



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION CASE NO. 19 OF 2020

EWN.....PETITIONER/APPLICANT

VS.

IN THE MATTER OF MENTAL HEALTH ACT

AND

IN THE MATTER OF SNG - SUBJECT

JUDGMENT

1. **EWN** has petitioned this Court seeking that she be appointed the legal guardian/manager of the subject, **SNG** and for **EWN** to be appointed manager of the estate of the subject to manage his estate including any such description of moveable or immoveable property, money, debts and legacies, power to execute, sign all deeds and instruments relating to or evidencing the title or right to any property or giving a right to receive any money or goods.

2. **EWN** is the wife of the subject. Although it is not stated, in **EWN's** affidavit the date they got married, she however stated that they were married under the Kikuyu Customary Law. They are blessed with two children. That the subject was hospitalised at Aga Khan University Hospital suffering from severe pneumonia and diabetes mellitus disorder which has led to memory loss incapacitating him. That as a result, the subject has been unable to properly manage his affairs without assistance. That as a consequence, "certain friends and conmen have been taking advantage" of the subject to defraud him of his assets. It is on that basis that, **EWN** sought to be allowed to manage all the affairs of the subject under the provisions of the Mental Health Act.

ANALYSIS

3. Orders for custody, management and guardianship under the **Mental Health Act Cap 248** is under **Section 26** of that Act. That Section states:-

"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."

4. As it is noted, **Section 26(1)(a)** shows that orders of custody, management and guardianship are made in respect of a person suffering from mental disorder. The definition of a person suffering from disorder is found in **Section 2 of Cap 248** 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.”

5. In the case of ***In re N.M.K (2017) eKLR*** the Court considered what should be borne in mind when an application is made under **Section 26 and 27 of Cap 248** as follows:-

“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.”

6. The subject was at first admitted at Aga Khan University Hospital on 14th July, 2020. From the documents before me, it seems the subject was transferred to the Nairobi West on 7th October, 2020.

7. There are two medical reports before court. The first is dated 19th August, 2020 which sets out the subject’s ailments as severe pneumonia and diabetic mellitus. That report further stated that the subject was on admission at Aga Khan University Hospital taken to ICU. By the date of that medical report the report stated that the subject had slightly improved although still at ICU due to high blood sugar. The report noted that the subject was not competent nor did he have capacity to make any decision and that while admitted at that hospital it was his spouse E.W.N. who made decisions on behalf of the subject particularly on consents for his treatment.

8. The second medical report is by a doctor at the Nairobi West hospital and is dated 28th October, 2020. After setting out the subject ailments and treatment at that hospital doctor wrote:-

“Currently 28-10-2020 he (the subject) is doing well, wearing off the ventilator is ongoing currently with no new complications.”

9. The two reports referred to above do not state the subject was suffering from mental disorder of any type. Rather, they set out the subject’s complication relating to pneumonia, which was COVID-19 virus related and his diabetic condition. Those ailments, according to the medical reports before court, did not lead to any mental disorder. It follows that the pleadings before court are not supported by evidential documents. The prayer therefore that the subject is incapable of protecting his interest and the prayer for an order under Mental Health Act is not proved. There is no proof before this court of the subject having mental impairment. In this regard, I make reference to the case ***In re CHEGE NJEKE JOSEPH JACK NDUNGU MBURU [2016] EKL*** as follows:-

“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.”

10. The other issue that has concerned me is that the petitioner has failed to disclose the properties that she wishes to manage on behalf of the subject. There is no mention of any title number nor bank account. Instead, the petitioner sought blanket orders to manage the subject’s estate without disclosing what that estate consists of.

11. The other issue that does concern me is that although E.W.N. alleges the subject is suffering from mental disorder, she however attached a General Power of Attorney given to her by the subject dated 13th July, 2020. That date is one day prior to the subject’s admission into Aga Khan University Hospital.

12. I believe I have stated enough to show that there is no merit in the petition before me.

DISPOSITION

13. The petition dated 22nd October, 2020 is hereby dismissed.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 3RD DAY OF JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Petitioner/Applicant : Mr. Kimani holding brief for Mr. Gatonye

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE