



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC APPLICATION NO. E12 OF 2021

IN THE MATER OF SECTION 26, 28 (1) AND 28 (2) OF THE MENTAL HEALTH ACT CAP 248 LAWS OF KENYA

AND

IN THE MATTER OF AHK SUFFERING FROM MENTAL DISORDER

AND

IN THE MATTER OF AN APPLICATION BY HSM & AHK TO BE APPOINTED GUARDIANS FOR THE PURPOSES OF PURSUING COMPENSATION FOR THE SUBJECT AHK

AND

IN THE MATTER OF GUARDIANSHIP OF SUBJECT AHK

HSM & AHK.....PETITIONERS

JUDGMENT

1. The petitioners herein HSM and AHK wife and brother to the subject respectively, moved to this court vide a petition dated 18th April, 2021 seeking orders that ; The Honourable court to appoint them as guardians to the subject herein AHK for purposes of pursuing compensation from the owners of motor vehicle registration Number KCB 950L and Tuktuks registration numbers KTWB 060 S and KTWB 617 Q make Piaggio which caused the subject head injuries with intracranial bleeding leading to his mental incapacity.
2. The petition is anchored on grounds set out on the face of it and averments contained in the affidavits of the petitioners separately sworn on 18th April, 2021 stating that; on 21st August 2020 the subject suffered severe intracranial injuries arising out of a traffic road accident occasioned by the aforementioned motor vehicles thus causing him suffer permanent disability at 100%.
3. That he suffered post traumatic memory loss and cognitive impairment hence incapable of presenting his case before a court of law. They averred that, in order to institute civil proceedings before a court of law to claim compensation, there is need to appoint a guardian to lodge a claim for compensation on behalf of the subject against the motor vehicles involved in the said accident.
4. In support of the claim that there is a pending compensation claim, they annexed a police abstract (HSM-5), demand letters served upon the owners of the concern motor vehicles (HSM- 6), medical report confirming the subject's mental status (HSM-2) and chief's letter (HSM-4).
5. During the hearing, Pw2 AH stated that the subject is his step brother who suffered permanent disability due to involvement in a traffic road accident. That the subject was admitted in ICU while in a coma for 3 months and has been bedridden since then to date.
6. Pw3 H wife to the subject corroborated the testimony of Pw2. She reiterated the content contained in her affidavit in support of the application. Equally, Pw4 MA mother to the subject further corroborated the testimony of Pw2 and Pw3.
7. On his part, Pw1 Dr. Darius Wambua Kiema who has been attending to the subject (patient) produced a medical report dated 8th February, 2021 (P Exh 1) thus confirming that he examined the subject who had sustained severe head injury arising from a serious traffic road accident leading to loss of memory and cognitive impairment, paralysis of all limbs leading to loss of independence and risk of post traumatic convulsions fits/epilepsy.
8. He concluded that the patient requires assistance by providing nerve medication estimated at ksh 6,000 per month for at least four ears, physiotherapy and occupational therapy sessions estimated at kshs 10,000 per years for 4 years, costs for a care giver, consumables like

diapers, feeding tubes, urine bag, catheters, electrical supply and special nutritional supplements.

9. I have considered the application herein, affidavit in support and evidence by various witnesses. The application herein has been brought pursuant to Section 26, 27 and 28 of the Mental Health Act. Section 26 of the said Act does provide that; "order for entry, 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.

10. According to the medical report tendered before court and various witnesses' evidence, there is no doubt that the subject is totally incapacitated both physically and mentally. I had the occasion of seeing him while lying inside an ambulance van while fitted with tubes in his nostrils. He appeared helpless and unaware of his environment. He could not even blink an eye despite several calls to attract his attention. He is definitely not capable of discharging his daily duties independently and or responsibly. He needs a care giver to constantly to attend to his daily needs including turning him over in bed.

11. For purposes of lodging a compensation claim before a court of law he needs a guardian to represent him.

12. Having taken into account his mental and general medical condition, I am sufficiently persuaded to make a finding in favour of the petition (application) and thus make the following orders in the best interest of the subject and his estate;

a. The applicants/petitioners herein HSM and AHK be and are hereby appointed as legal guardians to the subject AHK for purposes of instituting, prosecuting and or defending any action brought by or against the subject in respect to any assets comprising the subject's estate where appropriate.

b. Costs in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JUNE, 2021

J. N. ONYIEGO

JUDGE