



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**MISCELLANEOUS CIVIL CASE NO. 157 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR CUSTODY, MANAGEMENT AND APPOINTMENT OF A GUARDIAN**

**AND**

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

**AND**

**IN THE MATTER OF RWK**

**MNN..... APPLICANT**

**VERSUS**

**MK.....RESPONDENT**

**RULING**

1. The subject of the application filed on 25<sup>th</sup> March 2019 is **RWK**, a female diagnosed with dementia. She is 73 years old and has no children or spouse but she owns a property known as **RUIRU EAST/JUJA EAST/BLOCK [...]** acquired earlier in her active and healthy life. The Applicant herein is the subject’s sister. Her name is **MNN** and she too is advanced in years but on material available, she has a family including **PKN**.
2. The Respondent **MK** is a brother to subject and the Applicant. Although the application properly invokes the provisions of the Mental Health Act, the cause was filed as a Miscellaneous Civil Suit rather than a petition as prescribed under the Act. The court, alive to the injunction in Art 159 (2) d) to administer justice without undue regard to technicalities nevertheless proceeded to hear the application, effectively deeming it a matter or application brought under the mental Health Act. That said, the prayers in the application are interim orders, pending determination of a non-existent suit, there being no other pleading filed beyond the application.
3. Having considered the various medical reports on record and in particular, the report dated 9<sup>th</sup> December 2019 prepared pursuant to an examination ordered by this court, and having interviewed the subject, the court has no doubt that the subject falls under the definition of persons suffering from mental disorder as found in Section 2 of the Mental Health Act.
4. In light of the orders I propose to make in this matter, I do not intend to make any final determinations on the vexed question of the appointment of a guardian over the subject, save to observe the following. Three siblings of the subject, including the Applicant, **FMK** and **JGK** by their respective affidavits herein agree that their brother the Respondent is not capable of caring for the subject. They cite as evidence the fact that he is single and had allegedly so neglected the subject that they were forced in February 2019 to take away the subject from her home, where the Respondent apparently was living with her, to the Applicant’s home. It would appear that the Respondent reported the incident to police who intervened and forcefully took away the subject from the Applicant’s home before she could receive full treatment.
5. For his part, the Respondent maintains that he is well and capable of caring for the subject as he has previously done and that his older siblings are themselves being cared for by their children and are therefore unable to give adequate care to the subject. He asserts that his siblings are eyeing the landed property of the subject and have no interest in her welfare. He has attached records showing various treatments received by the subject whilst under his care.
6. Clearly, there is content between the Respondent on one hand, and other siblings on the other, as to who should have custody of the subject and it is unfortunate that none of the siblings moved the court earlier in this regard.
7. According to the medical report by the Medical Superintendent Kiambu County Referral Hospital dated 9<sup>th</sup> December 2019, the subject, despite having been previously treated at the facility for Alzheimer’s disease (dementia) had gone off treatment due to “financial constraints”

for a while now. The report documents the subject's appearance and state as "**unkempt, poor personal hygiene (foul smelling), ... Talking a lot, flight of ideas. Has visual hallucinations ... poor memory; remote and recent. Poor concentration, poor abstraction thinking. Poor judgment**" and without insight. It is recommended that she continues psychiatry follow up, medication and "assisted personal hygiene" These findings are consistent with the subject's presentation before this court on 28<sup>th</sup> November 2019 when the court interviewed her.

8. The subject is undoubtedly in need of treatment and proper care as she cannot care for herself. The Respondent in my view, being a man, and a younger brother to the subject cannot take care of the personal needs including bathing or feeding of the subject. Especially because he is admittedly unmarried and apparently without the capacity to employ an appropriate caregiver. On the other hand, the other siblings have families, so that even if they are old, they apparently have adequate support to help them care for the subject.

9. The three siblings, namely, **FMK, JGK** and the Applicant all appear willing to assist the subject although they appear intimidated by events orchestrated by the Respondent after the subject was taken into the care of the Applicant. Thus, upon a consideration of all the matters above, it is clear that the subject is in need of urgent medical and other care which at this moment, the Respondent is clearly non-suited to provide. In the circumstances, it is inimical to the subject's health for the subject to remain in the care of the Respondent as she has been, or to allow his involvement in her care, in view of his strained relationship with his siblings.

10. The court therefore makes the following orders:

a) That pending the filing and determination of a proper petition by the Applicant herein under the Mental Health Act, the subject be placed in the legal custody and guardianship of the Applicant herein, who, in consultation with the other siblings except for the Respondent herein, namely **JGK** and **FMK** will determine the best living arrangements, including accommodation of and caregivers to the subject.

b) The Applicant, will ensure that the subject receives prompt medical and other care and provides for her personal needs.

c) If no Petition as envisaged in (a) above is filed by the Applicant upon the lapsing of 6 (six) months from the date of this ruling, any appropriate person, including other siblings to the subject or other near relative may petition to the court under the Mental Health Act.

d) For the avoidance of doubt, none of the orders herein are to be construed as giving any power of appointment to any party over the subject's property.

e) In order to safeguard the subject's interest in her land parcel **No. Ruiru East/Juja East Block [...]** the court directs the Land Registrar Kiambu to place a restriction/caveat on any dealings by any person thereon, pending further orders of this court.

f) The Applicant is to extract and serve the order (e) above upon the Land Registrar Kiambu.

Parties will bear own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2020**

**C. MEOLI**

**JUDGE**

**In the presence of:**

Mr. Njehu for the Applicant

Mr. Nyakeriga for the Respondent

Court Assistant- Ndege/Nancy