



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 10 OF 2017
IN THE MATTER OF J K M

And

In The Matter Of An Application For Guardianship By S N N

RULING

1. On 16th January, 2017, J K M and S N N herein referred to as the petitioners/applicants came to court by way of a petition dated 13th January, 2017 filed under certificate of urgency seeking for orders of the court appointing them as guardians of Mr. J K M their father and by extension be the managers of his estate thus having powers to manage affairs of the said estate.
2. While petitioning the court, the petitioners specifically, sought for special powers as stipulated hereunder:
 - a. To access Bank account No.[particulars withheld] held at Middle East Bank with the account name of [particulars withheld].
 - b. To access Bank account No. .[particulars withheld] held at Bank of India with the account name of .[particulars withheld].
 - c. To access Bank account No. .[particulars withheld] held at Standard Chartered Bank Limited Machakos Branch under the joint account names of J K M and the late R K M.
 - d. To access Bank account No. .[particulars withheld] held at Standard Chartered Bank Limited Moi Avenue Nairobi Branch under the joint account names of J K M and the late R K M.
 - e. To access Bank account No. .[particulars withheld] held at Standard Chartered Bank Limited Moi Avenue Nairobi Branch under the account name of J K M and any other bank accounts under his name for purposes of ensuring that his medical expenses are taken care of.
 - f. To take control and execute, on behalf of Mr. J K M, a deed of surrender and any other necessary documents in relationship to an ongoing transaction in respect of L.R. No. 13208/2 and I.R. No.132563/2 in which there are other joint owners.
 - g. To take control of and execute, sign all deeds and instruments relating to or evidencing the title or a right to Machakos Stall No. 11/399 or to proceed to develop, improve and to take over to and or institute any litigation and or claims in respect thereof.

h. To take control of and execute, sign all deeds and instruments relating to or evidencing the title or right to land reference No. 209/9464 situated in Dandora Industrial Area Nairobi or to proceed to develop, improve, take over and or institute any litigation and or claims in respect thereof.

i. To take control of and execute, sign all deeds and instruments relating to or evidencing the title or right to land reference No. 3736/340 situate in Othaya road Nairobi and or to proceed to develop, improve, take over and or institute any litigation and or the claims in respect thereof.

j. To take control of and execute, sign all deeds and instruments relating to or evidencing the title or right to land Ref. No. situate in Riverside Drive Nairobi and or to proceed to develop, improve, take over and or institute any litigation and or claims in respect thereof.

k. To take control of and execute, sign all deeds and instruments relating to or evidencing the title or trust affairs of land Ref. No. 3734/141 situate in Gathanju road – Nairobi and or to proceed to transfer right thereto to the beneficiary P M M.

l. To access, take control and take over the affairs of Sunshine Beach Hotels Limited of No. C. 20697 which powers are to include the management of any movable properties of the company, power to execute, sign all deeds and instruments relating to or evidencing the title or right to any property or giving a right to receive any money or goods and to proceed to take over and or institute any litigation and or claims and also to include not only such property as has been originally in the possession or under the control of any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise.

m. To access, take control and take over the affairs of Nyaani Investments of No. C 24504 which powers are to handle the management of any movable or immovable properties of the company, money, debts, and legacies, power to execute, sign all deeds and instruments relating to or evidencing the dealings and or operations of the company.

3. The petition herein is premised on the grounds on the face of it and a supporting affidavit jointly sworn by the petitioners herein on the 13th January, 2017. The necessity in filing this application under Section 26 (1), 27 and 32 of the Mental Health Act crystallized from the fact that one J K M (hereinafter referred to as M) is an elderly man, whose health has been declining for a considerable period of time and has recently been diagnosed as having dementia that seems to be progressing rapidly and is not curable.

4. Given that M's general medical and mental condition has drastically deteriorated and also considering that while in the said condition he does not have the capacity to make decisions affecting his personal needs, adequately understand and or appreciate the nature and consequences of such inability, the family opted by consensus to appoint two of his children the petitioners herein to step in and fill the gap as guardians.

