that it is Bashir who is supporting them. Abdul has been unwell. She testified the subject can walk and they have taken him to hospital. She testified she supports the Petition.
  7. This court was able to observe the subject on the online platform and the court tried to engage the subject. He cannot engage in a conversation.
  8. I have carefully considered this application, the Affidavit filed in Court as well as the evidence adduced in the matter. Section 26 of the [Mental Health Act](#), Cap 248, Laws of Kenya provides for the circumstances under which a Court may make orders for the Guardianship of a Subject (Patient) and the management of their affairs as follows:-

"Order 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 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.” [own emphasis]
9. The Petitioner have sought to be declared as Guardian and Manager of the subject. To merit the above orders the Petitioner 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.
10. The Petitioner testified that the subject has been afflicted with Down Syndrome since birth with limited intellectual ability. The petitioner stated the subject has undergone medical treatment and doctor confirmed his diagnosis as evidenced by medical report marked BYJ2 attached to the application. The said medical report .
11. Dr. Janbibi Yusuf Mohamed testified that he is Psychiatrist and he works at Post Ractz sub-county hospital. He testified that he examined the subject and diagnosed the subject with down syndrome with intellectual disability. He cannot care for himself due to the disability and would need a guardian. He testified he prepared medical report dated 14.5.2024.
12. This court was able to observe the subject on the online platform and tried to engage him. The subject cannot engage in a conversation.
13. Based on the material availed to this Court, I am satisfied that the Subject suffers from a mental illness under Section 26 of the [Mental Health Act](#). I find merit of this Petition dated 28<sup>th</sup> May 2024 and make orders as follows;
1. YHA is hereby declared as a person suffering from a mental disorder as defined in section 26 of the [Mental Health Act](#) CAP 248 Laws of Kenya.
  2. The Petitioner BYH is hereby appointed as the Guardian of the affairs of the subject.
  3. The Petitioner BYH is hereby appointed as the Manager of the estate of the subject.
  4. The duties of the managers are as stipulated in Section 27 of the [Act](#) as:-
- 27.
- (1) The court may make such an order as it considers necessary for the administration and management of the estate of any person with mental illness including—



- (a) an order making provision for the maintenance of the person;
    - (b) an order making provision for the maintenance of members of the person's immediate family who are dependent upon the person; and
    - (c) an order making provision for the payment of the person's debts.
  - (2) The court may appoint a manager of the estate of a person with mental illness for the purposes of safeguarding the property of that person.
  - (3) The court may for the purposes of section (1), appoint the supporter or the representative of the person with mental illness as the manager of the estate of the person under subsection (2).
  - (4) The court shall, by notice in the Gazette, inform the public of the appointment of a person as the manager of the estate of a person who is suffering from mental illness.
  - (5) Within fourteen days of the Gazette Notice under subsection (4), any person may lodge an objection to the person appointed as manager.
5. In their duties they must comply with Section 28 and 29 of the Act.
- (1) Where a manager is appointed under this Part, the court may, upon considering the nature of the property whether movable or immovable, and subject to subsection (2), make such orders as the court may consider necessary for the management of the estate by the manager.
  - (2) The manager shall not, without the approval of the court—
    - (a) mortgage, charge or transfer by sale, gift, surrender or exchange any immovable property of which the estate may consist;
    - (b) lease any such property for a term exceeding five years; or
    - (c) invest in any securities other than those authorized under the Trustee Act.
  - (3) A manager shall not invest any funds or property belonging to the estate managed under this section—
    - (a) in any company or undertaking in which the manager has an interest; or
    - (b) in the purchase of immovable property under the authority of section 4 (1) (d) of the *Trustee Act* without prior consent of the court.
  - (4) A manager shall perform the manager's duty under this Act responsibly taking into account the best interests of the estate of the person who is suffering from mental illness.
  - (5) Every conveyance or other instrument made pursuant to an order of the court under this Part shall be valid.

“29. Inventory of property

A person appointed to be a manager of the estate of a person with mental illness under this Part shall, in the prescribed form, within six months of the date of appointment, deliver to the court and to the Public Trustee an inventory of—



- a. the property belonging to the person in respect of whose estate the manager has been appointed;
  - (b) all sums of money, goods and effects the manager receives on account of the estate; and
  - (c) a statement of debts owed by or due to such person with mental illness.
6. In accordance with the provisions of Section 33 of the *Mental Health Act*, the petitioner will furnish an inventory and annual statement to this court and the Public Trustee as required by the law.

**DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024**

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**S.N.RIECHI**

**JUDGE**

