



**In re JNCM (Miscellaneous Application E002 of 2023)
[2024] KEHC 1931 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS APPLICATION E002 OF 2023**

FN MUCHEMI, J

FEBRUARY 29, 2024

IN THE MATTER OF

BMN PETITIONER

JUDGMENT

1. By a Petition dated 21st November 2023, the Petitioner invoked Section 26 of the [Mental Health Act](#), Cap 248 Laws of Kenya and sought the following prayers:-
 - a. That the subject namely J.N.C.M. be adjudged to be suffering mental health and requires assistance, care and support for his wellbeing;
 - b. That the petitioner be appointed guardian and manager of the estate of J.N.C.M.
2. It is stated in the petition that the Petitioner is an adult of sound mind who resides and works in Birmingham in the United States of America and who is the first-born son of the subject.
3. It is the petitioner's case that the subject is aged seventy-three (73) years and was married to the late Charity Muthoni Ndaba on 10th August 2012. Following the death of his first wife, the subject married one TWN who deserted the matrimonial home and currently lives in Boston, USA. The petitioner avers that the subject has four children named in the petition including the petitioner.
4. The petitioner states that in the year 2021, the subject fell ill and suffers from loss of speech, has a weakness of the right hand and has a heart condition. As result of his medical condition, the subject has lost his cognitive and intellectual abilities. The petitioner contends that the subject is completely dependent on him and his siblings as he is incapable of living an independent life and requires constant medical attention. The petitioner further states that he has hired a nurse and a cook who help with the daily personal needs of the subject.
5. The petitioner states that the subject owns several properties. He used to run a physiotherapy clinic before he fell ill. At the clinic there are employees who need to be managed by someone else due to the incapacity of the subject. The subject has three real estate properties in Thika and in Nairobi. The



subject's bank account is currently operated by his employee to serve personal urgent needs of the subject. The petitioner urges the court to appoint him as the legal guardian of the subject to take care of him and to manage his properties and businesses.

6. The petition was further supported by an affidavit sworn by one EWN, a daughter of the subject. She deposes that the subject has been ill since 2021. The deponent further states that the subject cannot take care of himself, he has no speech and communicates through signs and he depends on his caregiver for feeding and hygiene. The deponent further states that the subject has a physical therapist who assists in doing physical exercise including taking a walk. The subject also has a house help who cleans and maintains his house and compound. The deponent urges the court to appoint the petitioner as guardian and manager of the estate of the subject to enable him take care of the subject's business, property and health.

Issues for determination

7. The main issues for determination:-
 - a. Whether the subject should be declared as suffering from mental disorder pursuant to the *Mental Health Act*, Cap 248.
 - b. Whether the petitioner should be appointed as guardian and manager of the estate of 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 suffer from mental disorder to be accorded such care through their close relatives and for their properties to be managed on their behalf by 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. Philip K. Kisyoka dated 17/11/2023, the subject fell ill in 2021. He suffers from loss of speech, weakness of the right side and has a heart condition. The doctor opined that the illness has significantly impacted the subject as he is unable to verbally communicate or to write, making him dependant on most of his needs and thus cannot make any decisions for himself or manage his affairs. Dr. Philip K. Kisyoka is a consultant physician and cardiologist who currently practices in Nairobi in his clinic at Nairobi Hospital Doctors Plaza. The doctor further stated that the subject has been under his medical care since 2021.
12. The subject was availed in court on 12/2/2024 for assessment of his condition through examination. The court noted that the subject was unable to communicate as he could not talk or give his names. A number of questions were put to the subject but he could not answer any of them which led this court to the conclusion that the subject is incapacitated both physically and mentally.
13. It is apparent from the doctor's report and the court's assessment that the subject is suffering from a mental disorder as per Section 2 of the [Mental Health Act](#) and further a medical condition contemplated under Section 26 of the [Act](#) and is thus incapable of managing himself and his own affairs.
14. Considering the doctor's report and the findings of the court based on its examination, the subject is hereby declared to be suffering from mental incapacity.

Whether the petitioner should be appointed as guardian ad litem to the subject.

15. As noted above, Section 26 of the [Act](#) gives court the power to make an order 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.
16. The petitioner said stated that he is the son of the subject and that although he lives in the United States, he has employed a cook and a caregiver who take care of the subject. Under his close supervision and follow up. Furthermore, he has stated that his sister EW lives in Nairobi and she visits the subject about three times a week thus frequently updating him on the progress of the subject. The petitioner's sister has deposed an affidavit confirming that the subject is mentally and physically incapacitated since 2021. The petitioner and his sister both state that the subject is wholly dependent on them for his daily needs. E has no objection to the petitioner being appointed guardian and manager of the estate of the subject. Additionally, his siblings do not object to the petitioner being appointed guardian and manager of the estate of the subject and have filed a joint consent to that effect.
17. In this regard, there is no evidence or document on record challenging the granting of the prayers sought in the petition. I am thus of the opinion that the petitioner has satisfied the court that he possesses the capacity to be appointed as the guardian and manager of the subject.
18. It is my finding that the petition is successful and I hereby grant the following orders: -
 - a. That the petitioner is hereby appointed the guardian of the subject.
 - b. That the petitioner is hereby authorised to manage the business and properties of the subject for the benefit of himself and his siblings named in the petition.



c. That the costs of this petition be paid from the estate of the subject.

19. It is hereby so ordered.

DELIVERED, DATED AND SINGED AT THIKA THIS 29TH DAY OF FEBRUARY 2024.

F. MUCHEMI

JUDGE

