



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 52 OF 2020**

**IN THE MATTER OF SECTIONS 26, 27, 28(1) AND (2) OF**

**THE MENTAL HEALTH ACT, CAP 248 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SMG (A PERSON SUFFERING FROM DEMENTIA)**

**JGM.....1<sup>ST</sup> PETITIONER**

**LWG.....2<sup>ND</sup> PETITIONER**

**SNM.....3<sup>RD</sup> PETITIONER**

**RWG.....4<sup>TH</sup> PETITIONER**

**VERSUS**

**LJNG.....1<sup>ST</sup> RESPONDENT**

**CNGM.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. These proceedings were initiated under the provisions of the **Mental Health Act, CAP 248** and are in relation to the Subject SMG. On the one hand, the Petitioners seek to be appointed guardians and managers over the affairs of SMG while on the other hand, the Respondents seek to be appointed as such. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are the children of the Subject whereas the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners are the Subject’s biological sisters. The Respondents are also children of the Subject. The Petitioners and Respondents have jointly filed their respective Petitions in this respect. Whereas the matter is yet to be concluded as the hearing of the main suit is currently underway, this court has been invited to decide the issue of access of the Subject. This ruling is therefore solely in respect of access to the Subject SMG.

2. On 23<sup>rd</sup> June, 2021 Thande, J visited the Subject in his home in Karen. This was after the Subject was not produced before the court despite numerous court orders in this regard, and a system failure during an attempt to produce him virtually via video conferencing. The court observed that the Subject was quite alert, and despite being able to answer questions put to him, his attention span was short and he would go off on a completely unrelated topic. He was unable to recognize his daughter C and son JM who has to introduce themselves to him, and he seemed happy to see JM. The court formed the opinion that the Subject was suffering from dementia and was in need of a guardian of both his person and his estate. The court then directed that JM and the other children of the deceased and the Petitioners be permitted to visit the Subject, noting how happy he was to see JM.

3. JM, who is a son of the Subject has since testified in these proceedings, during which time he stated that he last saw the Subject at his mother’s funeral and it was only during the court visit conducted by Thande, J at the Subject’s Karen home, that he was able to see him again. That he has however been denied access to the Subject since then.

4. At the hearing, learned Counsel Mr. Kanjama, Advocate for the Petitioners made an oral application seeking that the Petitioners be granted access to the Subject. Counsel asserted that the Petitioners were apprehensive that unless the access orders are granted, the Subject could pass away without them having seen him. Therefore, that both the Petitioners and the Respondents should be involved in making decisions concerning the Subject including visitation and safeguarding his property.

5. The oral application was opposed by learned Counsel Mr. Karori, Advocate for the Respondents who stated that the orders sought by the Petitioners in their petition were specific and that none were of an interim nature. Counsel asserted that it was only the court that could determine whether or not the Subject has dementia and the extent of the dementia, if any, and who would be suitable to be appointed guardian over the Subject and his affairs. Counsel urged that this could however only be at the conclusion of the trial. He noted that the Petitioners had sought similar orders before Thande, J on 21<sup>st</sup> July, 2021, and before this court on 21<sup>st</sup> October, 2021 but that on both occasions, the application was turned down. That as such, it is *res judicata* and cannot be raised again.

6. On 11<sup>th</sup> November, 2021, this court granted orders directing that there be family discussions on how both sides can access and visit the Subject in the interim and help in managing his property noting that this would be therapeutic to the Subject. To this end, Counsels on both sides were directed to make reasonable arrangements to allow all of the Subject's children and siblings to visit him and seek professional medical advice in reaching a decision.

7. Later on 19<sup>th</sup> November, 2021 when the matter came up for mention for compliance Mr. Kanjama noted that the parties did not meet as had been directed and urged the court to come up with reasonable guidelines to guarantee access to the children and siblings of the Subject and further that the court grant orders for preservation of the estate. His sentiments were echoed by learned Counsel Mr. Gatheru who noted that the meeting did not take place but attributed this failure to the short period.

8. On his part, learned Counsel Mr. Nyaburi submitted on behalf of the Respondent that since the Subject has a number of medical conditions and is vulnerable to infections including Covid-19, their doctor had advised that the applicable protocols should be the Ministry of Health and World Health Organization (WHO) protocols, which they had indicated in their letter dated 16<sup>th</sup> November, 2021. He asserted that these protocols are intended to protect the Subject, noting that full vaccination and Covid-19 tests are vital, and would apply across the board to all family members. He noted that after visiting the Subject at his home, the court decided to maintain the status quo which should continue to be maintained. He however stated that the other matters raised in the Petition can only be determined once the whole petition has been heard.

9. Mr. Nyaburi noted that when the Respondents wrote to the Petitioners, the Petitioners responded stating that the protocols they had proposed were onerous, when the protocols were not of their own making but those that had been set out by the WHO. Further that a meeting date had been picked, but that the family had their mother's memorial on 16<sup>th</sup> November, 2021.

10. Learned Counsel Mr. Nyamodi associated himself with Mr. Nyaburi's submissions. He asserted that the suggestions in the letter dated 16<sup>th</sup> November, 2021 that the Petitioners object to are the well-known Covid-19 protocols and cannot be settled upon by Counsels or by way of submissions, since they had been put together by people who understand Covid-19. He faulted the Petitioners for citing the protocols as onerous without making alternative suggestions. He however contended that Counsels ought not to play a role in the management and well-being of the Subject and that it should be a matter strictly for the Subject's family.

