



WLH v RA & another (Family Miscellaneous Application E003 of 2025) [2025] KEHC 14647 (KLR) (21 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
FAMILY MISCELLANEOUS APPLICATION E003 OF 2025**

**FR OLEL, J
OCTOBER 21, 2025**

**IN THE MATTER OF AN APPLICATION BY WLH TO BE APPOINTED AS GUARDIAN
AD LITEM & LEGAL MANAGER OVER THE AFFAIRS OF THE ESTATE OF ADH
AND**

BETWEEN

WLH PETITIONER

AND

RA 1ST RESPONDENT

AD 2ND RESPONDENT

RULING

A. Introduction

1. The application before this court for determination is the Petitioner/Applicant notice of Motion application dated 27th August 2025 brought pursuant to provisions of Section 1A, 1B, and 3A of the *Civil Procedure Act*, Order 32 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules, Section 26, 28(1) & (2) of the *Mental Health Act*, Cap 248 and all other enabling provisions of law. The applicant prays for orders that;
 - a. That the subject ADH be adjudged a person suffering from mental sickness under the Mental Act.
 - b. That the Honorable court finds that the subject ADH is incapable of protecting his interests with regard to his affairs due as he is mentally incapacitated.
 - c. That the Petitioner WLH be appointed as the subject’s guardian ad litem to manage the affairs of the subject.



- d. That the Honourable court be pleased to issue an order compelling the Respondents to return the subject to the petitioner's custody, care and control.
 - e. That this Honorable court be pleased to grant any such further orders or other relief it may deem fit and just to grant.
2. This application is supported by the grounds advanced on the face of the application and the Supporting affidavit of the Applicant, dated 27th August 2025, where she averred that she was the lawful wife of the subject herein, and are blessed with two children. She identified the respondents as her step son and sister in law respectively.
 3. She averred that the subject herein is of unsound mind/unwell having suffered from stroke and dementia since 2016 thus in need of constant care and attention, which she had unfailing provided until 6th June 2025, when the respondents in the company of the OCS Moyale Police station went to her home and unlawfully removed the subject herein therefrom and proceeded to confine him under his brothers custody with Marsabit Sub county, under the pretext of giving him better medical attention, which was not the case.
 4. On three separate occasions she had travelled to Marsabit town with the intention of visiting the subject but had been denied access, which acts were unlawful given that she was his lawful spouse. The respondents conduct outrightly infringed on her marital rights, right dignity and further faulted the respondents for not taking good care of the subject, which evidently had lead to his health deteriorating.
 5. The applicant reiterated that due to subject's nature of illness, he had been bed ridden for a long period time and needed unique emotional, physical and personal support which she had constantly provided. It was therefore in the subject's best interest, that he be left under her care as his primary caregiver.
 6. The applicant further filed her supplementary affidavit date 26th September 2025, where she reiterated the above averments and further stated that that the respondent worked of gain in Nyeri and could not bathe or clean his father. Invariably he had to hire a third party or care giver to perform these intimate tasks, which position was untenable/illogical as she had solemnly upheld her role as his wife and taken good care of him until he was unlawfully taken away from her custody.
 7. She urged the court to note that she had taken care of the subject for a period spanning nine (9) years (since 2016) and had done everything in her power to ensure that the subject herein had received continuous, adequate medical care and social support. It was therefore not right for the respondents to come late in day to pick the subject from his home and allege that he was not being taken care off, yet they knew that the same was not true.
 8. The applicant thus urged the court to find that her application had merit and prayed to be granted the orders sought
 9. In response, the 1st respondent did file his replying affidavit dated 13th October 2025, stating that this application had been filed in bad faith by the applicant, who was hell bent to ensure that, "they do not benefit from the estate of Abdullahi Halake as she seeks to continue misusing the estate and mismanaging the same".
 10. He confirmed that the subject too, was married to his mother, one Dida Halake (as first wife), and from this Union, they were blessed with four children. Further, the subject had been under the care of the petitioner from 2016 to 2025, during which period, they were unable to access him until June 2025, when through the intervention of the OCS Moyale Police station, the area chief and some elders



he finally got access to the subject and had insisted that he be allowed to have physical custody, to enable the subject get better medical care given that had been grossly neglected.

11. After picking the subject from the applicants home, he had him admitted at Moyale, Sub county referral Hospital, Marsabit County referral hospital before taking him to Nairobi, where a battery of tests were done in different hospitals and better treatment regime undertaken. It was therefore not true to claim that they had not taken care of the deceased nor had his health conditions deteriorating under his care. To the contrary the subject's condition had greatly improved and thus urged the court not to disrupt the current status quo.
12. The 1st respondent emphasized that the applicant's interest was to benefit from the subject's estate, given that he was a Senior pharmacist working with the County Government of Marsabit earning a salary of Ksh 259,424/=, which she had exclusive access to the detriment of other family members. He also further accused her of transfer their matrimonial property, Plot 5074 to herself, forcing him to file an objection to challenge the same.
13. Given the above scenario, the 1st respondent averred that it would be prudent to let him retain custody of the subject herein given that he was in a better position to take care of his health needs, care and love, which he had missed from the applicant. He reiterated that the applicant had unfairly benefited from the estate of the subject at the expense of the other beneficiaries and it was time to rectify that abnormally. He therefore urged the court to dismiss the Application.

