



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION CASE NO. E008 OF 2021

IN THE MATTER OF PROTECTION OF THE OLDER MEMBERS OF THE SOCIETY

IN THE MATTER OF S.G.N.

MNG.....1ST PETITIONER

SNG.....2ND PETITIONER

JUDGMENT

1. **MNG** and **SNG** (the petitioners) have presented a petition, in this matter seeking they be appointed joint managers of **SGN** (the subject) and to be allowed to access funds in the subject's account. The petition is brought under the Mental Health Act Cap. 248.

2. The petitioners are wife and son respectively of the subject. The subject and his wife were married on 16th December, 1967. They are blessed with five children. This petition is supported by all the children, each one of them has sworn an affidavit in support of this petition.

3. The evidence presented before court shows that the subject has been unwell since 2019. He has been admitted at various hospitals since then. He is presently admitted at *St. Matia Mulumba Mission Hospital*. The petitioner and also the other children of the subject have confirmed that the subject was diagnosed with dementia and prostate cancer and is presently unable to comprehend his surroundings or make any decisions. The petitioners deposed that the family are unable to pay the medical bills and that the hospital where the subject is presently admitted are demanding settlement of hospital bills of the subject, which demand has stretched the family's finances beyond limit.

4. The petitioners stated that the subject has funds in his Equity Bank account which funds can be used to settle the medical bills.

ANALYSIS

5. There is a report dated 11th November, 2020 written by St. Mary's Mission hospital which confirmed that the subject was being treated at that hospital for dementia. Another report dated 19th January, 2021 by *St. Matia Mulumba Hospital* also confirms that the subject is suffering with dementia.

6. **Section 26 of Cap 248** is the Section under which orders for custody, management and guardianship of a person suffering mental disorder are made. **Section 26 of Cap 248** provides:-

“26. 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) Where upon 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.”

7. Section 2 of Cap 248 defines who can be said suffers mental disorder as:-

“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.”

8. In discussing the rationale of Cap. 248, the court in the case of *In Re CHEGE NJEKE JOSEPH JACK NDUNGU MBURU [2016] eKLR*

“The rationale behind the enactment of the Act was well stated in NJUGUNA AND ANOTHER VS SHAH, CIVIL CASE NO 2456 OF 1994 (OS), where the Court stated that:-

“The general reading of the Mental Health Act (Cap 248) leaves one with the impression that those concerned or suffering from mental disorders are persons who are, to paraphrase, mentally sick. That by the sickness of the mind from one cause or another including taking drugs, a person cannot properly and fully address his mind to his affairs or his estate. That accordingly a manager or a guardian should be put in place on that account.”

9. The guide of what the court should consider when applying section 26 and 27 of Cap 248 was considered by the court in the case of *In Re N M K [2017] eKLR*, thus:-

“14. In considering an application brought under sections 26 and 27 of the Mental Health Act, the Court is guided by three main factors:

- a. There must be medical evidence warranting the determination by the Court that the Subject suffers from mental disorder;*
- b. The person to be appointed to be either a Guardian or Manager must be fit to be so appointed;*
- c. The Court must be satisfied that a proposed Manager will utilize her powers for the benefit and welfare of the Subject.*

15. The overriding principles in applying all these factors is that the welfare and best interests of the Subject must be the overall guiding principle.”

10. In keeping with the finding in *In re NMK* (supra), I confirm that petitioners have presented medical evidence that the subject is suffering mental impairment. I am satisfied that the petitioners being wife and son of the subject are fit to be appointed managers of the estate of the subject. More importantly, they have received the consent of the other members of the nuclear family to seek the present orders. Finally, I find that granting the orders sought is in the interest of the subject. The medical bills need to be paid to ensure the subject continues to receive medical care. The petition is merited.

DISPOSITION

11. I therefore grant the following:-

- (a) SGN is hereby adjudged to be a person suffering from mental disorder.
- (b) MNG and SNG are hereby appointed the joint guardians of SGN.
- (c) MNG and SNG are hereby appointed joint managers of the estate of SGN.
- (d) MNG and SNG are hereby permitted by this Court to access and operate bank account held by SGN at Equity Bank Account No. Thika Branch account held in the name of SGN within the Republic of Kenya.
- (e) There shall be no orders as to costs.

JUDGMENT, SIGNED DATED and DELIVERED at KIAMBU this 3rd day of JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Petitioner . Ms. Njoroge holding brief for Mr. Waithaka

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE