



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CIVIL APPLICATION NO.108 OF 2019

IN THE MATTER OF KK

AND

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

IN THE MATTER OF THE RIGHTS OF OLDER MEMBERS OF SOCIETY UNDER ARTICLE 57 OF THE CONSTITUTION

JAWK & PWV.....APPLICANTS

**RULING**

**INTRODUCTION**

1. The Notice of Motion was brought by way of Certificate of Urgency under the provisions of Section 3A of the Civil Procedure Act, Articles 57 and 159(2)(b) and (d) of the Constitution 2010 and Order 51 Rule 1 -3 of the Civil Procedure Rules; and the orders sought by the applicants are as follows;

(i) Spent

(ii) That this Honourable Court may be pleased to declare Mr.KK (**'subject'**) as a person suffering from mental disorder as defined in the Mental Health Act Cap 248 of the Laws of Kenya;

(iii) This court be pleased to appoint the petitioners herein as the guardians of the subject, Mr. KK;

(iv) This Court be pleased to appoint the petitioners herein to be the managers of the estate of the subject, Mr. KK;

(v) The costs of the application be borne by the estate of the subject.

2. Directions were given that all the children of the subject from his two wives be served with the application; and the subject and his doctor be in attendance at the hearing of the application; at the hearing hereof the petitioners were represented by learned counsel MsNdutaKamauwho relied on the Supporting Affidavit made on the 11<sup>th</sup> October, 2019 by both applicants JWK and PW and on the medical evidence adduced by Dr. Anduru;hereunder is a summary of applicants' case;

**APPLICANTs CASE**

3. The applicants relied on the grounds on the face of the application and the Supporting Affidavit made by both applicants, who are the wife and the daughter of the subject; they have also annexed the consents of the children of the subject authorizing them to look after the subject and manage his affairs

4. The applicants have actual and physical custody of the subject and take care of him;that the subject is also not able to look after himself and has a tendency of wandering and getting lost; further he has no capacity to manage his property nor manage his financial affairs, comprehend transactions, or protect his interests nor does he have the free will to deal with his property;

5. Dr.Andurua consultant psychiatrist had examined the subject on three previous occasions; his evidence which is supported bya medico-legal report dated 26/09/2019 is on the treatment of the subject which report was prepared and produced into court by the said doctor and is marked as "**JWPW-I**";

6. The subject is aged almost ninety-three (93) years and is suffering from a mental impairment/disability; that he was diagnosed with senile

dementia of Alzheimer's type which is characterized by memory loss, excessive forgetfulness tendency to wandering and getting lost;

7. The witness formed an opinion that the subject suffers from Dementia of the Alzhiemers type that has caused him progressive memory loss, impaired thinking, disorientation and changes in personality and mood; the condition is likely to worsen over time with little chance of recovery and declared him to be suffering from a mental disorder;

8. The applicants are apprehensive that given the subject's current mental status the estate may be wasted and stands to suffer irreparable loss; their prayer is that the orders sought be granted; that they both be appointed as his legal guardians and also be appointed to manage his estate so as to protect his proprietary interests from alienation.

### **ISSUES FOR DETERMINATION**

9. After reading the applicants averments and hearing the doctors evidence this court has framed only one issue for determination;

(i) Whether the subject has a mental disorder requiring the appointment of a guardian and a manager of his estate;

### **ANALYSIS**

10. The application is premised under the provisions of the Mental Health Act which governs the handling of persons suffering from mental disabilities;

11. The applicants deposed that the subject was suffering from mental impairment and was not capable of taking charge of his affairs;

12. There is a presumption of law that all persons are sane until proved otherwise; the burden of proof to controvert this presumption was upon the applicants to demonstrate that the subject was mentally challenged; the applicants relied wholly on the evidence of Dr.Anduru and on the annexure dated 26/09/2019 and marked as "JWPW-1";

13. At the hearing hereof the doctor was in attendance and gave evidence on the treatment of the subject; he prepared a report and produced the annexure which is a Medical Report;

14. The applicable law is found at Section 26 (1) of the Mental Health Act which empowers this court to make orders for the management of a person suffering from a mental disorder; and for a guardian of the subject who can either be a close relative or a person the court determines to be suitable;

15. Upon perusal of the annexure prepared by the said Dr. Anduru this court is satisfied with this doctor's area of specialty and expertise as a psychiatrist; and from his evidence it is apparent that this said doctor was the one treating the subject for his condition; the court notes that the application is uncontested and is satisfied that it is supported by satisfactory medical evidence on the subject's mental health;

16. From the material placed before it, this court is satisfied that the subject has a mental disorder and is not capable of managing his own affairs; this court is also satisfied that he requires a guardian and a manager to manage his estate;

### **FINDINGS AND DETERMINATION**

17. For the foregoing reasons this court makes the following findings and determinations;

(i) The subject is found to be a person who requires to be managed as he has a mental disorder; this court finds that this is a suitable case for the issuance of the orders sought;

(ii) The Applicants are hereby granted custody and guardianship of the subject herein; and are also appointed the managers of his estate for a period of one (1) year from the date hereof;

(iii) There shall be no order as to costs.

It is so ordered.

**Dated, Signed and Delivered at Nyeri this 21<sup>st</sup> May, 2020.**

**HON. A. MSHILA**

**JUDGE**