B. Analysis & Determination

14. I have carefully considered the Application, its Supporting Affidavit, Supplementary affidavit, the Respondent's Replying Affidavit, and find that the issues that arises for determination are
 - a. Whether the subject ADH should be adjudged as a person suffering from mental sickness under the Mental Act.
 - b. Whether the Applicant should be appointed as the subjects "guardian ad litem" to manage the affairs of the subject.
 - c. Who should have physical custody of the subject herein, ADH .
 - d. Who should bear costs of this Application.
15. On the 1st limb, whether the Subject is a person suffering from mental illness? Section 2 of the [Mental Health Act](#) provides that the Objective and purpose of the Act is to;-

provide for the prevention of mental illness, to provide for the care, treatment and rehabilitation of persons with mental illness; to provide for procedures of admission, treatment and general management of persons with mental illness; and for connected purposes.
16. To bring the application under the ambit of the law it is necessary to show that the Subject is suffering from a mental illness within the meaning of Section 2 of the Act which states-

"person with mental illness" means a person diagnosed by a qualified mental health practitioner to be suffering from mental illness, and includes—

 - (a) A person diagnosed with alcohol or substance use disorder; and
 - (b) A person with suicidal ideation or behaviour;



17. In the case of; Grace Wanjiru Munyinyi & Another vs. Gideon Waweru Githunguri & 5 Others [2011] eKLR it was held that: -
- “It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved to be mentally disordered. And, even where one person is shown to be of unsound mind one must always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering...”
18. Reference is made to the decision in *Re VWG (A person suffering from mental disorder) (Miscellaneous Application 12 of 2023) [2023] KEHC 24896 (KLR)* and *Re N M K [2017] eKLR* on factors that should guide the court when considering an application under Section 26 and 27 of the *Mental Health Act*.
19. The applicant stated that her husband has been suffering from stroke and dementia from 2016 and has been under her care since until June 2025, when the 1st respondent took him away under the pretext that he was going to offer him better treatment, but ended up leaving the subject at his brother’s house in Marsabit and also denying her access to him.
20. In reply, the 1st respondent had asserted that the applicant had not taken good care of the subject and was only interested exclusively enjoying his salary and inheriting his property. He confirmed that the subject had been unwell from 2016 and he had intervened in June 2025 to enable the subject access better care. He thus urged the court not to grant the orders sought.
21. Both parties agree that the subject is critically ill and in need of guardianship. Medical evidence availed to the court puts it beyond doubt that the subject is incapacitated on account of his illness and there is need of a guardianship order. On account of the foregoing I find that the subject is indeed suffering from a mental illness under Section 26 of the *Mental Health Act* and is therefore in need of a guardian.
22. On the 2nd issue as to who should be appointed as “guardian ad litem” to manage the affairs of the subject. The law is that preference will be given to the relative of the subject to act as guardian ad litem. The applicant and the 1st respondent are the 2nd wife and son of the deceased respectively, and therefore, both qualify to be appointed as Guardians ad litem.
23. Lastly as to who should have physical custody of the subject, the respondent confirms that the applicant has had the sole responsibility of taking care of the subject from 2016 to June 2025, when with the help of the police and elders managed to take over on the basis that he was in a better position to give the subject better health care access.
24. Based on his own pleadings and annexures, and despite acknowledging that the subject is mentally incapacitated, the 1st respondent has already changed the subjects salary account from KCB Moyale to Cooperative Bank Ltd Marsabit, and from the onset is more concern about sharing of his father’s wealth, than his health. He has also not showed any effort he made between 2016 to 2025 to help his father. His act of switching accounts of a mentally ill person act is illegal abinitio and imputes bad faith on his part.
25. On the other hand, despite the heavy burden, she has borne, the applicant remained true to her matrimonial vows in taking care of the subject herein for over nine (9) year of his illness. Beyond



physical care she has demonstrated a track record of acting in his best interests, and thus can be trusted with making decisions to safeguard the subject's health and wealth.

C. Disposition

26. The upshot is that, I do find and hold that the Application dated 27th August 2025 has merit and allow it on the following terms.
- a) ADH is hereby declared as suffering from a mental disorder under Section 26 of the *Mental Health Act* (Cap 248).
 - b) WLH and RA are hereby appointed under section 27 of the *Mental Health Act* as the joint Guardians of ADH
 - c) WLH and RA are hereby appointed manager of the estate of ADH under Section 28 of *Mental Health Act* to manage his estate including any such description of moveable or immovable property, money, debts and legacies, 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.
 - d) Pursuant to this appointment WLH And RA shall deliver to court and the public Trustee, within 6 months, an inventory of the property belonging ADH .
 - e) In accordance with Section 27(4) of the *Mental Health Act*, 2022 the Guardians shall cause within 30 days the publication of notice in the Gazette, informing the public of their appointment as the manager of the estate ADH .
 - f) The Applicant WLH , will had physical custody of the subject ADH and will grant the 1st respondent and his other siblings' access to see their father.
 - g) For avoidance of doubt both guardians' ad litem will have the joint responsibility of making sure the subject accesses medical care and continues treatment.
 - h) Based on the provisions of Order 3 & 3A of the *Civil procedure Act*, I do hold and declare that the 1st respondents act of transferring the subject's salary account from KCB Moyale to Co-operative Bank-Marsabit, is null and void abinitio, as the subject did not have mental capacity to approve the same.
 - i) The County Secretary Marsabit County and Secretary to Marsabit Public service Board-Marsabit are directed to stop any further salary payments to the subjects Cooperative Bank Account and reverse the same to the subject's account held at KCB Moyale.
 - j) For avoidance of doubt, the KCB Account will be jointly operated by the two guardians ad litem herein.

27. Each party will bear their Own costs of this Application

28. It is so ordered.

READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 21ST DAY OF OCTOBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 21st day of OCTOBER, 2025.



In the presence of;

.....for Applicant

.....for Respondent

.....Court Assistant

