



REPUBLIC OF KENYA



KENYA LAW
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**In re BMM (Miscellaneous Case E003 of 2024)
[2025] KEHC 5545 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CASE E003 OF 2024**

JN ONYIEGO, J

APRIL 30, 2025

**IN THE MATTER OF; AN APPLICATION UNDER
THE MENTAL HEALTH ACT SECTION 26 AND 27**

AND

**IN THE MATTER OF; AN APPLICATION BY JMM TO BE APPOINTED AS
THE MANAGER AND GUARDIAN AD LITEM OF BMM (THE SUBJECT)**

IN THE MATTER OF

JMM PETITIONER

JUDGMENT

1. By an amended petition dated 19.02.2025, the petitioner invoked sections 26 and 27 of the *Mental Health Act*, Cap. 248, Laws of Kenya seeking for prayers that she be appointed as next friend and guardian adlitem of BMM (hereinafter “the subject”) and that she be appointed as the manager of the affairs of the said subject.
2. The petition is supported by the petitioner’s affidavit sworn on even date in which it is deposed that she is the legal wife of the subject. That she sought to pursue and handle a civil suit seeking compensation for the injuries suffered by the subject in an accident which occurred on 24.01.2024 at Garissa. She averred that her father in law had previously sought for the orders of guardianship of the subject but unfortunately, he became very ill to proceed with same.
3. That the subject sustained multiple head and body injuries which rendered him physically immobile and mentally unfit and has been in the intensive care unit since the date of the accident (24.01.2024 to March, 2024). It was stated that in as much as he is currently out of the hospital, he is still battling multiple traumas including severe head and body injuries sustained as a result of the said accident.
4. Additionally, that as a result of the said accident, her husband suffered severe memory loss and physical immobility and has since become incoherent in his speech. That the foregoing has rendered him



incapable of comprehending any court proceedings or any other dealings of similar nature. She annexed a copy of a report by one Dr. Munga Edgar in support of her prayer for appointment as a guardian adlitem to represent her husband and manage the affairs of his estate.

5. During the hearing of the petition, PW1 Dr. Munga Edgar, a consultant psychiatrist stated that he knew the subject herein having previously examined him. That he was aware that previously the subject was admitted at the hospital for quite some time after being involved in an accident. He stated that as a result of the accident, the subject suffered mental complications thus cannot comprehend anything. That he suffers from hallucinations hence the need to have someone run his affairs. He produced his report dated 13.04.2020⁴ as evidence in support of the petitioner's case.
6. PW2, JM testified that the subject herein is her husband and that he is still in need of treatment after being involved in an accident. She stated that her husband can neither engage in any meaningful conversation nor can he manage his personal affairs. She urged this court to allow the prayers sought to enable her pursue compensation on behalf of the subject.
7. This court proceeded to independently examine the subject who was in a wheel chair but appeared partially okay in following court proceedings. Nevertheless, the doctor's opinion is more binding.
8. I have considered the petition herein and the evidence tendered. The only issue for determination is whether the subject therein is mentally incapacitated so as not to follow any court proceedings nor manage his affairs. It is trite that, the law governing the custody and guardianship of patients such as the subject and the management of their affairs is the [Mental Health Act](#), Cap 248. Section 26 of that Act provides: -

“Order 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 and 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.”

9. In the same breadth, Order 32 Rule 15 states that:

“The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by



the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.”

10. In the same breadth, the question of whether or not a litigant is competent to prosecute and/or testify in court is provided for under Section 125 of the Evidence Act, Cap 80. That Section provides as follows:
 - ‘(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.
 - (2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.’ (Underlines, mine).
11. In my humble view, the provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.’
12. Coming back to the case at hand, this court has carefully considered the evidence by the petitioner and Dr. Egdar’s testimony together with the medical report by the said Dr. dated 23.02.2024. The said report corroborates the evidence of the petitioner that the subject is a person of mental disorder.
13. The logical conclusion that one can draw from this medical report is that the subject is suffering from a mental disorder from which it remains unknown when he is unlikely to recover.
14. As already deliberated elsewhere in this judgment, the law governing the custody and guardianship of patients such as the subject and the management of their affairs is under section 26 and 27 of the Mental Health Act, Cap 248. Upon perusing the available evidence from this legal perspective, I am satisfied that a case has been made out for the petitioner to be appointed as the guardian of BMM and the manager of his affairs. That the patient (subject) is suffering from mental disorder and therefore incapable of managing his affairs.
15. It therefore follows that a manager appointed under the Act is deemed to be a trustee of the subject; this is so provided by subsection (4) of section 27 of the Mental Health Act which states: -
 - (4) For the purposes of this Act and the Penal Code (Cap. 63), a manager shall be deemed to be a trustee under any other law for the time being in force.
16. The above explains the reason why once the order for appointment is granted, a trust relationship is created between the petitioner and the subject and thus the subject’s estate that may be vested in him will only be held on behalf of and for the benefit of the subject. The grant of these orders does not in any manner grant the petitioner the right to transfer, sell or dispose any of the subject’s property unless through a court order.
17. As a consequence of the above, the petition herein is found meritorious and the petitioner is hereby appointed the guardian adlitem and next friend of BMM as well as the manager of the affairs of his estate.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF APRIL 2025

J. N. ONYIEGO
JUDGE

