



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO 4 OF 2014**

**PAUL THUO GIKONYO.....1<sup>ST</sup> PETITIONER**

**GRACE WANJIKU GIKONYO.....2<sup>ND</sup> PETITIONER**

**MARGARET WAMBUI NJUGUNA.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**CAROLINE MWIHAKI GIKONYO.....1<sup>ST</sup> RESPONDENT**

**DAVID MBUGUA GIKONYO.....2<sup>ND</sup> RESPONDENT**

**RULING**

The matter originated by way of an application filed by the Applicants on 16<sup>th</sup> January 2014 who sought the appointment of a guardian for the subject, S G N, and the management of his properties to access, monitor and to meet his sustenance and medical expenses. A Replying Affidavit was filed on 31<sup>st</sup> January 2014 by the Respondents. Another application of certificate of urgency was filed on 7<sup>th</sup> April 2014 by the Applicants that the subject's health had deteriorated, and a Replying Affidavit was filed by the Respondents on 18<sup>th</sup> April 2014.

After hearing the above applications, the Court gave its Ruling on 31<sup>st</sup> July 2014 by Kimaru J, and the substance this Ruling was the following:

1. a) Caroline Mwihaki Gikonyo, the 1<sup>st</sup> Respondent; and  
b) Mary Wangui Kuria, the wife of the subject were appointed guardians of the subject under **Section 26(1)(b) of the Mental Health Act.**
2. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners were allowed unimpeded access on Wednesdays and Saturdays from 9 am – 5 pm to visit the subject respectively.
3. The guardian to present the Deputy Registrar with monthly reports on the health status of the subject.
4. a) Caroline Mwihaki Gikonyo, the 1<sup>st</sup> Respondent; and  
b) Mary Wangui Kuria, the wife of the subject are appointed temporarily as managers of the subject's properties pending the determination of the application filed by the Petitioners seeking orders from the Court as to who shall be entitled to administer the subject's properties.

5. Before the hearing, the Petitioners and Respondents to provide the Court with an inventory of all the properties of the subject, including particulars of each property and rental income received from each property.

It is the implementation of the above order that gave rise to the matter before this Court. On 9<sup>th</sup> September 2014, Kimaru J further ordered by consent of the parties that Sterile Medical Services provide two (2) professional and accredited nurses with effect from 15<sup>th</sup> September 2014 to take care of the subject. The 1<sup>st</sup> Respondent to cater for the expenses and the company shall give monthly reports to the Court until further orders are issued

On 16<sup>th</sup> October 2014, Counsel for the Petitioners appeared before the Court and informed the Court that, pursuant to the Court order of 9<sup>th</sup> September 2014, the nurses were provided and they started to work. However, Counsel for the Petitioner disclosed that they have not been paid and that their duty of taking care of the subject at the home was made difficult by the interference of one Mr. Kariuki.

The guardian's advocate informed the Court that the nurses who were brought to look after the subject, a man and a woman, came and started looking after the subject but three (3) days later an invoice of Kshs. 53,000/= was issued and not substantiated. She also stated that the qualification and accreditation of the nursing personnel not provided, and that the scope of their work was not disclosed. Moreover, he stated that the guardian paid rent monthly, provides food, clothing, personal care and medical expenses for the subject and his wife.

The second issue that the guardian raised through Counsel is that the 1<sup>st</sup> Respondent had been disposing of property by giving the impression of using contested power of attorney. Counsel for the Respondent also stated that despite the Court order that a list of the subject's assets be provided, the Respondent continued to receive rent and manage the subject's properties. The Court at this juncture found that issue of the health; care and management were intermingled with management of the subject's properties, and the latter overshadowed the healthcare of the subject which is priority to the management of the properties..

The Court scheduled a meeting of Counsel and children and family of the subject to meet on 22<sup>nd</sup> October 2014. The Court met the family and impressed upon them to reach an amicable agreement of the care of the subject in line with the Court ruling of 31<sup>st</sup> July 2014 by Kimaru J. The Court met the subject and his wife. They looked clean and well taken care of. The nurse and helper came too. The nurse is professional. The subject seemed to lean on the helper. The siblings were in agreement on the need to take care of their father but would not agree on how to effectively achieve this. There were accusations and counter-accusations and hostility especially between the guardian and the 1<sup>st</sup> Petitioner.

The Court narrowed down the issues for discussion and amicable settlement by the family as follows:

- a. The special diet of the subject as he is diabetic.
- b. Nursing care of the subject.
- c. Cleaning and hygiene arrangements.
- d. Payment for expenses, food, clothing, diapers, medicine, and nursing care.
- e. Doctors' visits for the subject and his wife.
- f. Access to the subject by other family members uninhibited and anytime.
- g. Monthly reports to the Registrar of the Family Division.

On 25<sup>th</sup> November 2014, the Petitioners were represented by Counsel and they informed the Court of the developments with regard to the above issues that were discussed and amicable settlement reached. The meeting of the family was held on 20<sup>th</sup> November 2014 at All Saints Cathedral. They did not agree on the issues, and in fact new issues arose that needed to be addressed.

