



**RWW v AT (Family Miscellaneous Application E040 of 2024)  
[2025] KEHC 8951 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8951 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
FAMILY MISCELLANEOUS APPLICATION E040 OF 2024**

**PN GICHOHI, J**

**JUNE 25, 2025**

**IN THE MATTER OF THE MENTAL HEALTH ACT (CAP 248) LAWS OF  
KENYA  
AND**

**IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF  
GUARDIAN AND MANAGER OVER THE AFFAIRS OF THE ESTATE OF RWW**

**BETWEEN**

**RWW ..... APPLICANT**

**AND**

**AT ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 20<sup>th</sup> November, 2024 and brought pursuant to Section 26, 27, 28 and 29 of the [Mental Health Act](#), Section 1A, 1B and 3A of the Civil Procedure Rules, the Applicant seeks Order that:-
  - a. Spent.
  - b. The Subject RWW be and is hereby adjudged a person suffering from mental sickness under the Mental Act.
  - c. Spent.
  - d. RWW be appointed as the guardian of RWW, the patient herein suffering mental disorder in as far as the patient's personal and medical care and maintenance is concerned.
  - e. The honourable court be pleased to appoint RWW as the guardian manager of RWW the Subject herein suffering mental disorder.



- f. The Honourable courts do issue any other order it deems just, expedient and reasonable in the best interest of the Subject herein.
- g. Each party to bear their own costs.
2. The grounds are on the face of the application and Supported by the Affidavit of the Applicant sworn on 20<sup>th</sup> November, 2024. The Applicant stated that she is the biological daughter of RWW, the Subject herein, who is alleged to be suffering from mental disorder and that she is the one who has been covering the Subject's personal and medical expenses.
  3. She stated that the Respondent herein, who is also the Subject's biological son, is interfering with the Subject's medical needs and care by forcefully discharging the Subject from the hospital against medical advice.
  4. It is her case that the Subject's mental state makes her vulnerable to exploitation and incapable of protecting her own interests, necessitating a guardian. Further that there is an imminent danger of infringement of her right to medical care, leading to irreparable harm, unless the court intervenes.
  5. She stated that she has been residing outside Kenya but has since relocated to Kenya to personally care for her mother due to her health who was diagnosed with senile dementia, high blood pressure, and diabetes mellitus.
  6. However, that the Respondent has been interfering with the Subject's health by forcefully discharging her from Nakuru Specialist Hospital on 1<sup>st</sup> November, 2024, against medical advice, which discharge deteriorated the Subject health. Further that on 10<sup>th</sup> November, 2024, the Applicant took her mother to Nakuru Heart Centre hospital, where she was admitted. However, on 13<sup>th</sup> November, 2024, the Respondent wrote a letter to the hospital insisting on the Subject's discharge for home care. Consequently, the Subject was again forcefully discharged against doctors' advice.
  7. The Applicant reiterated that the Subject's general health continues to deteriorate, requiring immediate medical intervention and her mental state makes her vulnerable to exploitation and incapable of protecting her own interests. The Applicant believes court intervention is crucial to prevent further harm and infringement of her mother's right to medical care.
  8. The Respondent filed his Replying Affidavit 10<sup>th</sup> January, 2025 and in opposition to this application. He termed the Application unmeritorious, brought in bad faith, bad in law, incompetent and an abuse of the court process.
  9. He asserted that the Subject has been living under the care of his elder brother, Daniel Mathenge, with assistance from all other siblings for her upkeep, while the Applicant was residing in the United States of America and only visits Kenya for short periods.
  10. He claimed that the Applicant obtained a grant for their father's estate without the family's consent, using a Chief's letter that was given on the understanding that the family was in agreement. That since the issuance of that Grant, their family relationship has become shaky, with the Applicant allegedly bulldozing others and ignoring family arrangements for managing and distributing the estate.
  11. The Respondent further claimed that the Applicant has maliciously taken the Subject to hospital for medical care, only to leave the siblings to pay the bills. He also recalled an incident in December where the Applicant, through an uncle, complained to the area Chief about the Subject's neglect, but the Chief's visit confirmed that the complaint was untrue, as the Subject was under homecare with a nurse and in good, stable condition, only needing normal check-ups.



