



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

PETITION NO. 2 OF 2016

IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248

AND

IN THE MATTER OF R M A AILING AND OF UNSOUND MIND

AND

**IN THE MATTER OF AN APPLICATION TO RECEIVE PROPERTY OF A PERSON OF
UN SOUND MIND**

(CORAM: J. A. MAKAU – J.)

E A A APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 3.7.2015 in Criminal Case No. 834 of 2014 in BONDO Law Court before Hon. OANDA – S.R.M.)

RULING

1. The Petitioner E A A through a petition dated 17th April 2016 and filed on 24th May 2016, pursuant to **Section 26 of the Mental Health Act Cap 248** seeks the following orders:-

- (a) That E A A be appointed legal guardian of R M A.**
- (b) That E A A be appointed the manager of the Estate of R M A and they be granted access to receive properties belonging to R M A including monies held in Kenya Commercial Bank account No.[particulars withheld] at Siaya Branch.**
- (c) That such further relief be granted as will me the orders of justice in this course.**

2. The petition is supported by petitioner's affidavit dated 23rd May 2016 and annexures thereto in which the petitioner has deponed interalia, that she is the lawful wife of one R M A, the patient, the subject matter of this petition, as per National Identity card “EAA” No.[particulars withheld] in the name of R M A, that the petitioner is married to the said R M A pursuant to **Luo Customary law** which still subsists to date and out of the said marriage the two are blessed with a seven issues namely:-

(a) V A – 30 years.

(b) D O A – 29 years.

(c) P O A- 27 years.

(d) G A – 25 years.

(e) J A – 22 years.

(f) E A A - 12 years.

(g) R A – 10 years.

As per annexed and marked EAA 1 (a), (b), and (c) being Birth Certificates for G A, E A A and R A, that the petitioner's husband was a civil servant in the Republic of Kenya for 20 years, that he had history of mental illness and that he had undergone treatment in various hospitals, the latest treatment being at Siaya County Referral hospital as per annexure marked EAA 2 (a) and (b) being a letter from Siaya County Referral Hospital dated 30.10.2014 and a copy of a letter dated 19th January 2012 from the Assistant Chief of Osimbo sub-location respectively, that on 2nd April 2015, R M A left his home but never returned, that petitioner made a report of a missing person at Siaya Police Station under O.B. No. [particulars withheld] and efforts to trace him has proved futile, annexed and marked EAA 3 is a copy of a letter dated 24.11.2015 give O.C.S. Siaya Police Station, that R M A has not been heard of or been seen since then, that before the patient disappeared he used to receive his pension into his KCB A/C No. [particulars withheld] at Siaya Branch, that the petitioner and her children depended on the said pension for their upkeep since the petitioner is not in any gainful employment, that upon disappearance of the Petitioner's husband she was informed by the staff of KCB, which information she believed to be true, that monies were being withdrawn from her husband's account at KCB through the Automated Teller machine at Bondo Town Branch (*see attached letter marked EAA 4 from Deputy County Commissioner Siaya Sub-County to KCB Manager*), that petitioner obtained an order of court to restrain KCB from authorizing, approving, granting and/or allowing any monetary withdrawals from Account No. [particulars withheld] in the name of R M A pending the filing of a petition under the **Mental Health Act** or *suit under the Children's Act by the Petitioner herein*, (see annexure marked EAA 5), that G A A averred that the issue of petitioner and the patient was admitted as a student at Kenyatta University in 2015 and the Petitioner is required to pay more than 100,000/= per Academic year (see annexure EAA 6 (a) and (b)) a letter of Admission to the aforesaid University.

3. The Petitioner has further deponed, that being a person of no standard steady income, she is finding it difficult to provide for the upkeep of their issues, that she knows of her own knowledge that her husband's said account is in continued receipt of his pension and monies in the said account could assist in the upkeep of the family, that she beseeches the court to allow her control(access) to the said account to be receiving therefore a limited sum on a monthly basis, then if allowed access to the account she intend to solely use the monies for the benefit of the children of their subject marriage and two of whom are minors and are entitled to parental care which includes maintenance.

4. At the hearing Mr. Ooro, Learned Advocate appeared for the Petitioner and reiterated the contents of the affidavit in support of the petition which I have reproduced herein above. He relied on the authorities which he produced to this court.

5. I have very carefully perused the pleadings, considered the oral submissions and the issues for consideration in this petition can be summarized in my view as follows:-

(a) Whether the petitioner has in the petition established that the patient is suffering from mental disorder for the patient to be considered under the provisions of Mental Health Act Cap 248 Laws of Kenya?

(b) Whether the petition has satisfied the conditions set out under the Mental Health Act to warrant being approved manager in respect of the estate of the patient herein?

6. Section 2 of the Mental Health Act “person suffering from mental disorder” is defined as follows:-

“person suffering from mental disorder” means a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering form mental impairment due to alcohol of substance abuse;”

7. The petitioner in her affidavit attached annexures “EAA 2” (a) being a letter form Siaya County Referral Hospital dated 30th October 2014 which letter stated as follows:-

“TO WHOM IT MAY CONCERN

RE: R M A – AGE 63 YEARS

AD VOL PSY/MO: [particulars withheld]

DIAGNOSIS: SCHIZOPHRENIA

The above is an old psychiatric patient being treated in our psychiatric clinic.

