



**DMM & another v AWC & another (Miscellaneous Application E042 of 2021) [2024] KEHC 1977 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E042 OF 2021  
SM MOHOCHI, J  
FEBRUARY 28, 2024**

**IN THE MATTER OF THE MENTAL HEALTH ACT CAP 248 OF THE LAWS OF KENYA  
IN THE MATTER OF RWM (SUBJECT)  
AND  
IN THE MATTER OF JGN (DECEASED)**

**BETWEEN**

**DMM ..... 1<sup>ST</sup> APPLICANT**

**DNM ..... 2<sup>ND</sup> APPLICANT**

**AND**

**AWC ..... 1<sup>ST</sup> RESPONDENT**

**IWM ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Application is a Petition dated August 31, 2021 filed on 16<sup>th</sup> November 2021 Petition for guardianship of RWM (hereinafter referred to as "the subject") and management of her estate under Section 26 and 28 of the *Mental Health Act*, Cap 248 of the Laws of Kenya.
2. The Petitioner, DMM is the biological daughter to "the subject" a person suffering from a mental disorder within the meaning of the *Mental Health Act* Cap 248 of the Laws of Kenya and therefore falls within the ambit and jurisdiction of the said *Act*.
3. "The subject" is 78 years and is currently domiciled at [particulars withheld], Nakuru and suffers from age related neurological disorder (Alzheimer's Dementia) characterized by a progressive impairment of cognitive functions consisting of global impairment of intellect, manifested by difficulty with



memory, attention, thinking and comprehension. Other affected functions include mood personality, judgment, social behavior and self - care activities.

4. She has no ability to make sound judgment to weigh, to reason out or make reasonable decision, has no insight to the nature of her disturbance and is also incapable of handling her money and finances. The grounds of knowledge and belief in the mental disorder or incapacity to manage her affairs are founded on the medical and psychiatrist report submitted by Dr. Njau. Consequently, "the subject" is not capable of managing and administering her property business matters, legal transactions and other dealings and affairs of a similar kind and is therefore unable to manage her own affairs as set out under the *Mental Health Act*.
5. The Petitioner therefore prays that this grants the following Orders:
  - i. That RWM is hereby adjudged to be a person suffering from a mental disorder under Section 26 of the *Mental Health Act* Cap 248 of the Laws of Kenya.
  - ii. That DMM either by herself or her appointed agent be and is hereby appointed as the Manager of the estate of RWM which includes any such description of movable or immovable property, money's and legacies, power to execute, sign all deeds and instruments relating to or evidencing the title or right to any property or giving a right to receive any money or goods and to proceed to take over and/or institute any litigation and/or claims and also to include not only such property as has been originally in the possession or under the control of any person but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise.
  - iii. That DMM be and is hereby appointed as Guardian of RWM person and estate.
6. The 1<sup>st</sup> Application had never been set down for hearing and as such no guardian had been appointed for the subject. The Court contends that this being the primary motion then the Court shall adjudicate the motion as a way of entertaining the two subsequent Applications
7. The 2<sup>nd</sup> Application dated 20<sup>th</sup> February 2024 is filed under certificate of urgency pursuant to Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules* seeking the following four (4) reliefs;
  - i. Spent.
  - ii. Spent.
  - iii. That pending the inter parties hearing of this application, the respondents whether acting in person, through their agents, servants, employees or any other person acting at their behest be restrained by an order of injunction from burying, causing to be buried, interring, conducting any burial rites or in any other way interring the remains of JGN (Deceased) on the parcel of Land known as [particulars withheld] registered to the subject herein.
  - iv. That pending the hearing of this suit, the respondent whether acting in person, through their agents, servants, employees or any of her person acting at their behest be restrained by an order of injunction from burying, causing to be buried, interring, conducting any burial.
8. The 3<sup>rd</sup> Application is rather odd notice of motion filed by the 1<sup>st</sup> & 2<sup>nd</sup> Applicants pursuant to section 3A, order 45, rule 1 and order 51 rule 1 of the *Civil Procedure Rules* 2010 and all enabling provisions of the law for the following Orders; -
  - i. That, this Honourable Court be pleased to certify this application as extremely urgent, hear the same forthwith and dispense with service thereof in the first instance.



- ii. That, pending the hearing of this application inter partes, this Honourable Court be pleased to review/set aside its orders issued on 21<sup>st</sup> February 2024 and compel the Superintendent Nakuru Provincial General Hospital to release the body of the deceased JGN for its interment.
  - iii. That, pending the hearing & determination of this application, this Honourable Court be pleased to review/set aside its orders issued on 21<sup>st</sup> February 2024 and compel the Superintendent Nakuru Provincial General Hospital to release the body of the deceased JGN for its interment.
  - iv. That, pending the hearing inter partes & determination of all pending applications in this cause, this Honourable Court be pleased compel the Superintendent Nakuru Provincial General Hospital to release the body of the deceased JGN for its interment.
  - v. That, costs of this application be borne by the respondents herein.
9. The Application is premised on the following grounds, the grounds in the supporting affidavit of DMM.
10. I directed parties to Appear before me for oral arguments on the 27<sup>th</sup> February 2024 whereby oral presentations were made by

