



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 12 OF 2014

IN THE MATTER OF THE MENTAL HEALTH ACT (CAP 248) SECTIONS 27, 28 & 32

AND

IN THE MATTER OF J B K

AND

IN THE MATTER OF THE PETITION OF S N K

RULING

1. In High Court Misc. No. 35 of 2007 the petitioner S N K was under the **Mental Health Act (Cap 248)** appointed as the manager of her husband J B K (the patient). She has now applied under **sections 27, 28 and 32** of the **Act** to have the patient declared to be suffering from mental disorder; for her to be granted special permission to deal with his estate; to be permitted to gift their four adult children with the property in the estate; and that the costs of the application to be borne by the estate.
2. The couple got married on 11th April 1970 at St. Peter's Church at Elburgon and were blessed with four children as follows:-
 - a. P E K aged 42 years;
 - b. S K K aged 40 years;
 - c. B N K aged 39 years; and
 - d. G W K aged 34 years.
3. The patient has had a record of mental disorder leading to him being admitted on several occasions at Nairobi Hospital. He has also been a patient at Upper Hill Neurology Services. From the doctors reports, he suffers from Alzheimers disease, a condition associated with relentless decline in intellectual function to a point where he has become completely dependent for all his needs on the petitioner and the family. He has deteriorated and is 100% disabled and dependent. (Reports "SNK-1", "SNK – 2" and "SNK – 3" refer). The petitioner has stated that the property forming part of the estate is at risk of being lost as two of the properties, namely KIAMBAA/THIMBIGUA / *[particulars withheld]* and KIAMBAA/THIMBIGUA *[particulars withheld]*, have already been fraudulently transferred without her knowledge, or that of the children. It is her case:-

“11. THAT the children of my marriage to J B K are all adults and as their parent would want to gift them some part of the estate for their own maintenance and also that the same are safe from would be fraudsters.

12. THAT I would also wish to sell part of the Estate for the maintenance of J B K.

13. THAT if J B K was of sound mind he would have gifted part of the estate that is not necessary for his maintenance to his adult children as any parent would ordinarily do.

14. THAT J B K is not able to make the said decision.

15. THAT all our children of the said J B K have given their consent to this petition.”

In paragraph 16 of the petitioner’s affidavit the property forming the estate is indicated. It is an extensive estate that comprises various parcels of land, plots in Nairobi and other urban areas, flats and houses in Nairobi, motor vehicles, shares, insurance policies and monies in accounts in various banks. Of interest is the fact that the two properties that have been indicated in paragraph 10 of the affidavit to have been fraudulently lost are indicated to be forming part of the estate.

4. The children of the patient are adults and there is no indication that they, in any way, rely on the patient or the petitioner for their upkeep or maintenance. Nothing was sworn showing that when the patient was well he had intimated the desire to gift any of the children. What is clear, however, is that the patient is 100% mentally disabled and therefore relies on the petitioner to manage the estate and to take care of all his needs.
5. Under **section 27** of the **Act** a manager appointed in respect of the estate 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 not exceeding five years; or
 - c. invest in any securities other than those authorised by section 4 of the Trustee Act (Cap 167).

Further, the manager may not 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.

6. At **paragraph 682 of the Halsbury’s Laws of England, 4th Edition Volume 30(2)** it is stated that the management of the patient’s property is intended for the:-
 - a. maintenance of or other benefit of the patient;
 - b. maintenance or other benefit of members of the patient’s family;
 - c. making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered; or
 - d. otherwise for administering the patients affairs.

In relation to gift of a patient’s property, it is indicated at paragraph 694 as follows:

“The judge is empowered to direct that any property of the patient be disposed of by way of gift to any members of his family or to any other persons or purposes for whom or for which her might be expected to provide if he were not mentally disordered.”

In considering if such a gift is of a nature that the patient would wish to make if competent to manage his

affairs, the court must assume that the patient has become sane for sufficient time to review the situation, knowing that after such brief interval of sanity he will become as he was before **(Re L(WJG)[1966]Ch. 135 at 144)**. The Court must also consider if the proposed gift is one that the patient would be expected to provide if competent to manage his own affairs and removed from all influences which may have been brought to bear on him. **(Re CMG [1970] Ch. 574)**.

7. The petitioner sought special permission to deal with the estate and to gift it to the children. She was appointed as manager of the estate in 2007, and has therefore been taking care of the patient. She has been managing all the property of the estate. What has changed? Why has it become necessary to distribute all the estate? Why does she want to transfer all the estate by way of gifts to the children? Assuming they were dependent on the patient, why give all the property away? What will be left in the estate to take care of the patient and meet whatever other obligations, including rates, rents or taxes? The application and the affidavit in support does not indicate how, for instance, the sharing (gifting) will be done. What formula will be used? How much, in terms of maintenance, does each child require? This question is important because the Court does not have to give away the entire estate to meet the present needs of the children, or family.
8. I have considered the application. I direct that within 30 days from today, the petitioner files a further affidavit indicating:-
 - a. the financial requirements necessary for the maintenance of or other benefits of the patient, and her own maintenance; and
 - b. to propose the property of the estate that she may want to dispose to meet the above obligations.
9. Otherwise, the application to gift the children and herself from the estate of the patient is dismissed.

DATED and DELIVERED at NAIROBI this 10th June 2015.

A.O. MUCHELULE

JUDGE