



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO. E01 OF 2021

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

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

IN THE MATTER OF AN APPLICATION BY LWK AND AK TO BE APPOINTED GUARDIANS OF THE ESTATE OF THE SAID FKK

LWK1ST PETITIONER

AKK..... 2ND PETITIONER

JUDGMENT

INTRODUCTION

1. The Chamber Summons was brought by way of Certificate of Urgency under the provisions of Sections 26, 27 and 28 of the Mental Health Act and the Orders sought by the applicant are as follows;

i. Spent

ii. That this Honourable Court may be pleased to adjudge and declare FKK (the Subject herein) of ID Card Number [Particulars Withheld] to be a person suffering from a mental disorder and therefore incapable of protecting his interests under Section 26 of the Mental Health Act Cap 248 of the Laws of Kenya.

iii. That this Honourable Court may be pleased to appoint **LWK and AKK** as joint legal guardians '*ad litem*' of the Subject and managers of the estate of the Subject, herein, and to vest in them powers to manage his affairs including any such description of moveable property, money, debts and legacies, powers to execute and sue or right to receive any money or goods and his financial obligations;

iv. That the costs of the Petition be borne by the Petitioners.

2. The Petition was supported by a Supporting Affidavit made by the 1st petitioner on 19/01/2021; at the hearing hereof the petitioners were represented by learned counsel Mr. Wagiita; the Petition was unopposed; hereunder is the presentation made by the petitioners;

PETITIONERS' CASE

3. The petitioners are the spouse and the son of the subject and that they have actual and physical custody of the respondent and take care of him; the 1st petitioner and the subject solemnized their marriage on 31/10/1998; at the time of celebrating their marriage the subject was aged 40 years and as at the date of filing the instant petition he was aged 63years; the petitioners relied on the medical evidence of Doctor Fred Muleshe (**PW1**) who was the doctor who examined the subject;

4. In his testimony **PW1** stated that he was a Consultant General Surgeon and that sometimes on 16/01/2020 the subject was presented with a history of forgetfulness which had lasted for a year; he examined the subject on three (3) separate occasions within the year and diagnosed him with a mild cognitive impairment in that he had remote memory lapses and he was put under medication;

5. The witness stated that the subject could not recall when he was born nor when his deceased father passed away; he could not recall how many children he had nor their full names; nor could he recall his current status of occupation; **PW1** prepared a Medical Report which was

produced into court and marked as 'PEXh.1'; according to the report the subject had a family history of dementia in his mother and sisters;

6. The petitioners also relied on the letter dated 12/12/2020 from the Senior Chief of Kirimukuyu Location where the subject hails from which confirms that the petitioners herein together with the other children are the immediate family of the subject; also annexed to the Petition was a consent duly signed by the other children of the subject consenting to their appointment as legal guardians of the subject;

7. The petitioners pray that the orders sought be granted; that they be appointed to be the subjects' legal guardians and also as managers of his estate so as to protect his proprietary interests from alienation.

ISSUES FOR DETERMINATION

8. The petition was unopposed and this court has framed only one issue for determination;

i. Whether the Petition and orders sought are merited.

ANALYSIS

9. There is a presumption of law that all persons are sane until proved otherwise; the burden of proof was upon the petitioners to discharge this; at the time of filing the Petition the subject was aged about sixty-three (63) years and in January, 2020 he was diagnosed with mild cognitive impairment characterized by memory loss, forgetfulness and disorientation in time; a medico-legal report on the treatment of the subject prepared by Dr.Fred Muleshe and it was produced as evidence and marked s "PEXh.1";

16. The Petition is unopposed and it is noted that there are other family members who are beneficiaries who may also have a competing interest in the subjects' affairs but they have given their requisite consent for the appointment of the petitioners as legal guardians and managers of the subjects affairs and estate;

17. The applicable law is found at Section 26 of the Mental Health Act which reads as follows;

26. Order for custody, management and guardianship

(1) The Court may make order-

(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).....

(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 the mental disorder.

18. The subject is said to suffer from 'mild cognitive impairment'; this condition is defined as '*an early stage of memory loss or other cognitive ability loss (such as language or visual/spatial perception) in individuals*';

19. The petition is supported by medical expert evidence and is unopposed; this court is satisfied that the subject is not in a sound mental condition to manage himself and the affairs of his estate; the requisite consents have also been provided and for these reasons the petitioners have satisfied this court that the Petition is merited and that they are deserving of the orders sought.

FINDINGS AND DETERMINATION

20. For the reasons stated above this court makes the following findings and determinations;

i. The Petition is found to have merit and is hereby allowed;

ii. The subject herein FKK is hereby adjudged to be a person suffering from a mental disorder pursuant to Section 26 of the Mental Health Act;

iii. LWK and AKK the petitioners herein be and are hereby appointed as managers and legal guardians of the Subject FKK;

iv. The petitioners shall jointly act as managers and guardians in respect to the affairs and estate of the subject, which shall not include distribution of his estate and shall in particular do the following;

- a. Manage the subject's health care;
- b. Preserve the subject's estate including moveable property; receive monies and proceeds of his estate; execute and sign documents on behalf of the subject;
- c. Utilize these proceeds to cater for the subject's medical expenses and maintenance;
- d. Collect retirement benefits of the subject;
- e. To render to family members and other beneficiaries regular accounts on the status of the estate of the subject.

21. This being a family matter there shall be no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 5TH DAY OF NOVEMBER, 2021

HON. A. MSHILA

JUDGE