



REPUBLIC OF KENYA



In re MM (A Mentally Challenged Person) (Civil Miscellaneous Application E172 of 2024) [2025] KEHC 691 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL MISCELLANEOUS APPLICATION E172 OF 2024
FN MUCHEMI, J
JANUARY 30, 2025
IN THE MATTER OF MM (A MENTALLY CHALLENGED PERSON)**

**IN THE MATTER OF
DAVID MUTUKU MAKAU APPLICANT**

JUDGMENT

Brief Facts

1. By a Petition dated 11th November 2024 the petitioner invoked Sections 26, 27 and 28 of the *Mental Health Act*, Cap 248 Laws of Kenya and sought the following prayers:-
 - a. That M.M. alias M.N.N (the subject) be declared to be suffering from a mental disorder as defined in the *Mental Health Act*.
 - b. This Honourable court be pleased to appoint the petitioner as Guardian of M.M.
 - c. Upon the applicant being appointed as the guardian of the subject, this Honourable Court be pleased to authorize the applicant to institute an injury compensation claim on her behalf and the proceeds be utilized for the benefit and upkeep of the subject.
2. The matter proceeded by way of viva voce evidence.
3. PW1, DMM testified that he is a son of the subject. The witness testified that the subject was involved in a road traffic accident on 30th November 2021 at Kahuruko Area in Ithanga, Muranga County where she sustained severe injuries. The witness further testified that from the injuries sustained in the accident, she developed hearing difficulties and would need hearing aids whose estimated cost is Kshs. 90,000/-. PW1 testified that two years after the accident, the subject was examined by a psychiatrist, Dr. Kendi L.M. who opined that the subject is mentally incapacitated as a result of dementia and therefore needs a significant next of kin to assist her with decision making and other activities of daily living.



4. PW1 further testified that following the injuries sustained by the subject, she is entitled to a claim for compensation but she is not in a position to sue and to pursue the case given her current mental status. The witness further testified that the cost of the hearing aids is too expensive for her to afford and thus she intends to file an injury compensation case on behalf of the subject. If the case for damages will be successful, then PW1 plans to buy the hearing aids, and take the subject for her medical appointments as well as provide for her maintenance.
5. PW2, RM testified that he is a son of the subject who was involved in a road traffic accident on 30th November 2021 at Kahuruko area in Ithanga where she sustained severe injuries. The witness further testified that he and his siblings desire to file an injury compensation claim on behalf of the subject and they had consented to the applicant being appointed as guardian for the purposes of the said intended suit.
6. PW3, NM testified that she is a daughter of the subject who was involved in a road traffic accident on 30th November 2021. The witness further testified that she and her siblings desire to bring an injury compensation claim on behalf of the subject and they consent to the applicant being appointed as guardian for the purposes of the said intended suit.

Issues for determination

7. The main issues for determination are as follows:-
 - a. Whether the subject should be declared as suffering from mental disorder pursuant to the [Mental Health Act](#), Cap 248.
 - b. Whether the applicant should be appointed as guardian to the subject.

The Law Whether the subject should be declared as suffering from mental disorder pursuant to the [Mental Health Act](#), Cap 248.

8. The [Mental Health Act](#) provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons.
9. Section 2 of the Act defines “person suffering from mental disorder” 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 psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.”
10. Section 26 provides for custody, management and guardianship
 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.
 2. Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate of the guardian of any such person.
 3. Where upon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is



capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

11. According to the medical report by Dr. Linet Kendi, a consultant psychiatrist practicing at Trinity Wellness, dated 24th October 2024, the patient is suffering from dementia. The medical report indicated that the subject has had progressive memory loss, forgetfulness, hearing loss, inability to perform basic tasks. The medical report further indicated that the subject is mentally incapacitated and therefore a responsible person preferably, a next of kin is required to assist her with taking the necessary care and manage the affairs of the subject.
12. It is apparent from the medical report that the subject is suffering from a mental disorder as per Section 2 of the Mental Act and further a medical condition contemplated under Section 26 of the Act and is thus incapable of managing her own affairs.

Whether the applicant should be appointed as guardian to the subject.

13. Section 26 of the *Mental Health Act* gives court the power to make orders 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.
14. The applicant has stated that he is a son of the subject. Two of the applicant's siblings filed affidavits in support of the petition. They testified that they are in agreement that the applicant should be appointed the legal guardian of the subject. All the three witnesses confirmed that the subject was involved in a road traffic accident on 30th November 2021 and presented a police abstract in support. Furthermore, the applicant presented medical report by Dr. G.K. Karanja who examined the subject after the road traffic accident and found that she sustained injuries following the said accident which would require the subject to be fitted with hearing aids estimated at a cost of Kshs. 90,000/-. The subject was presented in court whereby she told the court that she was involved in a road traffic accident but could not remember the date of the occurrence of the accident. Neither could the subject answer critical questions put to her by the court due to her cognitive decline and memory loss.
15. The application is brought under Order 32 Rule 15 of the Civil Procedure Rules which provides for appointment of a guardian ad litem for minors and mentally unsound adults for representation in suits pending in court. This court has power to grant the relevant orders should it be convinced that the subject is mentally unsound. This incapacity has been confirmed through the medical report of Dr. Karanja.
16. There being no objection from the siblings of the applicant and the course of the application being well supported as required under the law, it is my considered view that the prayer for appointment of guardian ad litem is well grounded and merited. Consequently, the petition dated 11th November 2024 is allowed in the following terms:-
 - a. That the subject MM is hereby declared mentally incapacitated under Section 26 of the *Mental Health Act*.
 - b. That the petitioner DMM is hereby appointed the guardian ad litem of the subject to manage her affairs and to file a suit for injury compensation on behalf of the subject.
17. That there shall be no order as to costs.



**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30TH DAY OF
JANUARY 2025.**

F. MUCHEMI

JUDGE

