



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC MISC. APP. NO. 14 OF 2012**

**IN THE MATTER OF: A PETITION FOR THE APPOINTMENT OF A  
GUARDIAN AND MANAGER FOR A M  
A M AND HIS ESTATE**

**IN THE MATTER OF: A M A M(A PERSON SUFFERING FROM MENTAL DISORDER)**

**IN THE MATTER OF: THE MENTAL HEALTH ACT CAP 248**

**BETWEEN**

**G A D.....PETITIONER**

**=VERSUS=**

**A M A M.....RESPONDENT**

**AND**

**B M A.....INTERESTED PARTY**

**J U D G M E N T**

**Introduction:**

1. The Petition before me is the one dated 26<sup>th</sup> November 2012 and filed on 27<sup>th</sup> November 2012.
2. The Petitioner has averred that the Respondent is her cousin and that he is the son of F M M who is indisposed suffering from server Rheumatic Arthritis with cormobid joint deformation.
3. According to the Petitioner's Petition, the Respondent, who is the subject herein, suffers from mental illness and has suffered from the said condition in excess of four years.
4. The Petitioner has averred that when the Respondent's father died, he left a parcel of land known as Lamu/Block [*particulars withheld*] (the suit property) and that the said property is now a subject of several suits in Lamu and Malindi; that no administration of the Estate of the Respondent's father was ever conducted and that the Interested Party, with the full knowledge of the mental incapacity of the subject, entered into a sale agreement on 12<sup>th</sup> October 2011 and

purportedly purchased the suit property.

5. The Petitioner has averred that the said purported sale is void because the Respondent does not own the suit property and secondly because he was not compos mentis and therefore incapable of creating binding legal relations on the said property or at all.

6. In the Petition, the Petitioner is praying to be appointed by this court as a guardian ad litem for the Respondent; to be appointed as a guardian; to be appointed as the manager of the Estate of the subject and for a permanent injunction restraining the Interested Party from demolishing, altering, developing, constructing or in any other way interfering with the house on Lamu/Block **[particulars withheld]** and for costs.

7. In answer to the Petitioner's Petition, the Interested Party deponed that on 12th October 2011, he bought a house without land from the Respondent for Kshs.900,000; that he brought down the swahili house which was made of mud and makuti and started erecting a permanent block house with concrete, pillars and slab and that before signing the agreement, the Respondent gave him a copy of an affidavit as a proof of ownership of the house by him.

8. The Interested Party deponed that after he paid the Respondent the purchase price of Kshs.900,000, the Respondent used the sum of Kshs.700,000 thereof to buy another house from one Abbas Abubakar Alwi and the sum of Kshs.100,000 was used to connect water and electricity.

9. According to the Interested Party, he bought a house without land from the Respondent; that the land on which the house stood on belongs to H M H and 6 others and that the Petition has been filed as a plan to set aside the Sale Agreement between him and the Respondent.

10. It is the Interested Party's case that the Respondent is of sound mind capable of handling his own affairs.

11. The Petition proceeded by way of viva voce evidence as directed by the court. The Petitioner together with three witnesses testified, However the Interested Party did not testify.

**The Petitioner's case:**

12. Dr. Charles Mwang'ome, PW1, informed the court that he is a Consultant Psychiatrist.

13. It was his evidence that he knows the Respondent whom he examined on the 7<sup>th</sup> April, 2014.

14. It was the evidence of PW1 that the Respondent has been under his care for the past six years and that he suffers from mental illness.

15. It was his evidence that when he assessed the Respondent on 7<sup>th</sup> April 2014, he was mentally sick and he advised his handlers to take him to the psychiatric unit at the District hospital.

16. PW1 produced the report he prepared in respect of the Respondent.

17. PW2 informed the court that the Respondent is her son and the Petitioner is her niece.

18. It was the evidence of PW2 that the Respondent is mentally ill and that he has been unwell since he was twelve (12) years old.

19. It was the evidence of PW2 that although he took the Respondent to several hospitals, including Port Reiz in Mombasa, the Respondent would disappear from the said hospitals.

20. It was the evidence of PW2 that the house in dispute was owned by the Respondent's late father that the Respondent sold all the items that were in the house.

21. According to PW2, after the Respondent sold all the items in the house, he proceeded to sell the house when he was mentally unstable.

22. In cross-examination, PW2 stated that she was not present when the Respondent sold the house. PW2 stated that the Respondent could not have inherited his father's estate because of his unstable mental status.

23. PW3 informed the court that the Respondent is her cousin.

24. It was the evidence of PW3 that on 12<sup>th</sup> October 2011, the Chief and the police went to the subject house and picked all the documents in respect to the succession cause. When she went to report the issue to the District Commissioner, the DC informed her that he (the DC) was the one who had allowed the sale of the house.