He suffers from schizophrenia which is part of mental illness.

He is currently mentally unstable and cannot express himself properly. His illness requires that he takes medication daily.

Please assist him.

Yours faithfully

ROBERT MULWANI

INCHARGE COMMUNITY MENTAL HEALTH

FOR: MEDICAL SUPERINTENDENT

SIAYA COUNTY REFERRAL HOSPITAL”

8. I have carefully considered annexure EAA 2 (a) and (b) being letter from Siaya County Referral Hospital and Deputy County Commissioners letter respectively, both of which point to the fact that the patient R M A is a person with mental illness and a person suffering from schizophrenia which is a mental illness. I am therefore satisfied that the petitioners has established that the patient is suffering from mental illness disorder as per definition of “**person suffering from mental disorder**” under **section 2 of the mental Health Act Chapter 248.**

9. Section 26 (1) (a) and (b) of the mental Health Act provides as follows:-

“(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.”

The above Section gives court power to make an order regarding management of the estate of any person suffering from mental disorder to any relative or any person suitable but giving preference to a relative.

10. In the instant petition the Applicant has established that she is a wife to the patient with whom they are blessed with seven (7) children as listed in her affidavit in support, that she has attached Birth certificates, annexures EAA 1 (a), (b) and (c) in respect of some of the issues of the marriage thus, E A A and R A, which confirm their father to be the patient herein and annexure "EAA 3" letter from OCS, Siaya, Police Station confirming petitioner is a wife to the patient. The Petitioner through several annexures has demonstrated that the patient is not only suffering from mental disorder to the extent as to be incapable of managing his affairs and himself but that he has gone away and his whereabouts are unknown. That following his disappearance monies were being withdrawn from the petitioner's KCB account through Automated Teller machine at Bondo Town till, the petitioner obtained court's order, annexure EAA 4 staying any transaction in respect of her husband's Account.

11. Section 28 of the Mental Health Act Provides:-

"(1) 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 circumstance's of the case, the court may think fit.

(2) The Minister, the Public Trustee or a manager may take out, as a matter of course, an application in chambers for the determination of any question arising out of the management of any estate in respect of which an order has been made under this Part."

12. I have carefully considered the petitioner's application and the contents of the affidavit in support thereof. The petitioner is wife to the patient for a long period and both are blessed with seven children out of whom only two are minors. That the petitioner and the patient were cohabiting together as wife and husband till on 2nd April 2015 when R M A left home and has since not been heard of or seen. The partitioner made a report of a missing person to Siaya Police Station vide O.3. No. [particulars withheld] and to date her husband has not been traced. The petitioner and her children relied upon the patient for their support from his pension. The patient's children specially, G A, a University students need school fees and so are the two minors. The petitioner's petition has not been challenged by her children or anyone. I have no evidence or document before me challenging the granting of prayers sought in this petition.

13. Section 27 of the Mental Health Act provides:-

"(1) 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 the estate may consist: Provided that—

(i) a manager so appointed shall not, without the special permission of the court—

(a) mortgage, charge or transfer by sale, gift, surrender, exchange or otherwise any immovable property of which the estate may consist;

(b) lease any such property for a term exceeding five years; or

(c) invest in any securities other than those authorized by section 4 of the Trustee Act (Cap. 167);

(ii) no manager may invest any funds belonging to the estate of which he is manager in any company or undertaking in which he 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.

(2) Where the person appointed to be manager of an estate or guardian of a person under this Part is unwilling to act gratuitously, the court may fix such allowance to be paid out of the estate of the person in respect of whom the manager or guardian has been appointed as, in the circumstances of the case, the court may think fit.

(3) Any manager appointed under any other law in force before the commencement of this Act shall be deemed to have been appointed under this Act as from such commencement, but shall not be required to file any inventory or statement under subsection (1) of section 33 if he has already done so before such commencement.

(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.”

14. I am therefore satisfied that the petitioner's petition is merited and I proceed to make the following orders:

(a) R M A who is currently a missing person is a patient with a mental condition that requires attention.

(b) I appoint E A A the guardian of R M A (Missing person) with power to receive and manage the patient's estate.

(c) However, for the purposes of operating the account belonging to R M A held at Kenya Commercial Bank, Siaya Branch, the Petitioner shall operate the same jointly with V A and G A.

(d) The proceeds from the account under (c) above shall be applied as follows:-

i. Towards the medical expenses of the patient and his upkeep by his custodian/guardian E A O (as soon as he is traced or found)

ii. The school fees of the patient's school and/or college going children.

iii. For the upkeep and maintenance of E A A and her children who are below the age of 18 years including G A (25 years) but a college going child so long as she is attending college.

iv. Invest in any investment that the guardian shall consider necessary and appropriate for the future returns to meet the purposes set out in (i), (ii) and (iii) above.

v. Liberty to apply

vi. No order as to costs.

Orders accordingly.

DATED AT SIAYA THIS 14TH DAY OF JULY, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Mr. Ooro for the Petitioner/Applicant.

C.C. 1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE