



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS APPLICATION NO. E009 OF 2021

IN THE MATTER OF JNG

AND

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

BWG.....APPLICANT/PETITIONER

RULING

Brief Facts

1. By an application dated 3rd September 2021, the applicant relying on **Section 26 and 28 of the Mental Health Act, Cap 248 Laws of Kenya** and sought the following prayers:-

a) This Honourable Court be pleased to appoint the applicant BWG as Guardian of JNG the subject herein for the purpose of instituting a suit for recovery of MERU NTIMA/IGOKI/xxx which has been concluded and given to another person on claim of adverse possession MERU ELC No. 8 of 2018 (OS) FBJ Vs JNG

2. The application is supported by the affidavit of the applicant BWW. The applicant states that she is of sound mind and is the daughter of the subject. She further states that the subject suffers from Essential 2nd Stage Systemic Hypertension, Type 2 Diabetes Mellitus, Hypothyroidism, Vascular and Multi infarct Dementia, Acute on Chronic Kidney Disease, Osteoporosis and Anaemia of Chronis Disease. Due to her poor health condition condition, the subject is incapable of handling herself and needs close attention and care on a permanent basis.

3. It is further stated that the subject is the registered owner of L.R. MERU NTIMA/IGOKI/xxx the suit land in Meru ELC No. 8 of 2018 where the subject was sued as the defendant. The subject being of poor health and of diminished mental status due to acute illness, does not have the capacity to be sued, nor was she properly served with summons to enter appearance and defend the suit. The applicant contends that judgment was entered in default of appearance and the plaintiff in the suit transferred the said property to himself. The applicant is thus apprehensive that the plaintiff will sell and transfer the said land to a third party. The subject confirmed in her oral examination in the court that she is the proprietor of the said land and that it was subject to a suit in court whereby court orders were granted in favour of the plaintiff in the case without her being heard.

Issues for determination

4. On perusal of the application and the oral examination of the subject by the court, I have identified two (2) issues for determination:-

- a) Whether the subject should be declared as suffering from mental disorder pursuant to the Mental Health Act, Cap 248.
- b) Whether the applicant should be appointed as guardian to the subject.

The Law

Whether the subject should be declared as suffering from mental disorder pursuant to the Mental Health Act, Cap 248.

5. **The Mental Health Act** provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons.

6. **Section 2** of the Act defines “person suffering from mental disorder” as follows:-

“person suffering from mental disorder” means a person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.”

7. Section 26 provides 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 of the 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.

8. According to the Medical Report by Dr. Ndirangu K.M. the subject suffers from Essential 2nd Stage Systemic Hypertension, Type 2 Diabetes Mellitus, Hypothyroidism, Vascular and Multi-infarct Dementia, Acute Chronic Kidney Disease and Osteoporosis and the doctor adds that they have been managing the subject since 2016. Dr. Ndirangu is a consultant physician at the Lotus Medical and Wellness Clinic in Nyeri town.

9. The subject further testified that Dr. Ndirangu has attended to her for the last seven years and that he informed her that she suffers from dementia since three years ago. The subject is also a doctor by profession and she stated that she is very forgetful and her mental capacity is diminished.

10. It is argued that from the doctor's report it is apparent that the subject suffers from a mental disorder as per Section 2 of the Mental Act and further a medical condition contemplated under Section 26 of the Act. It is my considered view that the subject is incapable of managing herself and to conduct her daily activities due to her mental and physical condition.

Whether the applicant should be appointed as guardian to the subject.

11. As noted above, **Section 26 of the Act** gives court the power to make an order regarding management of the estate of any person suffering from mental disorder to any relative or any person suitable but giving preference to a relative.

12. The applicant has stated that she is the daughter of the subject. In support to her application, she has annexed an affidavit by her sister, CWB who confirms that the two daughters of the subject do take care of their mother's needs and wellbeing. The applicant has also relied on the affidavit by MMS, her other sister who supports the applicant being appointed as the guardian of their mother's estate. The applicant has further attached a letter from the area Chief who confirms that the subject suffers from dementia and that the chief has no objection to the applicant being appointed as guardian of the subject's estate.

13. The subject testified that the applicant and CW are the ones who normally take care of her assisted by another daughter namely EW who lives in the neighbourhood. It is evident from the subject's testimony that she relies heavily on the applicant to support her and supply to her needs. I have also noted that the applicant lives in the United States. There is no evidence challenging the grant of the orders sought in the application.

14. I have looked at the report of Dr.Ndirangu who is the doctor of the subject. He confirms that she suffers from several health and mental conditions including Hypertention, Type 2 Diabetes, Dementia, Kidney disease among others. The doctor opines that the subject is completely dependent on her care givers for all her activities of daily living and declares her a candidate for guardianship.

15. The court examined the subject in court. She was brought in a wheel chair because she is incapacitated physically due to the multiple illnesses and could not walk on her own. She was forgetful in that she could not remember the properties she owns and where they are situated except two. The subject confirmed that the applicant is the one who provides for all her financial needs while CW and one E all her daughters take physical and social care of their mother. I did form the opinion that the subject needs a guardian to manage her affairs and especially to attend to the case at hand Meru ELC No. 8 of 2018 where judgement has already been given against her in default of appearance.

16. I am satisfied that the applicant has established that the subject is unable to manage her affairs both physically and mentally and that she suffers from acute dementia, hypertension and other ailments. Being a daughter of the subject, the applicant is a close relative thus satisfying the requirement of the Mental Health Act. She is also mentally, physically and financially able to provide for her mother and to take care of her.

17. Consequently, I find the application merited and I hereby grant the orders sought in terms of prayer 2 of the chamber summons dated

03/09/2021.

18. There shall be no order as to costs.

19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF NOVEMBER 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 11th day of November 2021