11. On management of the Subject's property, Mr. Nyamodi asserted that there was no material before the court to allow it to deal with the matter in the summary manner suggested. He urged that there was no justification for the grant of the orders of preservation sought since there was on record an affidavit stating that the expectations of all of the Subject's children had continued to be met during the Subject's illness, an averment he says is uncontroverted. Counsel further noted that financial decisions in respect of the Subject's properties had been made within the context of limited liability companies whose affairs are regulated by the Companies Act. He urged that since the proceedings herein are under the Mental Health Act and the Subject is alive, the court ought to hear the Petition expeditiously and determine the substance thereof.

12. In his rejoinder, Mr. Kanjama conceded that these proceedings are urgent having been brought under the provisions of the Mental Health Act. He however noted that it had become evident that the matter would take longer to conclude in view of the number of witnesses.

13. According to Mr. Kanjama, there are grave issues to be determined by the court regarding the substantial management and waste of the Subject's estate. He pondered on a situation where after months of conducting hearings the court gives orders which are incapable of execution because the estate has been wasted. He contended that the **Mental Health Act** does provide for summary determination and prayed for interim orders stating that this would avoid violation of the law, noting that the Respondents were currently in control of the Subject's affairs without legal authority.

14. In respect of the protocols to be observed in order to access the Subject, Mr. Kanjama stated that what the Respondents had proposed were guidelines used for isolation and confinement of Covid-19 patients, when the Subject herein is not a Covid-19 patient. That the Respondents had further supplemented the Ministry Covid-19 protocols with guidelines of their own which, in his view, are incapable of being observed and would only cause harm to the Subject.

15. Mr. Kanjama urged that all the Petitioners were seeking was for the court to grant reasonable and fair directions taking note of the status of these proceedings. That if the court fails to give directions, it would be interpreted that the court is comfortable with the Respondents continuing to run the affairs as they have done to the exclusion of the Petitioners.

16. I wish to observe that while this ruling is in respect of orders of access, in their oral submissions before the court, the Counsels on record submitted on issues which are the subject of the main suit. I will nonetheless restrict myself to only those submissions which touch on the aspect of access to the Subject.

17. There is on record correspondences between the parties through their Advocates on record in respect of access to the Subject. From the correspondences, it appears that Respondents are now ready to grant the Subject's other children and siblings access to him but subject to Covid-19 protocols. They proposed that the Subject's children and grandchildren visit him at his Karen home but that his siblings visit him at his home in Limuru Gardens. The Petitioners however opposed the conditions set by the Respondents citing them as farfetched and onerous.

18. To my mind, by dint of his age and the pre-existing health conditions alluded to, it is imperative that the Subject has access to his family,

especially his siblings and children and spend time with them as this would be great for his overall health and memory. Since it has been stated that the Subject has preexisting health conditions which would make him susceptible to a Covid-19 infection, it is imperative that the parties comply with the Covid-19 protocols in respect of gatherings and meetings. This would ensure that the overall health and safety of the Subject is prioritized.

19. Since the parties made reference to the Covid-19 protocols issued by both the WHO and MOH, I saw it fit to examine the guidelines to discern which ones would best serve the present circumstances. The WHO states that when meeting or in gatherings, people should avoid the 3Cs: spaces that are closed, crowded or involve close contact. Outdoor gatherings are indicated as preferable since they are safer than indoor ones especially if indoor spaces are small and poorly ventilated. If the gathering is indoors, then windows should be open and all parties wear a mask. I believe that an outdoor gathering where parties are properly masked will ensure that the Subject is able to interact with his children and grandchildren safely. To my mind, the proposal in respect of PPEs and being fully vaccinated is extreme. A negative Covid-19 test should suffice in these circumstances. In the event that any of the parties has tested positive for Covid-19, it would be best that they are precluded from interacting with the Subject and instead isolate as indicated in the Covid-19 guidelines.

20. It is imperative to reiterate that this ruling is only in respect of access to the Subject. With the respect to the other orders sought, I am of the considered view that those orders can only be granted once the court holds a proper inquiry through the hearing of the main suit to determine whether the Subject can be adjudged as suffering from a mental disorder under the **Mental Health Act**, from what date he was declared mentally infirm and who should be appointed guardian over the Subject and his affairs. The interest of justice can only be met if these issues are determined after a full and proper inquiry which would be accomplished once the hearing of the main suit is concluded. The orders in respect of management of the Subject's affairs cannot therefore issue at this time.

21. Since none of the parties have been granted custody or orders of guardianship over the Subject and his affairs, by continually denying the other parties access to the Subject, the Respondents are therefore disregarding the Subject's right to human dignity.

22. In the end, I direct that all of the Subject's children, grandchildren and siblings shall be allowed access to him at his Karen home, where he is stated to reside. The parties shall come up with a duty roster to ensure order in visiting the Subject and to avert situations where his immediate or extending family would visit him at the same time. I further direct that the parties shall observe the laid down Covid-19 protocols save to state that wearing of PPEs and being fully vaccinated shall not be mandatory, and that a negative Covid-19 test shall suffice. It is so ordered.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of..... Advocate for the Petitioners.**

**In the presence of..... Advocate for the Respondents/Petitioners in E119/2021.**