12. He confirmed that his mother has been suffering from dementia for over five years, and the family had no disagreements regarding her medical attention and maintenance until the Applicant filed this unexpected guardianship application. In addition, that the Subject visits Nakuru County Referral & Teaching Hospital weekly for health monitoring, an arrangement agreed upon by all the children.
13. He stated that medical expenses for the Subject and her maintenance have been sufficiently provided and are derived from their late father's Estate as ordered by the Court in Succession Cause F052 of 2022 via a consent order dated 13<sup>th</sup> October, 2022, and reaffirmed on 26<sup>th</sup> November, 2024. However, the family has been unable to access these funds due to the Applicant frustrating the process.
14. The Respondent further stated that the Court ordered a medical check-up for the Subject at Aga Khan Hospital Nakuru, but the facility did not offer the required services and the parties then agreed to go to Nakuru Referral & Teaching Hospital on 24<sup>th</sup> December, 2024, where the Applicant allegedly caused a commotion, calling the Police with false claims of a "Mungiki invasion" to disrupt the check-up, as confirmed by the Area Chief's statement.
15. He added that the Doctors on both 23<sup>rd</sup> and 24<sup>th</sup> December, 2024, found the Subject medically stable and did not recommend urgent medical attention, as the family has proper arrangements for her care.
16. He reiterated that seven of the Subject's children have collectively taken care of her well-being until early last year when the Applicant became an administrator and diverged from family arrangements, despite all siblings being in agreement with the current setup and the estate being capable of providing for the Subject's maintenance.
17. He argued that the Applicant is unsuitable for guardianship because her actions are self-serving. Furthermore, he asserted that the Applicant has approached the Court deceitfully by fabricating claims of neglect and urgent medical need for the Subject. Accordingly, the Respondent urged this Court to dismiss the application with costs.

### **Applicant's submissions**

18. She submitted that the Court is empowered to grant the Orders sought in the Application herein under Section 26(1)(a)(b), Section 27, and Section 28 of the *Mental Health Act*.
19. While, citing Re NMK [2017] eKLR, the Applicant highlighted three guiding factors for the court when applying Sections 26 and 27 of Cap 248, where the High Court held; -
 

“In considering an application brought under sections 26 and 27 of the *Mental Health Act*, the Court is guided by three main factors: There must be medical evidence warranting the determination by the Court that the Subject suffers from mental disorder; The person to be appointed to be either a Guardian or Manager must be fit to be so appointed; The Court must be satisfied that a proposed Manager will utilize her powers for the benefit and welfare of the Subject.”
20. On that note, she submitted that the Subject requires a guardian based on presented medical reports dated 15<sup>th</sup> November, 2024, which confirmed that the Subject suffers from Dementia/Hypertension/bed sores and required in-patient care due to bed-sores (secondary to Neglect/Dementia).
21. Further that a subsequent medical report dated 24<sup>th</sup> December, 2024, by Dr. Wafula (Consultant Psychiatrist), stated that the Subject was unaware of her surroundings, unable to recognize her children, could not state why she was in the hospital, had poor time, person, and place judgment, and concluded that she has dementia and is unaware of her current state.



22. The Applicant argued that based on the medical reports, the Subject lacks the mental capacity as defined by Section 2 of the *Mental Health Act* Cap 248, which adversely affects her cognition and ability to care for herself or her affairs, thus necessitating the appointment of a guardian.
23. Furthermore, the Applicant cites Article 57 of the Kenyan Constitution, specifically Article 57(d), which guarantees the rights of elderly persons to receive reasonable care and assistance from their family and the state. She added that her commitment to the Subject's well-being aligns with this constitutional mandate.
24. She further submitted that the Subject needs someone to ensure regular check-ups and raised concerns regarding the Respondent's actions, including discharging the Subject from the hospital against medical advice.
25. She asserted her suitability as guardian due to financial stability, a history of covering medical bills and other expenses for the Subject, and willingness to relocate to effectively meet the Subject's needs.
26. In conclusion, she submitted the Subject's welfare should be prioritized by appointing a guardian acting in her best interest and therefore, the family disputes should not hinder proper care of the Subject herein.

### **Respondent's Submissions**

27. He identified three issues for determination as follows:-
  - i. Whether the application is defective for want of form.
  - ii. Whether the Subject's health condition qualifies her as a person with mental illness within the provisions of the *Mental Health Act*.
  - iii. Whether the Applicant has met the threshold for appointment as guardian and manager of the Subject's estate.
28. The Respondent argued that suits under the *Mental Health Act* should be made by way of a Petition, not a Notice of Motion, and should follow the *Civil Procedure Act* using an Originating Summons. Furthermore, the application allegedly fails to adhere to the mandatory provisions of Section 26(2) of the *Mental Health Act*, which requires an affidavit setting out the grounds, particulars of properties and relatives, and a certified true copy of admission or treatment particulars.
29. He contended that the Subject, RWW, is suffering from senile dementia, diabetes mellitus, and bedsores, as indicated by the doctor's report, and clarified that senile dementia is an age-related condition distinct from mental illness.
30. He asserted that the Applicant has not provided evidence to substantiate the claim of mental instability, and under Section 107 of the *Evidence Act*, the burden of proof lies with the party making the claim. The court may require the individual to appear for evaluation or a medical report to confirm mental illness, as reiterated in *MMM v AMK* [2016] KEHC 4741 (KLR).
31. He contended that the Subject Ruth is receiving active treatment for dementia and diabetes, is in stable condition, and has not been diagnosed with any mental illness. That she resides with her children who provide excellent care, a fact corroborated by a recent visit from the local chief. Further that all siblings are united in financially supporting and maintaining their mother, ensuring she receives necessary medical treatment and care.



32. He submitted that the Applicant's intentions are malicious and self-serving, designed to frustrate the siblings and their ailing mother, and that claims of inadequate care are unfounded fabrications.
33. It is argued that guardianship applications must genuinely serve the best interests of the individual, and if not, they must be dismissed, as established In re NMK (Subject) [2017] KEHC 921 (KLR), that reiterated that the paramount consideration in granting guardianship for individuals with mental infirmity must be their welfare and best interests.
34. It is his submissions that this application is without merit, constitutes an abuse of court process, and should be dismissed. Citing the decision in the case of MMM v AMK [2016] KEHC 4741 (KLR) and Dickson Daniel Karaba V John Ngata Kariuki & 2 Others [2010] EKLR, the Respondent further submitted that dismissal on technicality is justified when the suit undermines the court's integrity. The Respondent therefore urged the Court to dismiss the case with costs to him.

### **Analysis and determination**

35. After considering the application, affidavits and submissions herein, the issues for determination arising are:-
  1. Whether the suit herein is defective in form for being instituted through a Notice of Motion instead of a Petition.
  2. Whether the Subject suffers from a mental disorder as provided under Section 26 of the *Mental Health Act*, Cap 248 of the Laws of Kenya.
    3. Whether the Applicant should be appointed as the manager of the estate of the Subject, as well as guardians of the Subject as sought in the Application.
    4. Who bears costs of this application.

### **Whether the suit herein is defective in form.**

36. As noted herein, this Court was moved solely by way of a Notice of Motion. Faced with a similar application in Re NS [1972] EA 292, Harris J nullified proceedings commenced by Originating Summons under the *Mental Health Act*, stating that an inquiry into whether a person is suffering from mental disorder can only be initiated by petition.
37. Similarly, the current application, which seeks orders under the *Mental Health Act*, primarily to adjudge the Subject as a person suffering from mental illness and subsequently appoint the Applicant as the Guardian and manager of her Estate, is procedurally flawed.

Whether the Subject suffers from a mental disorder as provided under Section 26 of the *Mental Health Act*, Cap 248 of the Laws of Kenya.

38. In considering an application brought under Sections 26 and 27 of the *Mental Health Act*, the Court is guided by three main factors, that is:-
  1. There must be medical evidence warranting the determination by the Court that the Subject suffers from mental disorder.
  2. The person proposed to be appointed as either a Guardian or Manager must be fit for such an appointment.



3. The Court must be satisfied that a proposed Manager will utilise their powers for the benefit and welfare of the Subject.
39. Further, Section 2 of the *Mental Health Act* defines a person with mental illness as:-

“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.”
40. Sections 26 and 27 of the *Mental Health Act* outline the clear procedures for applying for court orders to manage and administer the estate of a person with mental illness. Such an order must be made to the court, with priority given first to a supporter of the person with mental illness, and then to their representative if no supporter has been appointed.
41. The Court is empowered to issue various orders for the administration and management of the estate. These orders include provisions for the maintenance of the person with mental illness, the maintenance of their dependent immediate family members, and the payment of their debts.
42. What is crucial is that the Court can appoint a manager for the estate to safeguard the person’s property. This manager can be either the supporter or representative of the person with mental illness.
43. In this particular case, the Applicant attached three documents to her application. The first is a “Leaving Against Medical Advice (LAMA) Form,” signed by three doctors on 1<sup>st</sup> November, 2024, alleging that the Respondent discharged the Subject from Nakuru Specialist Hospital without medical authorization. The second document is a letter from Nakuru Heart Centre dated 12<sup>th</sup> November, 2024 drawn by the Respondent and addressed to Dr. Ogada, seeking to discharge the Subject for home management.
44. The final document is a medical report dated 15<sup>th</sup> November, 2024, indicating the Subject’s diagnosis as NIDDM (Non-Insulin Dependent Diabetes Mellitus), Dementia, hypertension, and bedsores. This report further indicates that the patient is faring well but requires inpatient management, particularly for bedsores secondary to neglect.
45. The Applicant also alluded to a medical report dated 24<sup>th</sup> December, 2024, by Dr. Wafula, a consultant psychiatrist, allegedly confirming the Subject’s disorientation and poor judgment, and recommending a brain MRI for the dementia. However, this specific report was not furnished to this Court.
46. Conversely, following directions by this Court dated 19<sup>th</sup> December, 2024, for the Subject to undergo medical assessment, the Respondent filed a medical report from Nakuru County Referral & Teaching Hospital dated 3<sup>rd</sup> January, 2025. This report indicated that the Subject ( RWW) is aged 78 years , is a patient under follow-up for various ailments, including diabetes and hypertension, and is on treatment. An echocardiogram and ECG done on her showed anteroseptal myocardial infarction with low voltage on chest leads, and features consistent with hypertensive heart disease with mild pulmonary hypertension.
47. In conclusion, the report stated that the Subject has been initiated on medication for cardiac ailments and requires regular blood pressure and blood sugar monitoring at home.
48. It is noted that despite this Court’s explicit Orders issued on 19<sup>th</sup> December, 2024, neither the medical report dated 15<sup>th</sup> November, 2024, nor the one dated 3<sup>rd</sup> January 2025, makes any mention of the Subject undergoing psychiatric assessment.



49. Consequently, no Psychiatric Report has been filed before this Court and therefore, even if the Applicant had properly moved this Court by way of a petition as is required under the law, the reports tendered in support of the application do not substantiate the prayers sought, primarily because no medical report has been filed definitively ascertaining that the Subject is suffering from a mental illness as defined by the Act.
50. In these circumstances, the Application dated 20<sup>th</sup> November, 2024 is not only incompetent but also lack merit as there is no basis for appointment of a guardian manager as sought.

**Who bears costs of this Application.**

51. It is trite law that costs are within the discretion of the Court and in this matter, this is a family issue.
52. In conclusion therefore, the Notice of motion dated 20<sup>th</sup> November 2024 be and is hereby dismissed with no orders as to costs.

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

**PATRICIA GICHOCHI**

**JUDGE**

In the presence of;

Ms Kiprop for the Applicant

Ms. Wambui for Respondent

Kamau, Court Assistant

