



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. E108 OF 2021

RULING

This Ruling relates to the Notice of Motion dated 7<sup>th</sup> June 2021 by SWC, the Petitioner in a Petition for Guardianship of JCM dated 7<sup>th</sup> June 2021. It seeks the following orders:

1. That this Application be certified urgent and be admitted for hearing forthwith on account of the urgency.
2. That pending the hearing and determination of the Petition, this Honourable Court be pleased to appoint SWC, as the Guardian of JCMand as the Manager of his estate.
3. That pending the hearing and determination of this Petition this Honourable Court be pleased to order ABSA Bank Kenya Ltd to pay such hospital bills from Account No. xxxxxxxxxx held in Queensway Branch to the Metropolitan Hospital as may be furnished to the Bank by the Guardian from the account held in the Bank by JCM.
4. That pending the hearing and determination of the Petition this Honourable court be pleased to authorize SWC to operate the Bank Account No. xxxxxxxxxx held at ABSA Bank Kenya Ltd, Queensway Branch Nairobi **without making withdrawals or any payments whatsoever** (this has been amended with leave of the court to read "**Including making withdrawals and payments.**").
5. That this Honourable Court be pleased to direct that all orders that it may give shall lapse automatically once the patient fully recovers from his incapacity and is certified by his doctor as capable of managing his affairs normally.
6. That this Honourable Court be pleased to grant such further order and/or orders as it may deem fit to grant in the circumstances of this case.

The Application is supported by the grounds found on the face of it and on the Supporting Affidavit sworn by 7<sup>th</sup> June 2021.

The Applicant is the wife of JCM, the patient. She told the court through her depositions that she married the patient under Kikuyu Customary Law and later solemnized their marriage at the Registrar's Office on 19<sup>th</sup> February 1989. She attached Marriage Certificate No. [...]. The couple have two issues of the marriage EMC now 31 years old and CWC now aged 30 years. The Applicant deposed that she and the patient have been running the family business of buying and selling Commercial Properties as well as running residential premises in various parts of the Republic including Nairobi and Murang'a and also own agricultural land in Murang'a; that the patient opened ABSA Bank Account No. xxxxxxxxxx in Queensway Branch Nairobi where all the money from the business operations is banked. That the patient is the sole signatory of that account. That the patient fell sick on 26<sup>th</sup> April 2021 after testing positive for Covid 19 and was admitted at Metropolitan Hospital where he had been undergoing treatment; that he was in a coma and unable to sign any documents including cheques and the hospital bill is running high. The Applicant further deposed that she knew that the account held sufficient funds to cater for the hospital bill.

The Applicant is also seeking to be appointed the patient's Guardian and Manager of his Estate to enable her to facilitate any payment of bills by the bank and an order to operate his account.

On 15<sup>th</sup> June 2021, Mr. Uvyu appeared on behalf of Mr. Gaturu for the Applicant and presented the Application. This court allowed certain prayers contained in the order of this court dated 15<sup>th</sup> June 2021 and extracted and signed o 22<sup>nd</sup> June 2021. Specifically this court appointed, in the interim, the Applicant as Guardian of the patient pending hearing and determination of this application. The court also allowed in the interim the ABSA Bank, Queensway Branch, to pay the hospital bill directly to Metropolitan Hospital. The remaining orders were kept in abeyance pending hearing and determination of the Application.

On 7<sup>th</sup> July 2021 Mr. Gaturu attended court and argued the application. He informed the court that the hospital bill had been paid by the bank directly to the Metropolitan Hospital and that the patient had been discharged and was undergoing home based care. Mr. Gaturu submitted that the Applicant is seeking to be authorized to operate the ABSA Bank Account because the family operations are run through that bank account and that the Applicant wants to make payments from that account which she was not able to do without authority from the court. Mr. Gaturu submitted that the orders being sought will automatically lapse once the patient recovers. He submitted that the money in the bank will be used to run the family business until the patient recovers. He confirmed to the court that the patient is in real estate business in Nairobi running commercial and residential businesses with rental income as well as agricultural land in Murang'a with income from farm produce and that all income is deposited in this account.

I have considered this matter. In my considered view, it is crucial that family business continues to operate during the illness of the patient. This court has no problem granting the orders sought to enable the family business to continue and to enable payments of bills where this becomes necessary especially in respect of the illness of the patient. However, it is my view that to grant the order appointing the Applicant as the Manager of the Estate of the patient will compromise the Petition before the same is heard and determined because that is the main prayer in the Petition. For this reason, it is my considered view that the Applicant should be allowed to deposit monies collected from the family businesses and make withdrawals that may become necessary to enable the family to maintain upkeep and care of the patient as well as pay bills that may fall due. However this should be done on temporary basis pending the hearing and determination of the Petition and pending the full recovery of the patient whichever may be the first. I therefore grant the following prayers:

1. Prayer No. 2 is granted in so far as it seeks to have the Applicant appointed Guardian of the patient.
2. Prayer No. 4 is granted authorizing the Applicant to operate ABSA Account No. xxxxxxxxxx held in Queensway Branch including making withdrawals from and payments into that account.
3. That prayer No. 5 is allowed.
4. That the Applicant shall keep proper record of all the dealings in this account and file quarterly reports and audited accounts to this court until this matter is fully heard and determined or until the patient fully recovers and is able to take up the management of his affairs.

Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 21<sup>ST</sup> JULY 2021**

**S. N. MUTUKU**

**JUDGE**