### **Analysis and Determination**

11. All decisions made herein are made in respect to the best interest of the subject “the subject”.
12. The *Mental Health Act* CAP 248 is the law relating to the care of persons who are suffering from mental disorder or mental sub-normality with mental disorder; for the custody of their persons and the management of their estates; for the management and control of mental hospitals; and for connected purposes.
13. A 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 a psychopathic person with mental illness and person suffering from mental impairment due to alcohol of substance abuse;
14. Section 29 provides for the Power to apply property for maintenance of person suffering from mental disorder without appointing manager:
- “(1) Where it appears to the Court that, having regard to the circumstances of a person who is suffering from mental disorder and of his family and any other relative circumstance, it is expedient that his property should be made available for his or their maintenance it may, instead of appointing a manager or, notwithstanding such appointment, order that the property or the proceeds thereof when realized be paid to such person as the Court may think fit, to be applied for such maintenance.
  - (2) Where it appears to the Court that a person is suffering from mental disorder of a temporary nature and that it is expedient to make temporary provision for his maintenance or for the maintenance of such members of his family as are dependent upon him for their maintenance, the Court may in the manner provided in subsection (1), direct that his property or sufficient part of it be applied for such purpose.



(3) The receipt of any person under subsection (1) shall be a valid discharge to any person who pays any money delivers any property of the person suffering from mental disorder to the person so appointed."

15. According to the Medical Report by Dr. Njau J. W, a psychiatrist, the subject was examined on the 20<sup>th</sup> August 2020 and found to suffer from age related neurological disorder (Alzheimer Dementia) she has no ability to make sound judgment or reasonable decision. Additionally, the Applicant has availed to the medical examination report confirming the mental illness of the subject.
16. It is apparent from the doctor's 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.
17. Notably, 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.
18. The Applicant is a daughter to the subject with the responsibility of taking care of her and this is confirmed by the Applicant's affidavit deponing that she has been taking care of the subject medical needs.
19. In my considered view, the Applicant has availed sufficient evidence to demonstrate that the subject suffers from schizophrenia and is incapable of managing herself and her property which is already subject to unexplained internal unexplained family wrangle. It is not in dispute that the Applicant is a biological daughter of the subject and has shown commitment to take care of the subject's property by filing legal proceedings in this Court.
20. I am satisfied that the Applicant has established that she is qualified to be appointed a guardian of the subject and a manager to her property.
21. I find the 1<sup>st</sup> Application is merited and it is hereby allowed with modifications to suit the peculiar circumstances.
22. With regards to the 2<sup>nd</sup> and 3<sup>rd</sup> Applications, the Court observes that the 3<sup>rd</sup> Application ought to have been a response to the 2<sup>nd</sup> Application but the Applicants deemed it fit to further obfuscate the issue.
23. In a nutshell the 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that their father cannot be buried on the only land [particulars withheld] registered in the name of "the subject" who is a souse of the deceased for decades.
24. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that their mother has not consented to the burial hence their opposition. The Respondents have not incorporated any arguments for utilization of the proceedings to get a guardian appointed to act on her behalf.
25. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not offered any alternative where the remains of the deceased may be interned other than casually indicating that their deceased father can be buried in a public cemetery.
26. This Court pondered, if the subject had a lucid moment to comprehend the happenings and she was asked where she would wish to have the remains of her husband buried, what would be her answer?
27. This Court is of the view that "the subject" would wish her husband of many years is buried on her only land, no evidence to the contrary has been tendered by the Respondents.



28. The reliefs being sought herein relating to injunctions against burial remain hollow relief in the absence of protective orders for the subject and as such the Court in its wisdom has resolved to have two joint guardians Appointed herein in the interim.
29. The Reliefs sought in the 2<sup>nd</sup> and 3<sup>rd</sup> Applications are discretionary in nature, thereby inviting the Court to rule on what ideally should be “the subject’s” best interest
30. RWM is hereby adjudged to be a person suffering from a mental disorder under Section 26 of the *Mental Health Act* Cap 248 of the Laws of Kenya thereby entitled to legal protection.
31. The 1<sup>st</sup> Applicant - DMM, is hereby appointed Joint-guardian of the Subject,
32. The 1<sup>st</sup> Respondent-AWC is hereby is hereby appointed Joint-guardian.
33. The Joint guardians shall be expected to work together and if for any reason this is not possible, then parties can approach this Court for appropriate directions.
34. An Order is hereby made compelling the Joint guardians (AWC and DMM) to forthwith, and not later than 10.00 am on 29<sup>th</sup> March 2024, to present the original Title Deed of the Parcel of Land commonly known as [particulars withheld] to the Deputy Registrar of the High Court to be kept under “lock and key” pending resolution of any disputes as may arise during guardianship.
35. An Order is hereby made on behalf of “the subject”, that both Applicants and Respondents and the larger family of JGN (Deceased) shall jointly and in unison conduct the burial and funeral rights as scheduled for the 29<sup>th</sup> February 2024 to take place on all that parcel commonly known as [particulars withheld]
36. The Parties shall Appear for mention for further directions on \_\_\_\_\_
37. This being a family matter there shall be no orders as to costs.

It is so Ordered

**SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**MOHOCHI S.M**

**(JUDGE)**

