



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**PETITION NO. 6 OF 2016**

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

**AND**

**IN THE MATTER OF THE OATHS AND STATUTORY DECLARATIONS ACT CAP 15 OF  
THE LAWS OF KENYA**

**IN THE MATTER OF S K K**

**AND**

**IN THE MATTER OF AN APPLICATION BY**

**JWK.....1<sup>ST</sup> PETITIONER**

**KKKK .....2<sup>ND</sup> PETITIONER**

**GNK .....3<sup>RD</sup> PETITIONER**

**RULING**

1. The Petitioners herein first approached the Court vide a Petition dated 02/09/2016 filed under the provisions of the Mental Health Act seeking for certain orders respecting the guardianship of SKK as well as the preservation and management of his estate of SKK (the “Subject”). The Petition was supported by the Affidavit of the 1st Petitioner, JWK.

2. Filed simultaneously with the Petition was a Chambers Summons Application seeking certain interim reliefs related to the estate of SKK. The most consequential order sought was for the sale of one of the properties owned by SKK so as to provide for the medical care of SKK and his spouse, MWK, as well as take certain actions aimed at preserving the estate.

3. The Petition is by three children of SKK and is supported by the spouse, MWK, as well as all the children of SKK with the very notable exception of one: Godfrey Gichimu Kimani.

4. At the first hearing of the case, the Petitioners as well as the spouse, MWK, came to Court. I directed that all the members of the family be served. Godfrey came on record – appearing in person but often filing documents authored by a Mr. Nyaundi, an advocate working with Kituo cha Sheria, a legal aid organization in Nairobi.

5. It soon emerged that there was a disagreement in the family between Godfrey on the one hand and all the other members of the family. I urged them to meet outside court and attempt a mediation. The most pressing issues that needed resolution were the following:

- a. There was credible information – shared by all involved – that some fraudsters had somewhat come into contact with SKK and had began a process of divesting him of his property fraudulently. The estate, hence, needed to be preserved as a matter of extreme priority.
- b. The Petitioners asserted that there was urgent need to raise funds for the medical care of the spouse MWK who is wheelchair bound and who needed urgent surgery.
- c. There was need to raise cash to take care of certain debts of the estate as well as keep the rest of the estate in good repair for sustainable income.

6. After repeated attempts, the parties agreed to record a consent on the certain key issues. On 21/11/2016, the Parties recorded the following consent:

- i. The petitioners be appointed to act jointly as guardians of SKK
- ii. The petitioners be appointed as managers of the estate of SKK
- iii. That a bank Account at Equity Bank Kenya Ltd in the name of KW Trust Account to which all the three petitioners and Godfrey Gichimu Kimani shall be signatories with instructions that any two signatories can sign
- iv. That all income from the estate shall first be deposited into the bank account mentioned in (iii) above
- v. That all family members as listed in paragraph 2 of the petition shall be involved in sourcing for suppliers and service providers for all matters involving the estate which quotations shall be tabled at family meetings where the most affordable and most appropriate vendor shall be awarded. The meetings to be chaired by the 3rd petitioner - GNK.
- vi. That the petitioners are authorized to use income from the estate for the day to day care and medication and upkeep of the subject and subject's spouse.
- vii. That meeting of all the family members as listed in para 2 of the petition be held on 19th November 2016 at 11.00 am at Garden Estate where the issue of financing the treatment of MW (subject spouse) shall be discussed and a decision made on the source of funding for the treatment.
- viii. That the parties return to court on 21/11/16 for a mention and report on progress.

7. This consent was adopted by the Court. In doing so, the Court formed the opinion that the Subject, SKK, was, indeed, suffering from mental disorder as defined in section 2 of the Mental Health Act. This ruling will now formalize that finding. The Court had occasion to see reports by Dr. Ngugi Gatere and Dr. Divya Gandhi. Their conclusions are unmistakable: the subject suffers from dementia which is progressive impairment of cognitive functions. Dr. Gatere definitively concluded: "He is not in a position to take care of himself or his estate and cannot enter into contracts due to the illness."

8. This assessment by Dr. Gatere is not contested. It is, therefore, my finding that SKK is suffering from mental disorder to such an extent as to be incapable of managing his affairs. As such, there is a need to appoint (a) guardian(s) of SKK and managers/administrators to manage his property and make provision for his upkeep and maintenance.

9. Once a Court makes a finding as I have done above, it considers whether the Applicants are fit to be appointed as guardians/administrators. This Court adopted the agreement of the family on 21/11/2016 that

the guardians to SKK and managers to the estate shall hence be JWK, KKK, and GNK all acting jointly.

10. The only issue that was left for consideration was whether to permit the Managers to sell the portion of the estate of the Subject known as Plot [particulars withheld] Section III, Eastleigh and to use the proceeds of the sale for certain named purposes chief of which is to provide for the surgery and post-operation care of MWK, payment of certain debts owed by the estate; perform certain renovations to the buildings owned by the estate and buy a vehicle for use by the estate. At the family meeting contemplated in the consent order of 21/11/2016, Godfrey was the hold out while the rest of the family adopted the proposal for the sale.

11. The three Managers – J , Kand G – support the sale of the Eastleigh Property. G is opposed. This is what necessitated the fully-fledged hearing I held to consider whether the Court should permit the Managers to dispose off the property.

