



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISC. APP. NO.88 OF 2019

IN THE MATTER OF SECTIONS 26,27,28 AND 29 OF THE MENTAL HEALTH ACT CAP 248 LAWS OF KENYA

AND

**IN THE MATTER OF A PETITION FOR ORDERS OF CUSTODY, MANAGEMENT AND GUARDIANSHIP
RELATING TO LWN1 (PATIENT)**

PNN.....PETITIONER

(Suing for the benefit of LWN1)

VERSUS

PN.....1ST RESPONDENT

EN.....2ND RESPONDENT

RULING

1. The Petitioner PNN filed this Petition dated 27.5.2019 against the two Respondents seeking the following orders:

(i) THAT he be appointed guardian of the said LWN1 “patient” with powers to manage her affairs

(ii) The Petitioner to place before the Honourable Court at expiry of every 3 months from date of Judgment hereof a full and accurate account of handling of the patient’s affairs.

(iii) A permanent injunction do issue restraining the Respondents/their agents/servants and others from ever interfering with LWN1 “patient”.

(iv) Costs of this suit.

2. The Petition is supported by the Affidavit of the Petitioner dated 27.5.2019 in which he has deposed as follows:

(i) THAT he is the biological father to one LWN1 “Patient” (annexed herewith and marked “PNN2” is a copy of the Patient’s birth Certificate).

(ii) THAT he has since divorced from the biological mother of the patient and subsequently celebrated another marriage and he is residing in the Republic of Canada where he is a certified citizen.

(iii) THAT the Patient herein is aged 31 years and suffers from Cerebral Palsy that has rendered her mentally dysfunctional in all means and she is not in charge of herself in all ways imaginable.

(iv) THAT as a result of the patient’s aforesaid mental illness, and through the advice of qualified doctors, he committed her to a mental facility known as TOTAL REHAB CENTRE hereinafter referred to as “REHAB” that specializes inter-alia in rehabilitation for disabled children.

(v) THAT the said REHAB further offers occupational therapy, proper medication, care, love and protection for such patients with special needs.

(vi) THAT on 26th April 2019, the REHAB through one TERESIA W. NJERU informed him which information he verily believe that the patient had been taken away by the 2nd Respondent for Easter holidays and was to be brought back after one week.

(vii) THAT after the expiry of the said one week, the REHAB informed him which information he verily believe that the patient had not been brought back as promised by the 2nd Respondent and the patient is at large at the date of this petition. (Annexed herewith and marked "PNN3" is a copy of the letter from the REHAB.

3. The Petitioner who believes Respondents are incapable of handling LWN1 now wants her to be returned to the REHAB, which will cater for her needs since there is imminent risk of a critical deterioration of health of LWN1.

4. The 1st Respondent filed a Replying Affidavit dated 7.6.2019 in which she has deposed as follows:

(i) THAT the Subject herein, LWN1, is their niece by virtue of being a daughter to their late biological sister, LWN2 hereinafter referred to as "the deceased parent" who died on 11th March 2015.

(ii) THAT the Subject suffers from Cerebral Palsy and we have registered her with the National Council for Persons with Disabilities under registration number NCPWD/P/[XXXX]. Annexed herewith and marked "PNN1" is a copy of her identity Card issued on 5th February 2014.

(iii) THAT the Subject herein is and has always been multiply handicapped to date and is totally dependent on others for activities of Daily Living like feeding, toileting and body grooming. Annexed herein and marked "PNN2" is an assessment report dated 14th November, 2010 done by the Kenya Institute of Special Education.

(iv) THAT the Petitioner herein is the biological father to the Subject LWN1 and was married to LWN2 the deceased parent, but they divorced on 14th February, 2011. Annexed herein and marked "PNN3" is a copy of the Divorce dated 14th February, 2014.

(v) THAT the Petitioner and the Deceased parent were blessed with three children namely LWN1 the Subject herein, RNN and MKN who are all adults.

5. The 1st Respondent also stated in her affidavit that when Petitioner and the deceased parent of LWN1 divorced, the Petitioner refused to take care of LWN1 and further, that the REHAB does not take good care of the subject as it is overcrowded and does not provide physiotherapy, speech therapy, medication or any other form of medical care to the subject.

6. Further, that there were no medical specialists at the REHAB and LWN1 was left on a bed the whole day and further that the two respondents take the subject for a few days and return her to the REHAB.

7. The 1st Respondent also stated that the REHAB placed all patients in one room and due to poor sanitation conditions they decided to carry minor home to their maternal home at Githunguri.

8. The Respondent also said that the brother of the Petitioner and his wife at one time took the subject but returned her in less than a week claiming that her condition was too complicated for them to handle.

9. The 1st Respondent stated that the two of them – the first Respondents are maternal Aunties to the subject and they have always taken care of LWN1 since her mother relocated to Canada.

10. The first Respondent further stated that the subject stays with her maternal grandmother, the 2nd Respondent and a cousin RN and they have hired a caretaker who looks after the subject whom they pay Ksh.9,000 per month.

11. They stated they have engaged the services of a physiotherapist who comes to massage the subject's muscles.

12. The parties filed written submissions in the Petition, which I have duly considered. I find that the condition of the subject is not in dispute. It is also not in dispute that the Petitioner is the biological parent of the subject.

13. The issues for determination are as follows:

(i) Whether the Petitioner should be appointed guardian of LWN1.

(ii) Whether the Court should issue a permanent injunction to restrain the Respondents from interfering with the subject.

14. On the issue as to whether the Petitioner should be appointed guardian of the subject LWN1, I find that the Petitioner is the biological father of the subject and he has a parental responsibility to take care of her.

15. The Petitioner who is in his comfort zone in Canada abandoned the subject and it is not clear how he wants to be appointed guardian when in the first place he has failed to take care of the subject.
16. There is no indication that he has ever been available for the subject or taken responsibility to provide for her.
17. The prayer for appointment as a guardian is misplaced as the Petitioner is the biological father of the subject with parental responsibility to provide, protect, and care for her which responsibility he has abdicated.
18. On the issue as to whether the Respondents should be restrained from interfering with the subject, I find that it is not in the interest of justice to prevent the two respondents from taking care of LWN1 whose biological mother died and the biological father (the Petitioner) is far away in Canada where he has carried on with another family.
19. It is the duty of this Court to act in the best interest of the subject.
20. The **Constitution of Kenya, 2010** in **Article 53(2)** provides as follows:

A child's best interests are of paramount importance in every matter concerning the child.

Section 4(2) and 3(b) of the **Children's Act** echoes the Constitutional imperative:

(2) In all actions concerning children, whether undertaken by Public or Private Welfare Institution, Courts of Law, Administrative Authorities or Legislative bodies, the best interest of the child shall be the primary consideration.

(3) All Judicial and Administrative Institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with the adopting a course of action calculated to –

a. Safeguarding and promoting the rights and welfare of the child;

b. and promote the welfare of the child.

21. To order that the subject be returned to the REHAB under the circumstances of this case would be tantamount to imprisoning subject. The Petitioner cannot take care of LWN1 in absentia.
22. The Petition dated 27.5.2019 is accordingly dismissed for want of merit in the following terms;

(i) THAT the two Respondents will continue to take care of the Subject pending further directions of this Court.

(ii) THAT an educational assessor and or occupational therapist or a specialist from the Kenya Institute of Special Education to visit the Subject and write a report on the best way to handle LWN1.

(iii) THAT the Subject LWN1 be brought to this Court after the said report has been filed for further directions.

(iv) THAT the Petitioner to bear costs of the Petition and the Report by the Specialist.

(v) THAT this matter will be mentioned on 18.10.2019 for the report to be availed.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 20TH DAY OF SEPTEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.