There was agreement that the subject requires a special diet but the issue is who would prepare the special diet and ensure adequate provision of the diet in line with the diet prepared by Social Services League, M.P. Shah Hospital. The cleaning of the subject, washing his clothes and cleaning the surrounding environment was important but apart from there being a washing machine, it was not agreed who would clean him and make the bed, change sheets, change clothes, change diapers except that members of the family would come in turns.

On the issue of the doctors' visits, the subject has been taken to M.P. Shah Hospital by the guardian. The 1<sup>st</sup> Petitioner demands the subject be taken to Dr. Gikonyo at Karen Hospital as he chose him before he became sick, he had seen him for 21 years, and has his history. He is a cardiologist, but the hospital has doctors to treat diabetes. It is also nearer his home in Langata rather than go all the way to M.P. Shah Hospital.

Access to the subject and his wife by all other siblings was agreed as follows:

- a. On Wednesdays the subject is taken to hospital.
- b. The 1<sup>st</sup> Petitioner to see him on Friday.
- c. The 2<sup>nd</sup> Respondent to see him on Saturday.
- d. The visits are unsupervised and unhindered by Mr. Ngigi and Kariuki.

The issue of nursing care is not agreed. The nurses who came to work were treated in an inhuman and degrading manner, and their bills were not paid. Their services were terminated. There is still need for specialized care.

The guardian provides food, clothing subsistence and pays hospital bills. The Applicants ceded the management of the subject's properties to the guardian.

Monthly reports have been filed as required. At the end of the session the Court requested Counsel to submit on the activities/issues. On 11<sup>th</sup> December 2014, submissions were filed and the matter was scheduled for ruling on 6<sup>th</sup> February 2015.

The Court is called upon to determine the dispute regarding the best way to ensure that the subject is well taken care of, and all children have access to the father. From the above outline, it is clear that the family of the subject will never agree on the issue of the care of the subject and demand equal access to the subject.

**Section 26(1) (b) of the Mental Health Act** which provides:

*The Court may make orders –*

*For the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.*

The above provision mandates the guardian to carry out his/her duties to ensure the wellbeing of the subject as the primary caregiver. The guardian seems so far to have carried out the duties except for the fact that she seems overwhelmed by the family demands and squabbles on occasion. In Court all siblings seemed quite angry and hostile to each other especially between the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent. It was also alleged that access to the subject by other family members is hindered. That employees have more access and prevent the subjects children to visit and care for him.

The Petitioner has questioned the quality of care especially with regard to the doctor and hospital and prefers Karen Hospital/Dr. Gikonyo where the records of the subject's medical history are.

In light of the foregoing circumstances, the Court makes the following findings to give effect to the Court order of 31<sup>st</sup> July 2014 and to make access to and care of the subject more inclusive of the children of the

subject.

- a. The subject shall be taken to see Dr. Gikonyo at Karen Hospital once every week to be checked on:
  - i. dementia
  - ii. hypertension
  - iii. diabetes
- b. The subject shall be seen by doctors in Karen Hospital who will be directly under supervision of Dr. Gikonyo, and the latter shall provide the Court with periodic/monthly /status/progress reports on the subject's
  - i. Medical health status, including tests, drugs etc.
  - ii. Special diet requirements.
  - iii. Any other relevant issues regarding his health
- c. The guardian remains in charge of food, clothing, medical expenses, cleaning and hygiene, and nursing care expenses. To alleviate the tension and acrimony among siblings and ensure access of all children to their father and ensure the subject is well maintained the Court will amend the Court order of 31<sup>st</sup> July, 2014 to include more members in the upkeep of the subject.
- d. The Deputy Registrar Family Division to write to the National Council of Nurses for recommendation of qualified and accredited nurses to provide specialized nursing care to the subject; two (2) nurses one (1) for the day and the other on night duty.
- e. The recommended special diet by the hospital/doctors shall be prepared by Mr. Ngigi and Mr. Kariuki supervised by the guardian.
- f. Cleaning of the subject, his clothes and surroundings shall be by Mr. Ngigi and Mr. Kariuki and children of the subject to reasonable notice and agreement if they are available.
- g. The visits by other family members to see the subject shall be amicable, uninhibited and unsupervised with reasonable notice and agreement.
- h. The proceeds of rent and other revenue from the subject's properties be deposited in an account opened jointly by the guardian and the 1<sup>st</sup> Petitioner/Applicant. The proceeds will be used among other expenses to cater for the subject's needs and upkeep, especially medical care and specialized nursing care.
- i. If the medical expenses and nursing care expenses are not paid by the guardian and 1<sup>st</sup> Petitioner/Applicant from the proceeds of the account, the bills be presented to Court/Deputy Registrar Family Division for scrutiny and further orders to ensure payment and the specialized care and upkeep of the subject.
- j. The Petitioner to comply with the order of full inventory of the subject's property filed in Court.
- k. The 1<sup>st</sup> Respondent be restrained from disposal, waste or alienation of any of the subject's properties without a Court order until hearing and determination of the application with regard to the property.
- l. The matter be mentioned in two months for compliance/further orders/dates.
- m. Each party is at liberty to apply.
- n. No order as to costs.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF FEBRUARY 2015**

**M. MUIGAI**

**JUDGE**

In the presence of:

Counsel for the Applicant Mr. Kirimi

Counsel for the Respondent.....