25. It was the evidence of PW3 that the Interested Party had given to the Respondent another house in exchange of the house on the suit property.

### **Submissions:**

26. The Petitioner's counsel submitted that the Petitioner has demonstrated that she has no interest in competition with those of the subject; that the Petitioner is willing to manage the subject as well his estate and that the jurisdiction of this court is donated by the provisions of Sections 26, 27, and 28 of the Mental Health Act.

27. Counsel submitted that the subject was entitled to the house on Lamu/Block *[particulars withheld]* and that the Interested Party had sought to acquire it through dubious means.

28. Counsel submitted that in the absence of an administrator of an Estate and appointment of a person to manage such an Estate under the law of succession, no valid transaction related to the suit property could be made. Counsel relied on the case of **Touristik Union International & Another Vs Jane Mbeyu & Another (1993) e KLR.**

29. The Interested Party's advocate did not file his submissions.

### **Analysis and findings:**

30. The evidence before this court shows that on 12<sup>th</sup> October 2011, the Respondent entered into a sale agreement with the Interested Party for the sale of a house without land at a consideration of Kshs.900,000. The agreement was witnessed by one of the registered proprietors of the land, the Senior Chief and two other persons.

31. The question for determination is whether the Respondent had the capacity to enter into the said agreement.

32. According to the evidence of DR. C.M. Mwangome, a consultant psychiatrist, he has been treating the Respondent for paranoid schizophrenia for the last six years.

33. Dr. Mwangome informed the court that when he observed the Respondent on 7<sup>th</sup> April 2014, he concluded that the Respondent is still suffering from mental disorder. PW1 advised the Respondent's relatives to have the Respondent admitted in a psychiatric unit in the District hospital.

34. The evidence by PW1 that the Respondent has been mentally ill for the past six years was not controverted by any other expert evidence. In the circumstances, I am satisfied that the Respondent has been mentally ill for the past six years, and was mentally ill when he purported to enter into the agreement of 12<sup>th</sup> October 2011 with the Interested Party.

35. The Mental Health Act is the law that relates to the care of persons suffering from mental disorder and for the management of their estates.
36. According to the provisions of Section 26 of the Act, the Court may make orders for the guardianship of any person suffering from mental disorder by any near relative or by any other person.
37. Section 27 of the Act provides that the court may also appoint a manager for the management of the estate of a person suffering from a mental disorder.
38. Having found that the Respondent is suffering from mental disorder as defined by Section 2 of the Mental Health Act, this court appoints the Petitioner to be a guardian and manager of the Interested Party's estate.
39. I have already found that as at 12<sup>th</sup> October 2011, the Respondent had no capacity to sale the house that was standing on parcel of land number LAMU/BLOCK *[particulars withheld]* because of his mental status. Indeed, the Respondent could not pass any interest in the said house considering that the house was owned by his late father and he was a person of unsound mind.
40. Section 2(3) and (4) of the Law of Succession Act is clear that the Estate of the Respondent's father must be administered before the same could vest in anyone, including the subject. It does not matter that the Respondent was the only beneficiary of the Estate of his late father.
41. If the deceased and the Respondent profess the Muslim faith, then it is the Kadhi's court that shall have the jurisdiction to determine the question of inheritance viz a viz the suit property pursuant to the provisions of section 5 of the Kadhi's Act and Article 170 (5) of the Constitution.
42. Indeed, pursuant to the provisions of Section 82(b)(ii) of the Law of Succession Act, immovable property cannot be sold before the confirmation of grant. Consequently the purported sale of the suit premises by the Respondent to the Interested Party was null and void ab initio because he is not the legal administrator of the Estate of his late father. The sale agreement of 12<sup>th</sup> October 2011 is therefore null and void.
43. For those reasons, I allow the Petitioner's Petition dated 26<sup>th</sup> November 2012 in the following terms.

- (a) The Petitioner be and is hereby appointed guardian ad litem for the subject A M A M.**
- (b) The Petitioner be and is hereby appointed as a guardian of the subject.**
- (c) The Petitioner be and is hereby appointed the Manager of the Estate of the subject.**
- (d) A permanent injunction be and is hereby issued restraining the Interested Party, his servants and or agents from demolishing, altering, developing, constructing on or in any other way interfering with the house on Lamu/Block/ *[particulars withheld]*.**
- (e) The Sale Agreement of 12<sup>th</sup> October 2011 be and is hereby declared null and void.**
- (f) The Interested Party to pay the costs of the Petition.**

Dated and delivered in Malindi this 22<sup>nd</sup> day of **May**, 2015.

**O. A. Angote**

**Judge**