



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. E035 OF 2020**

**IN THE MATTER OF A PERSON WITH A DISABILITY**

**AND**

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

**AND**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF GUARDIANSHIP OF AMM**

MGM.....PETITIONER/APPLICANT

**JUDGMENT**

1. By an application brought by way of a Petition dated 28<sup>th</sup> August, 2020 brought under **Articles 22, 28** and **43** of the **Constitution** and **sections 2** and **20** of the **Persons with Disabilities Act No. 14 of 2003** the Petitioner/Applicant seeks for orders that:

- a) AMM be declared a person with disability as defined under the Persons with Disability Act.
- b) The Petitioner be appointed as the legal guardian of the said AMM.
- c) The income and money of the said AMM specifically pension sum of Kshs, 2,317,917.00/= be paid to the Petitioner with powers to receive all and apply the same to the maintenance and medication of the said AMM.
- d) The costs of this Petition be borne by the estate of the said AMM.
- e) Such other orders as may be necessary to preserve the interest and welfare of the said AMM.

2. The application is premised on grounds that AMM (hereinafter referred to as the Subject) who is aged sixty three (63) is currently bedridden and cannot speak, communicate or take care of herself in any way.

3. On 7<sup>th</sup> March, 2019 the Subject was admitted to Intensive Care Unit at Nairobi Hospital having suffered a major stroke. She was thereafter diagnosed with loss of memory and recognition, and loss of movement and speech and is therefore unable to write or communicate. The subject has since been discharged and continues to recuperate at home. As a result of the medical condition, the Subject is bedridden and is continuously under medication. The prognosis is that the Subject will not recover sufficiently or undertake any of her previous responsibilities with any ability or competence.

4. The Petitioner/Applicant swore an affidavit on 28<sup>th</sup> August, 2020 in support of the Petition. In it, he deposes that he is the son to AMM, the Subject who is currently ailing and bedridden following a stroke. He stated that the Subject exhibits an intellectual decline, severe physical deterioration and is totally dependent on family members for self-care, medical care and maintenance.

5. Before her ailment and diagnosis, the Subject worked with [Particulars Withheld] Company and was contributing to the Staff Pension Scheme which was administered by Madison Life Assurance Kenya Limited. The Subject retired on 15<sup>th</sup> November, 2017 but her pension was not released until 22<sup>nd</sup> July, 2020 when Madison Life Assurance Kenya Limited informed her through her bank, Family Bank Limited, that they had paid out her pension in the sum of Kshs. 2,371,917.00/=. However, due to the Subject's medical condition, she has not been able to access the funds.

6. The Petitioner/Applicant states that the retirement pension benefit will go a long way in catering for the Subject's medical and other basic needs. That it is therefore in the Subject's best interest that the Petitioner/Applicant is appointed a guardian over the Subject's affairs.

He urged that if appointed, he would faithfully administer the affairs of the Subject according to the law in addition to rendering annual reports of the true accounts of the Subject's estate.

7. The application was filed under Certificate of Urgency. On 24<sup>th</sup> September, 2020 Aroni, J certified the application urgent and directed that the matter be listed for hearing 15<sup>th</sup> October, 2020. Further that the medical reports be availed, the Subject be produced in court at the hearing, the Area Chief of where the Subject resides issue a letter confirming the marital status of the subject and details of the husband if any and that the application be served upon LWM and AMM.

8. Consequently, this matter was cause listed for hearing before Aroni, J today 15<sup>th</sup> October, 2020. The Honourable Judge is however on transfer and was therefore unable to proceed with the hearing of the matter. Due to the urgency in the matter, it was placed before this court.

9. A letter from the Office of the Senior Chief, Nairobi West location, dated 14<sup>th</sup> October, 2020 produced in court indicates that the Subject is unmarried and that she had two adult children, GMM, the Petitioner/Applicant herein, and LWM.

10. The Petitioner/Applicant has attached a letter authored by Dr. Cheruiyot of Jon-Lee International Hospital, Nairobi which states that the Subject presented with high blood pressure and a CT SCAN HEAD was done on 31<sup>st</sup> August, 2011 with conclusions of cerebral atrophy with empty sella. That on 6<sup>th</sup> March, 2014 she developed right oculomotor nerve palsy with drowsiness and an MRI Brain Scan revealed that there was gross cerebral shrinkage with ex vacuo ventriculomegaly.

11. Later on 6<sup>th</sup> November, 2016 the Subject developed left iliac fossa mass and a CT SCAN of the abdomen was done with findings of subcutaneous abscess/cholelithiasis/with renal agenesis and the Subject put on medication. She is currently bedridden with catheter insitu ASA/AMLOZAA and is undergoing physiotherapy. She cannot therefore attend court proceedings.

12. They have also attached a letter from the Family Bank and Madison Life Assurance Kenya Limited, both of which confirm that the Subject's pension benefits of the sum of Kshs. 2,371,917.00/= had been released and paid into the Subject's bank account held at Family Bank.

13. Both of the Subject's children, the Petitioner/Applicant and LW were present at the hearing. LWM, the Subject's daughter, stated that she was in support of the Petition and asked that she and the Applicant be appointed as joint guardians over the affairs of the Subject. There is on record a consent dated 28<sup>th</sup> August, 2020 signed by LWM in this respect.

14. I have perused the pleadings filed in this matter, and in view of the expert opinion of Dr. Cheruiyot, I am persuaded that AMM, the Subject herein, is a person who is incapacitated both mentally and physically. The mental capacity is envisaged under the provisions of the **Mental Health Act**. She is therefore incapable of taking care of herself and conducting her own affairs. Although the application was brought by MGM, both he and his sister were present in the virtual proceedings and intimated to the court that they were in agreement that both should be appointed as legal guardians over the Subject's affairs.

There being merit in the Petition dated 28<sup>th</sup> August, 2020, I hereby allow it in the following terms:

a) AMM be and is hereby adjudged to be a person suffering from a mental disorder under **section 26** of the **Mental Health Act**, Cap 248 of the Laws of Kenya.

b) MGM and LWM are hereby appointed as legal guardians in respect of the affairs of AMM.

c) MGM and LWM as such guardians be allowed to access the income and money of the said AMM specifically the pension sum of Kshs, 2,317,917.00/= and apply the same towards the maintenance and medication of the said AMM.

d) The costs of this Petition be borne by the estate of the said AMM.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 15<sup>TH</sup> DAY OF OCTOBER, 2020.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**