



REPUBLIC OF KENYA



**In re PO Mc' O (Subject) (Adoption Cause E019 of 2024)  
[2025] KEHC 3605 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3605 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
ADOPTION CAUSE E019 OF 2024  
SM MOHOCHI, J  
MARCH 25, 2025**

**IN THE MATTER OF**

**JAW ..... PETITIONER**

**RULING**

1. Before me is a petition dated 19<sup>th</sup> September 2024 filed pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rule (1, 3, 8 & 10) of the Civil Procedure Rules 2010 and all the enabling provisions of the Law contending that;
2. That the Petitioner is the legal wife of PO Mac' O, the subject herein who is an adult of 68 years old, having been born in 1956, a medical doctor and is undergoing mental challenges which has rendered him immobile with loss of memory and incoherent speech thus cannot do anything.
3. That the subject, lived a normal life, worked as a medical doctor at Nakuru Level 5 Hospital and at his Private Clinic in Nakuru Town at House, before developing a mental health complications and was with hit a stroke that has rendered him completely immobile and in coherent in his speech.
4. The subject had pending suits in various Courts and other development transaction but due to the ill health, he cannot conduct the same. He cannot make any decisions regarding his daily affairs and management of his properties thus forcing the petitioner to step in as his wife but there are those that she cannot do without the sanction of the Court under the *Mental Health Act*.
5. That the medical condition by experts has now been considered as chronic and irreversible.
6. The condition the subject is suffering from cannot allow him to carry out any legal transaction.
7. The petitioner confirms through the medical documents that the subject's condition has now reached a point that requires a guardian to do everything on behalf of the subject. This will enable the smooth running of the subject's daily life.
8. The petitioner therefore seeks;



- i. To be appointed guardian ad litem to the subject Peter Opiyo Mac Odero.
  - ii. To be appointed a signatory to the subject's accounts
  - iii. Spent
  - iv. The Court makes such orders as it considers justice in the circumstances of this petition.
9. The Court had on the 4<sup>th</sup> November 2024 directed that the Applicants file a Supplementary Affidavit annexing a Psychiatric Medical Examination Report certifying the subject's mental status.
  10. The Applicant complied to this direction by filing the supplementary Affidavit dated 13<sup>th</sup> December 2024 annexing the Psychiatric Report dated 3<sup>rd</sup> December 2024 by Dr. Njau J.W, a consultant psychiatrist.
  11. The issue that this Court has to consider is Whether the subject should be declared as suffering from mental disorder pursuant to the *Mental Health Act*, Cap 248 and secondly what relief(s) is/or are available?

### **The Law**

12. 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.
13. Section 2 of the Act had until 2022 defined a person suffering from mental disorder as;
 

“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.”
14. With the amendments by Mental Health (Amendment) Act, 2022 (*Act No. 27 of 2022*) on 11<sup>th</sup> July 2022 we no longer have any definition of what would constitute a “mental disorder”
15. Section 26 provides for custody, management and guardianship where 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.
16. 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.
17. 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.
18. According to the medical report by Dr. Njau J.W, a consultant psychiatrist in his Psychiatric Report dated 3<sup>rd</sup> December 2024 he does not explicitly diagnose the subject to be a person with mental illness, the doctor describes the subject as being “mentally unstable” which cannot presuppose a permanent



situation, or constitute a mental disorder or in fact as to whether an inference of mental incapacitation can be drawn.

19. The Doctor thus concludes;

“XXXX He is a 67 years old male who suffers from a left sided Hemiplegia and vascular dementia, which has caused significant decline from his previous level of functioning. He is currently bed ridden, have no capacity of undertaking self-care activities such as toileting, bathing or feeding himself. Due to the stroke he has impaired cognitive functions such as memory, concentration, attention and speech. He has no capacity to make sound judgment, to weigh, to reason out or make any informed decision.

20. The Supreme Court in the case of Hon Justice Mary Muthoni Gitumbi v the Tribunal appointed to Investigate the Conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Lands Court of Kenya established guidelines for Courts to follow in matters which involve an assessment of mental incapacity:

“(73) This Court, guided by prevailing social needs as well as relevant case law as developed in comparative jurisdictions, is well aware of the necessity to strike a balance, on the one hand, of the rights of an individual in a free society and, on the other hand, the need to protect the individual, employment environment, and society at large, from the adverse effects of mental illnesses and disorders.

Therefore, in determining cases of mental incapacity, and bearing in mind that conclusions cannot be transposed from one case to another, we establish the following guidelines for Courts to follow in matters which involve an assessment of mental incapacity:

- i. Mental incapacity includes but is not limited to a person’s inability to make a decision, understand information about a decision, remember information, use the information to make a decision, or communicate a decision.
- ii. Mental incapacity can result from mental illness but it does not necessarily follow that mental illness equals mental incapacity.
- iii. Mental incapacity must be diagnosed by a qualified professional.
- iv. A Court is bound to consider whether an employer caused the establishment of an independent medical board of duly qualified members to determine whether the employee is, by reason of an infirmity of mind, incapable of discharging the functions of the relevant office.
- v. If an employee’s mental illness is adversely affecting their ability to perform their duties, in some instances, the employer, following due process, may terminate the employee’s contract of employment or recommend the employee’s removal from office.
- vi. A Court must consider the diagnosis by a qualified professional, and medical expert evidence and assess whether, on a balance of probabilities, the employee’s mental illness affects their work duties.



- vii. Where a person is deemed to lack mental capacity, any interference with his or her fundamental rights and freedoms must be the least restrictive possible."

- 21. The Mental Health Act defines "person with mental illness" to mean;
  - "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 behavior;"
- 22. This Court does not consider a stroke in itself as a mental illness, however the left sided Hemiplegia is a neurological disorder characterized by paralysis or weakness on one side of the body. and vascular dementia is a type of dementia caused by reduced blood flow to the brain, leading to problems with thinking and memory, it tends to worsen over time, and there is no known cure, but treatments can help manage symptoms and slow down the progression.
- 23. This Court will not hesitate to find that, the subject is mentally incapacitated following multiple strokes and advanced age that has impaired cognitive functions such as memory, concentration, attention and speech, this is a degenerative condition that has no known cure and the subject therefore is subject to the protection of the law.
- 24. Having found and declared the subject to be mentally incapacitated thus suffering from a Mental Health Disorder, it is incumbent upon this Court to appoint a manager of the estate of the subject as provided for by law according to Section 26 above.
- 25. The Petitioner has shown that she is the wife of the subject therefore well placed to support himmake any decisions regarding his daily affairs and management of his properties
- 26. I thus find the Application and the Petition both dated 19<sup>th</sup> September 2024 merited and both are allowed as follows;
  - i. The Subject herein be and is declared as a person suffering from a Mental Health Disorder.
  - ii. The Petitioner herein is hereby appointed as Legal Guardian of the subject to forthwith manage and administer his estate in accordance with the Mental Health Act.

It is so Ordered

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 25<sup>TH</sup> DAY OF MARCH, 2025**

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**MOHOCHI S.M**

**JUDGE**

