



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAKURU

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. E031 OF 2021

IN THE MATTER OF MWK

AND

IN THE MATTER OF THE MENTAL HEALTH ACT, CHAPTER 248 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE RIGHTS OF OLDER MEMBERS OF THE SOCIETY

UNDER ARTICLE 57 OF THE CONSTITUTION

RULING

1. The petitioners herein filed this petition on 13th September 2021 under the **Mental Health Act, Chapter 248 of the laws of Kenya** seeking the following prayers: -

- i.** This Honorable Court be pleased to declare **Mrs. MWK** a person suffering from a mental disorder as defined in the **Mental Health Act, Cap 248 of the Laws of Kenya**.
- ii.** This Honourable Court be pleased to appoint Petitioners **HWK** and **TWK** the guardians of the subject, the said **MWK**.
- iii.** This Honourable Court be pleased to appoint **RW** and **JW** to be the managers of the estate of the said **MWK**.
- iv.** As an alternative to (iii) above, this Honourable Court be pleased to appoint all the Petitioners' both guardians of the subject and managers of her estate.
- v.** The costs of this application be borne by the estate of the said **MWK**.

2. The Petition is supported by the affidavits sworn by **HWK**, **TWK**, **EWK**. They averred that they are adults of sound mind and beneficiaries of the estate of the subject being daughters and granddaughters of the subject.

3. The petitioners aver that the subject is aged 88 years is suffering from a mental disorder and progressive neurodegenerative disorder; that she has senile dementia, is disoriented in time, space and person and is not cognitively able to make important life decisions and requires close nursing care on a 24-hour basis, and therefore not able to manage her property or look after herself.

4. They averred that her declining memory loss has worsened, and is not expected to recover sufficiently to shoulder her previous responsibilities; that she is looked after by 2 people by day and 2 people by night; she needs care and support for the most basic needs.

5. They averred that there is a need to appoint a manager as there is still Nakuru succession 158 of 2005 in the matter of the estate of **DKK** that is pending distribution, the subject was the administratrix and has been replaced by **EWK**.

6. They further averred that that plot Nyandarua/Tumaini Ngorika Block1 /Nyandarua/xxx be sold in order to meet her medical expenses.

7. The petitioners averred that **BK** withdrew Kshs 500,000/= from the subject's account without her consent and he is using the subject's motor vehicle which should be used by the subject.

ANSWER TO PETITION AND CROSS-PETITION

8. **FNK** who is also a daughter to the subject filed an answer to the petition and cross-petition. She averred that whereas she admits the subject is of old age and senile and requires care and support, she has been discriminated against for not being involved as a child of the subject in running the affairs of the subject.

9. She further averred that the petitioners have several allegations against her son **BK** which demonstrates ill motive in filing the current petition; that the petition was filed with hidden malice and mischief excluding those around the subject and available to take care of the subject.

10. She averred that she was appointed by the court on 11th February 2021 as the substitute for the subject in the administration of the estate of the late **DK**. She averred that the money to maintain the subject is obtained from her farm proceeds in LR NO. xxxxNakuru, Roslyn Farm and there is no supplement from other members of the family and LR No. Nyandarua/Tumaini Ngorika Blockx/Nyandarua/xxxx should only be sold if the proceeds from Roslyn Farm are utilized on the subject medication.

11. The objector further averred that motor vehicle in question was wasting away when her son B took the same and serviced and he is using the same to take the subject to hospital and run her errands; further that the petitioners based in the USA will not be able to utilize the vehicle.

12. On withdrawal of Kshs. 500,000/= the objector averred that it was authorized by the subject who was present in the bank when the transaction was being carried out.

13. The objector in her cross cross-petition sought the following prayers:

i. She urged the court to dismiss the petition dated 9th September 2021.

ii. The court be pleased to declare **MWK** a person suffering from a mental disorder,

iii. The court be pleased to appoint **HWK, TWK, Edward Thuku, and FNK** the guardians of the **MWK**.

iv. The court be pleased to appoint **HWK, TWK, ET, and FNK** to be managers of the estate of **MWK** and signatories of her accounts.

v. As an alternative to iii above, this honorable court be pleased to appoint all the petitioners and **FNK** both guardians and managers of the subject estate.

vi. In the alternative to ii, iii, and iv, the court be pleased to appoint **RWK** and **FNK** as managers and **HW** together with **WK** and **FNK** to be guardians and caregivers to the said **MWK**.

vii. The court be pleased to issue orders to the petitioners **EW, RW, JW, HW, and WK** either by themselves, their agents or anyone acting on their behalf from preventing **FNK**, her son (**BK**), and her daughter **HK** from attending/serving/visiting or in any way giving assistance where need be to their mother/grandmother.

viii. The costs of the application be borne by the estate of **MWK**.

14. She filed an affidavit in support of the cross-petition where she reiterated the averments in the cross-petition. She averred that the cross-petition is not biased as all the children of the subject should be allowed to care for and protect the subject.

15. **BK** filed a response to the petition and reiterated the averments in the cross-petition. He averred that he was given the motor vehicle by the subject and since he is based in Kenya while the petitioners are based in the USA, him and his mother would best take care of the subject. He averred that he has not wasted any property belonging to the subject but has taken care of the subject for close to 6 years.

