



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS PETITION NO. 31 OF 2015

IN THE MATTER OF SECTION 26 & 28 OF THE MENTAL HEALTH ACT CAP 248 LAWS OF KENYA

AND

IN THE MATTER OF JBK

BETWEEN

VNK

EMK

RGK.....PETITIONERS/RESPONDENTS

~VERSUS

HWM (Suing as

Next friend of AC & AJM (Minors).....APPLICANT

LMK

YNK

AWK.....PROPOSED INTERESTED PARTIES

RULING

1. The genesis of this case is a Petition by the three petitioners herein dated 3.3.2015 which was seeking the following orders;

(i) THAT the Petitioners being VNK, EMK and RGK be appointed as managers and guardians jointly in respect of JBB (hereafter referred to as the W)

(ii) THAT the Petitioners shall jointly act as managers ad guardians in accordance with the directions and orders of the Court and in particular to jointly have access and operate the Ward’s bank accounts.

(iii) THAT the Costs and legal fees of the Petition be provided from the Ward’s estate.

2. The Application was allowed on 5.3.2015 and the Petitioners were directed to discharge their mandate in accordance with section 26 of the Mental Health Act.

3. The Applicant herein, HWM (Suing as next friend of AC and AJM (Minors) filed a Notice of Motion on 18.11.2016 seeking review of the orders issued on 5.3.2015 on the grounds that the Petitioners had allegedly committed fraud in the management of the Ward’s Estate.

4. The said application has not been heard and determined as there were other intervening factors including an application dated 15.5.2017 seeking to have the ward declared fit to manage his estate and for the discharge the orders granted on 5.3.2015.

5. The said Application dated 5.5.2017 was withdrawn on 29.11.2018 leaving two Applications pending determination dated 18.11.2016 and 22.11.2016.

6. The Application dated 22.11.2016 was filed by the Interested Parties LMK, YNK and AWK.

7. The Application dated 22.11.2016 by the Interested Parties is seeking among other orders to vary the orders made on 5.3.2015 to include LMK as an administrator of the Estate of the W in her own capacity and on behalf of AWK and YNK.

8. The Interested parties are also seeking for orders that the current managers and guardians of the ward furnish the Court with an inventory of the Property of the Ward, Statements of all debts owed by or due to the Ward and annual accounts of the property in their Charge Showing sums received and disbursed on account of the estate since their appointment.

9. The Application coming for consideration in this ruling is the one dated 22.5.2019 which was triggered by an oral Application by the Applicant in the Application dated 18.11.2016 seeking to cross examine the Petitioners in the Applicant's Application dated 18.11.2016 which was coming for hearing.

10. The Application dated 22.5.2019 is seeking the following orders:

(i) THAT this Court be pleased to issue directions that the hearing of this Petition do proceed by way of viva voce evidence.

(ii) THAT the Costs be provided for.

11. THAT the parties were directed to file written submissions in the Application dated 22.5.2019 which I have duly considered.

12. The Applicants are seeking to cross examine the Petitioners on the grounds that they have raised allegations of fraud against the petitioners in the Application dated 18.11.2016 which is coming for hearing.

13. The Petitioners filed a Preliminary Objection dated 30.5.2019 together with grounds of opposition to the Application dated 22.5.2019. They also filed a Replying Affidavit sworn by the 1st Petitioner VICTORIA KARUGU dated 31.5.2019.

14. The Petitioners submitted that the Petition has already been determined and that the Applications which are pending are seeking to set aside and or vary orders issued on 5.3.2015.

15. The Petitioners also submitted that the Applicant has not produced any evidence to substantiate the allegations of fraud and cannot seek to remedy her failure by the Application dated 22.5.2019.

16. My findings are as follows:

(i) I find that the Petitioners were appointed Guardians of the Ward and managers of his estate by order issued on 5.3.2015 under Section 26 of the Mental Health Act.

(ii) The Petitioners were required to comply with Section 26 of the Mental Act which provides as follows

“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 relative or any other suitable person”.

17. In the case of In Re R N C [2016] eKLR, Justice Musyoka stated that;

“The law which governs the handling of persons suffering mental illness is the Mental Health Act. It provides, among other things, for custody of such persons and the management of their estates. Part XII of the Act deals with the judicial power over persons and estates of persons suffering from mental disorder. Section 26 of the Act specifically provides for orders for custody, management and guardianship of such persons and their estates. A petition and or application for appointment of a guardian under the Mental Health Act Cap 248 is clearly spelt out in Sections 26.

18. The issues for determination in the Application dated 22.5.2019 are as follows:

(i) Whether the Petition has already been determined.

(ii) Whether the Petitioners should give viva voce evidence.

(iii) Whether the Petitioners should be cross-examined on their Replying Affidavits.

19. On the issue as to whether the Petition has already been determined, I find that the answer is in the affirmative.
20. However, the Applicant is seeking to vary the orders granted in the Petition and also wishes to have the Petitioners give an account of their management of the Estate of the ward.
21. I find that the two Applications dated 18.11.2016 and 22.11. 2017 respectively which are pending are seeking review of orders granted on 5.3.2015 and at this moment in time the court cannot take viva voce evidence.
22. I find that the Petitioners were required to comply with the Mental Health Act in the discharge of their mandate including delivering accounts to the Public Trustee and to the Court under part xii of the Mental Health Act.
23. The Court may summon the managers where a person impugns the accuracy of the said accounts and I therefore find that the Application to cross examine the petitioners or to require viva voce evidence at this stage is premature.
24. Section 33 of the Mental Health Act states as follows;

Manager to furnish inventory and annual accounts

(1) Every person appointed by the court to be manager of the estate of a person under this Part shall, within six months of the date of his appointment, deliver to the court and to the Public Trustee (to whom he shall pay such fee as may be prescribed) an inventory of the property belonging to the person of whose estate he has been appointed manager and all such sums of money, goods and effects as he receives on account of the estate, together with a statement of all debts owed by or due to such person, and every such manager shall furnish to the court and to the Public Trustee (to whom he shall pay such fee as may be prescribed) annually, within three months of the 31st December, an account of the property in his charge showing the sums received and disbursed on account of the estate during the year and the balance; such inventory, statement and account shall be in the prescribed form.

(2) Any person may, on payment of such fee as may be prescribed, inspect and obtain a copy of any inventory, statement or account delivered to the court and to the public Trustee under subsection (1).

(3) The Public Trustee shall report to the Minister annually on all accounts delivered to him under subsection (2).

(4) Where any person, by petition to the court, impugns the accuracy of any inventory or statement or of any annual account made under this section, the court may summon the manager and inquire summarily into the matter, and make such order as it thinks proper or the court may refer the petition to a magistrate having jurisdiction in the place where the property belonging to the estate concerned is situated, for inquiry and report, and upon receipt of the magistrate's report the court may make such order as it thinks fit.

25. The Application dated 22.5.2019 is accordingly dismissed with no orders as to costs and the parties are directed to file submissions as directed earlier.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 5TH DAY OF JULY, 2019.

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.