5. In total, M sired seven children five of whom are alive namely S M M (Son), J K M (Son), S W N (daughter), M W M (Son), P M M (Son), A N (deceased daughter) and D M K (deceased son). The petitioners obtained consent to petition the court for the orders sought from their siblings who signed an affidavit of no objection sworn on the 9th October, 2016 (marked exhibit JKM1).

6. A medical report compiled by Dr. Dilraj Singh Sokhi, Aga Khan University Hospital marked JKM-5 affirmed that M has a significant global brain atrophy and that he is suffering from progressive dementia that has impaired his ability to make decisions.

7. For purposes of providing for the personal needs of their father and most importantly medication and general upkeep, the applicants pleaded with the court for appointment as guardians. They contended that, if granted, they will be able to access funds in his accounts to facilitate payment of land rent and rates and other statutory obligations affecting his estate which cannot be undertaken without guardians in his place.

8. In further support of their application and as a proof of the existence of the estate, the applicants annexed several ownership documents, a grant of letters of administration intestate issued on 19th September, 2016 in respect of the estate of their late mother R K being succession cause No. 575/2015 Machakos High Court. Equally, they attached a letter dated 6th August, 2016 from the Assistant Chief Wamuyu Sub-Location listing M's family members.

9. During the hearing, J K M (PW1), S N M (PW2), S M M (PW3) and M W (PW4) testified. They all agreed that their father's general medical and mental condition had degenerated and that he was bedridden throughout. PW1 told the court that his father has been sick for 16 years and that after undergoing head surgery in London, he never recovered at all and instead suffered mental impairment and or incapacitation, immobilized and totally dependent on 24 hour nursing care. He suffered a stroke which worsened and weakened his physical mobility. That for twelve years while the father was sick, it was their mother who was managing family business and affairs but unfortunately she passed away on 18th May, 2015. Since her demise, the family has been unable to manage his estate hence the need to appoint guardian. In a nutshell, all the siblings admitted that in the current health condition of their father, no business can be transacted and unless a guardian is appointed, entire family business and their father's personal needs and care will greatly suffer.

10. Before the hearing commenced, the court demanded for the patient to be produced in court. When he was availed the court had to break for the sake of seeing him while lying inside a car at the car park. I observed the old man whom in my own assessment was extremely weak, and unable to communicate. His speech is completely impaired, movement limited, his memory lost and simply not dependable.

11. Having gone through the petition herein, supporting affidavit, annexures attached thereto and having heard the testimony of the family members, this court has to determine whether the applicants/petitioners herein meet the criteria and or conditions set under the mental health Act and in particular Sections 26 and 27 and 32. Issues for determination therefore are:-

- Is Mr. M suffering from any sickness;
- If the answer is yes, is he suffering from any mental disorder as consequence;
- Does he require any medical or personal care;
- Does he have an estate that would require administration and management by a guardian;
- Are the applicants related to him and or suitable persons;
- Is there consent from interested persons;
- What will be the guardians mandate in managing and or administering the estate;

12. A petition and or application for appointment of a guardian under the Mental Health Act Cap 248 is clearly spelt out in Sections 26 and 27.

Section 26 (1) provides:

“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”.**

13. In compliance with this provision, the applicants proved and clearly convinced the court that their

father is ailing having suffered a stroke and mental impairment and or loss due to what his doctor Dilraj Sing Sokhi described in his medical report marked JKM5 as “significant global brain atrophy hence resulting to progressive dementia thus impairing his ability to make decisions”.

His children also confirmed his condition by way of affidavit and oral testimony in court. The court had the advantage of engaging the patient born in 1926 while in his car outside court and in my assessment, I saw a critically sick person who was not aware of his environment. He was not even aware that he was in court. He could not even recognize his children. I am convinced beyond reasonable doubt that the patient herein referred to as M is sick and indeed a classic case of a person suffering from mental disorder.

14. Are the petitioners related to him and or suitable? According to their testimony, evidence from the Assistant Chief and affidavits sworn in support of petition, it is clear that they are his children and indeed suitable to act as guardians. As I said earlier, there is no objection from anybody as all family members are in agreement.