12. The three Managers (hereinafter, “Applicants”) are of the view that it is necessary and urgent for the property to be sold. From the testimonies of Jane and George, they maintain that funds are needed for the following purposes:

- a. Surgery for MWK for three joint replacements. Each of these three surgeries will, according to an estimate provided by Dr. Gikenye, cost Kshs. 474,000.
- b. Post-surgery care for MWK.
- c. Renovation of the house in Garden Estate, Nairobi where the Subject and MWK are anticipated to live into their sunset years.
- d. Renovations of some of the rental properties that are in bad shape.
- e. Payment of certain debts of the estate – notably electricity bills running to almost Kshs. 700,000; Water bills and other debts.
- f. Purchase of a motor vehicle to be used to transport SKK and MWK.
- g. Completion of a building that SKK had started constructing in Sakika, Murang’a.

13. G remained opposed to the sale of the property. His position is that the rental income from the four properties owned by SKK should be sufficient to take of all these expenses. Naturally, Godfrey did not think all the expenses were necessary. At first, he alleged that his mother (MWK) does not need any surgery. Suffice it to say that I have perused the Scan Report by Dr. Nidhi Leekha and the Reports by Dr. Kahenya and Dr. Gikenye which were produced in evidence. I also had occasion to listen to MWK in evidence and also observed her when she came to Court – pushed in her wheelchair to which is now bound. There is no doubt whatsoever in my mind that the surgery is needed.

14. Similarly, it would appear to me as well that all the other expenses intended by the Applicants are essential. One cannot really say that there is splurge here.

15. G was present when the Applicants started testifying but did not cross-examine the three witnesses who testified. When the matter was adjourned and the Applicants applied to re-open their case to produce certain documents, George requested for an adjournment which was granted. He eventually did not appear during the hearing of the Petition to expound on his belief that there was no need to sell the Eastleigh Property in order to raise the funds needed despite the Court exercising its discretion to adjourn the case a couple of times so that he could be present. In the end, the Court retired without hearing his side of the story beyond his affidavits filed in Court.

16. Most of what he says in his affidavits is aimed at demonstrating that he is fit to be a Manager/guardian and that the Applicants were excluding him from the running of the affairs of the family. This question is

now moot since the question of guardianship has been settled.

17. Regarding the sale of the Eastleigh Property, I can decipher two complaints by G:

- a. He is not sure that all the rental income from the four properties is being properly utilized; and
- b. He is not sure that the proceeds of the sale will be utilized properly and prudently.

18. Tellingly, in his affidavit deposed on 17/11/2016, G had this to say in paragraph 27:

I have no objection to the sale of the Eastleigh Property but my only reservation is that this Honourable Court should keenly monitor the sale or at least appoint me as co-manager to prevent the Petitioners from misrepresenting on the true value of the property and the expenditure of the proceeds of the sale as has always been the case.

19. I have now heard from MWK, JWK and GNK under oath. I have carefully perused the bundles of documents filed regarding the estate and I have become familiar with the state of accounts of the estate. In particular, I have looked at the statements of expenses and income from the four known sources of income for the estate – the buildings in Nairobi West; Embakasi; Eastleigh and KU. I am persuaded that in view of the upfront costs needed for the surgery of MWK; her post-surgery care; the impending debts of the estate (including threats to close down the buildings); need to provide physical accommodation for MWK through renovations to the house in Garden estate and need to provide for their transport costs by purchasing a Motor Vehicle, that the sale of the Eastleigh Property is warranted and necessary.

20. As for the second concern expressed by G, I believe that the law takes care of it. It is also true that the terms of the Consent Order of 21/11/2016 which are expressly incorporated to the orders I shall grant today will give Godfrey an opportunity to monitor the use of the funds.

21. In the end, therefore, upon conducting the inquiry and hearing herein, having listened to the parties and having perused all the documents filed, I am satisfied that the Petition and the Application are merited. I therefore proceed to make the following orders:

- a. The Subject herein, SKK, is declared to be suffering from mental disorder to such an extent as to be incapable of managing his affairs.
- b. I appoint JWK, KKK, and GNK (“Managers”) to act jointly as the guardians of SKK with authority to receive and manage SKK’s estate.
- c. The Managers are authorized to jointly manage all the properties and assets of SKK by collecting, maintaining and doing all that appertains to the preservation of the estate. The powers of the Managers to manage the estate shall expressly be subject to the Consent Order entered on 21/11/2016 to the extent it is not conflicting with any orders made here.
- d. The Managers are specially authorized to enter into an agreement for the sale and transfer of Plot No. 1261 Section III Eastleigh and to sell the land.
- e. The returns of the proceeds from the sale of Plot No. 1261 Section III Eastleigh shall be applied as follows:
  - i. Provision of special care and treatment to SKK and MWK and Matters incidental thereto.
  - ii. Surgery costs and post-surgery care for MWK.
  - iii. Renovation of the house in Garden Estate, Nairobi.
  - iv. Renovations of some of the rental properties of the estate.

- v. Settlement of debts of the estate.
  - vi. Purchase of a motor vehicle to be used to transport SKK and MWK.
  - vii. Any remaining amounts to be invested as the Co-Managers deem fit for the benefit of the estate.
- f. The parties shall be at liberty to apply for any future orders.
- g. The costs of this Petition to be paid from the estate.
- h. Orders accordingly.

**Dated and delivered at Kiambu this 20th day of January, 2017.**

**JOEL NGUGI**

**JUDGE**