



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISC CIVIL APPLICATION NO. 46 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR APPOINTMENT AS NEXT FRIEND, GUARDIAN**

**& MANAGER OF THE AFFAIRS OF THE ESTATE OF CMW (A PERSON OF UNSOUND MIND)**

**AND**

**IN THE MATTER OF SECTION 26 (1) OF THE MENTAL HEALTH ACT CAP. 248 LAWS**

**OF KENYA AND ORDER 32 RULES 1 TO 15 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF**

**MOSES GATHUA MWANIKI.....APPLICANT**

**JUDGMENT**

By a motion dated 5 June 2018 and filed in court on 6 June 2018, the applicant invoked **sections 26 (1) of the Mental Health Act, cap. 248**, Laws of Kenya and Order 32, Rule 1 to 15 of the Civil Procedure Rules, 2010 and sought for prayers that he be appointed as next friend and guardian of CMW (a person of unsound mind) (hereinafter “the subject”) and; that he be appointed as the manager of the affairs of the subject.

The application is supported by the applicant’s own affidavit sworn on the even date and in which he has deposed, inter alia, that he is an adult of sound mind who resides in Kenya and he is the son of the subject.

At the heart of the applicant’s motion is the contention that the subject is a person of unsound mind and being of that disposition, all he does is to roam the streets of Nyeri town; thus, he has become incapable of handling his own affairs.

Meanwhile, the subject, has a claim against the Teachers Service Commission (TSC), his previous employer and also against one Daniel Gatuguta King’ori relating to landed property known as L.R. No. Nyandarua/Oljoro Orok Salient/11145. The applicant seeks to be appointed as next friend, guardian and manager of the affairs of the subject so that, among other things, he may prosecute these claims on his behalf.

At the hearing of the motion, the applicant adopted the depositions in his affidavit and added that at the moment the subject lives in Nyeri with his nephew, while he himself lives in Kiambu with his mother and sister. Hellen Wangui Karimi a programme coordinator in the mental health department of the Catholic Archdiocese of Nyeri also testified in support of the application. Her evidence was that she had known the subject since July 2015 when she found him at the gate of Caritas, a catholic organisation, in Nyeri. Their investigations on the social background of the subject revealed that the subject had separated from his wife and that he lived in Tetu with a nephew. This organisation resolved that owing to the subject’s mental status, it was prudent that a guardian or manager to manage the affairs of the subject be appointed, and in this regard the best placed person to undertake that role would be the applicant.

Dr. Moses Richu Mwenda, a psychiatrist testified that he had attended the subject from time to time; according to him, the subject was diagnosed of chronic schizophrenia. With this condition, the subject has no calmness of the mind; he certified him to be mentally handicapped. In its pertinent part, the psychiatrist’s report dated 24 July 2018 stated:

***The above named has been brought to Nyeri County Referral Hospital for mental state assessment. He has been followed up at Nyeri for chronic schizophrenic. He still suffers from relapses last week he disappeared from home and complains of seeing visions and hearing voices.***

## **CURRENT MENTAL STATE**

- *He is restless but oriented in time space and person*
- *Mood/Affect is labile*
- *Concentration and memory – partially affected*
- *Judgment- partially preserved*
- *Perception – experiencing visual and auditory hallucinations*
- *Insight – partial*

## **Diagnosis**

- *Chronic schizophrenia with residual symptoms*

## **Conclusion**

- *Abnormal mental status*
- *Fit for registration as a person living with a disability*
- *Not fit (sic) to representing himself in court proceedings*
- *Fit for retirement on medical grounds*
- *He is not in position to manage his property prudently*

The logical conclusion that one can draw from this report is that the subject is suffering from a mental disorder from which he is unlikely to recover.

The law governing the custody and guardianship of patients such as the subject and the management of their affairs is the **Mental Health Act, Cap 248. Section 26** of that Act provides: -

### **26. Order for custody, management and guardianship**

#### **(1) The court may make orders—**

*(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) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate and guardian of any such person.*

*(3) Where upon 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 mental disorder.*

Looking at the available evidence from this legal perspective I am satisfied that a case has been made out for his appointment as the guardian of CMW and the manager of his affairs.

I am minded that though this honourable court was moved by way of a motion, section 28(1) of the Mental Health Act prescribes a petition as the means through which such a matter should be lodged in court; that section states:

*The court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or with his estate, make such order, subject to this Part, regarding such application as, in the circumstances of the case, the court may think fit.*

Want of form, however, shouldn't be a hindrance to an application that is otherwise merited in every other respect. Such defects of form can be disregarded in the spirit of Article 159 of the Constitution which enjoin the courts to administer justice without undue regard to technicalities of procedure.

A manager appointed under the Act is deemed to be a trustee of the subject; this is so provided by **subsection (4) of section 27** of the Mental Health Act which states: -

*(4) For the purposes of this Act and the Penal Code (Cap. 63), a manager shall be deemed to be a trustee under any other law for*

*the time being in force.*

No doubt, once the order for appointment is granted, a trust relationship is created between the applicant and the subject and thus the patient's estate that may be vested in him will only be held on behalf of and for the benefit of the subject.

In the ultimate, the applicant's motion dated 5 June, 2018 is allowed in the following terms:

1. The applicant is hereby appointed the guardian and next friend of CMW and the manager of the affairs of his estate.
2. The subject's estate including any proceeds accruing to the estate from any source or claim shall be held in trust and for the benefit of the subject.
3. There shall be no order as to costs.

**Dated, signed and delivered in open court this 13<sup>th</sup> day of June, 2019**

Ngaah Jairus

**JUDGE**