15. Regarding the existence of an estate capable of being managed and or administered, the petitioners have attached bank statements and general ownership documents to show that their father owns property and therefore the need to appoint a guardian to oversee effective management and administration of the same.

16. Having found that the patient herein one M is sick suffering from mental disorder and that he has an estate which his children have been found suitable to manage and administer, the court is left with the discretion to determine the powers the guardians/managers to be appointed will exercise.

Section 27 stipulates powers of the manager as follows:

“Sub-Section (i) – where a manager is appointed under this part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper regard being had to the nature of the property whether movable or immovable, of which estate may consist”.

Provided that –

(iii) No manager may invest any funds belonging to the estate of which he is a manager in any company or undertaking in which he is himself has an interest, nor on the purchase of immovable property under the authority of paragraph (d) of Section 4 (1) of the Trustee Act without the prior consent of the court.

17. In the instant case, the petitioners have enumerated properties and bank accounts listed from a to m in which they want to access and or manage. Under prayer 2 (a) and (b), they are seeking to access three bank accounts in the name of M K alone held at Bank of India and Middle East Bank. This prayer is not acceptable as it will amount to disposing of the amount of money therein as if it was a confirmed grant in case of death. I will allow access to run these two accounts only if it is intended to get funds to meet the personal medical needs and care of the patient subject to production of proof or evidence to that effect.

18. Concerning prayer 2 (c) and (d) being access to the bank accounts held in Standard Chartered bank Moi Avenue and Machakos Branch in joint names of M K and his late wife who is now deceased, it is equally not prudent since one of the account holders is deceased hence the account ought to have been frozen pending confirmation of grant now pending in Machakos High Court in respect of R K.

19. Prayer 2 (e) seeking for access to bank account No. [particulars withheld] held at Standard Chartered bank Limited Moi Avenue Nairobi Branch for purposes of taking care of his medical expenses is allowed to the extent that and only if all family members sign a written consent and approval.

20. Prayers contained in Paragraph 2 (f) to (m) regarding general management, control and or

administration of their father's estate is persuasive enough and indeed justified. I do allow the prayers sought only to the extent of management, control, administration and institution of a claim for or on behalf of the estate without disposal of any of the mentioned property in Paragraph 2 (f) to (m).

For avoidance of doubt, no property belonging to the estate shall be disposed off without the consent of all family members subject to the court's permission.

21. Having considered the pleadings herein, testimony by the applicants and material evidence placed before the court, and in the interest of the patient referred to as M and having considered the relevant law in this case, mental health act, I am sufficiently persuaded that the petitioners have made their case to the required degree hence do allow the application/petition with the following orders:-

- a. That J K M be and is hereby adjudged to be suffering mental health and requires assistance, care and support for his well being.
- b. That J K M and S N N be and are hereby appointed guardians ad litem of the patient herein J K M.
- c. That the petitioners/guardians ad litem shall access patient's bank account No. [particulars withheld] held at Standard Chartered Bank Limited Moi Avenue Nairobi branch account name J K M for purposes of his medical expenses, personal needs and care and payment of rates, rent and other statutory amount required in respect of his property.
- d. That the petitioners/applicants J K M and S N N be and are hereby authorized to administer the finances and properties of the respondent and to manage the patient's estate for his care and well being as well as execute and or control all necessary conveyance documents, deeds and or instruments with regard to his property.
- e. For avoidance of doubt, and save for and subject to order No. (c) above, the petitioners/applicants shall not make any withdrawal of any funds from any account whether held in the name of the patient herein J K M individually or jointly with any other person or dispose any property held in similar manner without any good reason and the express consent of the other family members in writing subject to court's permission and approval.
- f. That the petitioner/applicant shall periodically after every three months update the court on the progress of the health of the patient herein and general administration and management of his estate.
- g. Costs in the cause.

Order accordingly.

DATED AND DELIVERED IN OPEN COURT THIS 14TH DAY OF MARCH, 2017.

J.N. ONYIEGO (JUDGE)