PETITIONER'S SUBMISSIONS

16. The petitioners restated averments in the petition and submitted that a copy of the medical report has been availed in compliance with the requirement to declare a person as suffering from a mental disorder and further submitted that the overriding principles are the welfare and best interest of **MWK** and urged this court to be guided by the case of **JWN vs MWK (2020) eKLR**.

17. The petitioners further submitted that **HW** and **TWK** who have been taking care of the subject be appointed as guardians of the subject as they have acted in the capacity of guardians for a long time and are residents in Kenya; that they have the best interest of the subject and relied on **Section 26 of the Mental Health Act**.

18. The petitioner submitted that the objector and her son have taken advantage of the deteriorating health of the subject and taken over the administration of her estate without legal authorization; that the petitioners have been contributing money from their savings to support the

subject yet the proceeds from her estate can take care of her, and they are best placed to be appointed as manager.

19. The petitioners urged court to declare the subject **MWK** a person suffering from a mental disorder and appoint **HW** and **TWK** the guardians of the subject and, **RW** and **JW** as managers of the subject. In the alternative, all petitioners be appointed as managers and guardians.

OBJECTOR'S SUBMISSIONS

20. The objector submitted that she is the only daughter of the subject who has been left out by the petitioners and she is not opposed to the subject being declared a person suffering from a mental disorder.

21. She submitted that she has not intermeddled with the subjects' estate and has been the primary caregiver of the subject, even during the time she contracted Covid -19 and restated that motor vehicle KBH XXX was given to **BK** by the subject 6 years ago and has been using it for the benefit of the subject.

22. The objector submitted that the only issue is that **FNK** as a daughter and **ET** a son have been left out and it is only in the interest of justice that they be included as a guardian and manager of the subject. Further petition by the petitioners is clothed with malice and mischief. She submitted that the subject is maintained from rent form **LR No. Nakuru Rosslyn Farm xxxx** which is about 150,000/= per month. She urged this court to adopt the medical report filed. She submitted that allowing the petition will lead to a conflict of interest and the fair way is to allow all the children of the subject to be appointed guardians and managers of the estate.

ANALYSIS AND DETERMINATION

23. I have considered averments and submissions by parties herein. Provisions of sections 26 and 27 of Cap 248 of the Mental Health Act was considered in the case of *In Re N M K [2017] eKLR*, where the court stated 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 a 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 principle in applying all these factors is that the welfare and best interests of the Subject must be the overall guiding principle.”

24. The doctor's report dated 7th April 2021 by **Prof Benson Gakinya** indicate that the patient has senile dementia, a chronic progressive neurodegenerative disorder and as a result of this illness, she is not cognitively able to make important life decisions including activities of daily living (ADLs) and therefore, requires assistance to perform her ADLs and cannot engage in any contracts as of now. The doctor recommended close nursing care on a 24-hour basis including physical therapy.

25. In respect to management and guardianship of persons suffering from a mental disorder, **Section 26 of the Mental Health Act** provides as follows:

26. Order for custody, management, and guardianship

26(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 a mental disorder.

26. It is not disputed that subject is suffering from mental disorder and thus incapable of managing her own affairs. All her children have made averments confirming the mental status of the subject herein.

27. The petitioners have left out **pnk** in the application to be a guardian and manager of the subject. She averred that she lives in Kenya and has been participating in taking care of the subject. No sufficient reason has been advanced as to why she should be excluded from taking care of her mother together with the other siblings. In my view, leaving her out amounts to discrimination and is unfair.

28. **Section 33 of the Mental Health Act** obligates managers of assets of a person with mental disorder to give an inventory of the accounts of the subject from time to time. A manager once appointed is from time to time required to give accounts in respect to assets of the subject. **Section 33 of the Mental Health Act** provides as follows: -

“Every person appointed by the court to be manager of the estate of a person under this Part shall, within six months of the date of his appointment, deliver to the court and to the Public Trustee (to whom he shall pay such fee as may be prescribed) an inventory of the property belonging to the person of whose estate he has been appointed manager and all such sums of money, goods and effects as he receives on account of the estate, together with a statement of all debts owed by or due to such person, and every such manager shall furnish to the court and to the Public Trustee (to whom he shall pay such fee as may be prescribed) annually, within three months of the 31st December, an account of the property in his charge showing the sums received and disbursed on account of the estate during the year and the balance....”

29. For the foregoing reason, I find that there is no reason advanced as to why any of the subject’s children should be excluded from being her guardian or managing her affairs.

30. FINAL ORDERS

- 1) The subject MWK is hereby declared a person suffering from mental disorder as defined under Mental Health Act Cap 248 Laws of Kenya.
- 2) That the petitioners and cross petitioner FNK are hereby appointed the guardians and managers of the affairs of the estate of MWK.
- 3) In the event of deficit in medical and upkeep expenses in respect to the subject herein, Plot Nyandarua/Tumaini Ngorika Blockx /Nyandarua/xxxx to be disposed of.
- 4) The managers herein to file statements of accounts in respect to the estate of MWK every 6 months.
- 5) The costs of this application be borne by the estate of the said MWK.

RULING dated, signed and delivered via zoom at Nakuru

This 18th day of November, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Dr. Kamau Kuria for petitioner

Charles Kimathi for respondent