



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 13 OF 2019

IN THE MATTER OF THE MENTAL HEALTH ACT (CAP 248, LAWS OF KENYA)

AND

IN THE MATTER OF MSG (A PERSON SUFFERING FROM MENTAL DISORDER)

HNW.....APPLICANT

JUDGMENT

(1) Before this court is the Petition dated **1st February 2019** in which the Petitioner **HNW** seeks orders that:-

(i) This Honourable Court to be pleased to appoint the Petitioner as Guardian of the affairs of MSG in accordance with the Mental Health Act with power to sign and file Court documents, enter into a deed for family settlement and release on behalf of MSG and to carry out other incidental and general functions of MSG.

(ii) This Honourable Court be pleased to appoint the Petitioner as Manager of the Estate of MSG in accordance with the Mental Health Act with special permission pursuant to Section 27(1) (a) of the Mental Health Act to mortgage, charge, or transfer by sale, gift, surrender, exchange or otherwise any immoveable property of which the estate may consist; and

(iii) The costs of this Petition be borne by the Petitioner.

(2) The Petition was supported by the Affidavit of even date sworn by the Petitioner. The matter was canvassed by way of viva voce evidence. The first **two (2)** witnesses testified before **Hon. Justice John Onyiego**. Following the transfer of the Judge to Mombasa I took over the hearing.

(3) **PW1 HNW** told the Court that the subject **MSG** was his step-sister. He states that the Subject has suffered mental incapacity from birth and is not in a position to manage her own affairs. He seeks to be granted orders of Guardianship and Management over the Patient.

(4) **PW2 HPWK** is a sister to both the Petitioner and the Subject. **PW2** told the Court that she lives with the Subject in her house and cares for her. **PW2** confirmed that the Subject is sick and is not in a position to manage her own affairs.

(5) **PW2** told the Court that she sought and obtained Letters of Administration in respect of the estate of their late mother **ANK** who passed away on **30th March 2013**. That following the Confirmation of the Grant on **15th January 2015**. **PW2** now desires to distribute the estate to the beneficiaries of the deceased who include the Subject herein. Given her mental incapacity the Subject is not in a position to manage her share of the estate. The witness states that she has no objection to this application or Guardianship as made by the Petitioner. **PW2** expresses her confidence that the Petitioner is best placed to manage the Affairs of the Subject.

(6) The Subject **MSG** appeared before the Court online on **13th May 2021**. The Court observed that she was a middle aged woman, was clean, calm, neatly – dressed and was able to communicate and express herself well. The Subject informed the Court that she was aware of the nature of proceedings. She told the Court that she is unwell and is not able to manage her own affairs. The Subject confirmed that the Petitioner was her elder brother. She understood that her brother was seeking Guardianship over her. The Subject stated that she had no objection to the Petition and that she preferred that her brother take up the management of her affairs.

(7) **Section 26** of the **Mental Health Act, Cap 248** provides for the circumstances in which a Court may make orders for the management and maintenance of a Patient (Subject) 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) 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.” [own emphasis]

(8) I have carefully considered this Petition as well as the material presented before the Court. I have perused the Medical Report dated **13th November 2018** prepared by a **DR. MBURU** Consultant Psychiatrist at the **Murang’a Level 5 Hospital**. The Report indicates that upon examination the Subject was found to have an impairment in higher mental functioning which directly impacted her ability to manage her own affairs.

(9) A second Medical Report dated **24th February 2020** prepared by **DR. KIMUNGUYI** a Medical Officer at the **Athi River Level 4 Hospital**, came to the same conclusion. Based on the two medical reports presented to the Court I find that the Subject **MSG** suffers a mental incapacity rendering her incapable of managing her own affairs.

(10) The Petitioner is the elder brother to the Subject. This is confirmed by the Subject herself. The Subject’s sister who is also her care-taker informed the Court that she had no objection to the Petition. **PW2** swore an Affidavit dated **1st February 2019** giving written consent to the Petition. The Subject herself indicated to the Court that she had no objection to the Petition.

(11) Based on the foregoing I find and hold that the Subject suffers from a mental illness under the terms of the **Mental Health Act, Cap 248 Laws of Kenya**. Accordingly I do grant prayers (ii) and (iii) of this Petition. No orders on costs.

DATED IN NAIROBI THIS 2ND DAY OF JULY, 2021.

.....

MAUREEN A. ODERO

JUDGE