



In re ERW (A Person Suffering from Mental Disorder) (Petition E040 of 2023) [2024] KEHC 1660 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E040 OF 2023
G MUTAI, J
FEBRUARY 23, 2024
IN THE MATTER OF ERW (THE SUBJECT)
(A PERSON SUFFERING FROM MENTAL DISORDER)**

AND

**IN THE MATTER OF SECTIONS 26, 27, 28, 29 AND 38 OF THE
MENTAL HEALTH ACT (CAP 248 OF THE LAWS OF KENYA)**

AND

IN THE MATTER OF AN APPLICATION BY EMK, PMK AND TN

1. EMK

2. PMK

3. TN.....PETITIONERS

RULING

Introduction

1. The applicants are the children of ERW (hereafter “E”). E is 64 years old, having been born in 1959. She has three children, the applicants, who are 33, 30 and 27 years old. Over time, she has developed a mental health ailment that has affected her cognition.
2. E was attended to by Dr. Salim Said Ahmed at the Aga Khan Hospital Mombasa on 15th July 2022. The medical report states that she has:-

“neurologic examination revealed an elderly patient with cognitive dysfunction coupled to a poor mini-mental state score and relative quadriparesis. She has been commenced on central nervous system stimulant therapies as a second evaluation is being scheduled here in Mombasa. Due to the mentally and physically disabling nature of the dementia; it will be prudent for her to have a formal neuro-psychological and neuro-psychometric evaluation



by a clinical psychologist and a psychiatrist to document the level of mental incapacitation in her case. This will also aid in the transfer of her decision making to her legal guardian.”

3. E was examined on 17th February 2023 by Dr. Iham Mohamed. She was diagnosed with vascular dementia with psychotic depression. In the said doctor’s opinion, E is currently mentally unstable with poor testamentary capacity.
4. Given the patient’s condition, the petitioners filed the petition now before the Court. The petitioners seek the following orders:-
 - a. ERW, the subject, be and is hereby declared to be a person suffering from mental disorder pursuant to section 26 of the *Mental Health Act*, Cap 248 of the Laws of Kenya;
 - b. The 1st petitioner, EMK, be and is hereby appointed the legal guardian to ERW, the subject;
 - c. The 1st petitioner, EMK, be and is hereby appointed as the Manager of the Estate of ERW, the subject pursuant to section 26 of the *Mental Health Act*, Cap 248 of the Laws of Kenya, to manage the Estate of ERW, the subject including any such description by movable and immovable property, money, debts 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 or receiving any money or goods such power not to extend to selling or alienating any of the immovable assets of the estate without any specific Court orders for such purpose;
 - d. The 1st petitioner, EMK, to access the funds from ERW, the subject’s bank account no. 30XXXXXX02 held at Mwalimu National Sacco Ltd, Mombasa Branch, and to continue to receive any pension due to ERW, the subject, and to utilise the same for the subject’s upkeep;
 - e. The costs of the Petition to abide in the suit; and
 - f. Any further or any other relief that the honourable Court deems just and fit to grant.
5. The 1st petitioner, EMK, averred in an affidavit sworn on 21st November 2023, that her mother is a retired teacher previously employed by the Teachers Service Commission. She receives a monthly pension of Kes.33,000, which is deposited in bank account No. 30XXXXX02 held at the Mwalimu National Sacco Ltd. E prayed that since she resides with E, she be appointed her legal guardian and given access to her account so that she can use the funds in the said account for her mother’s upkeep.
6. E further deposed that her brothers, PMK and TN, are all agreeable and have consented to her request. She estimated that taking care of her mother costs Kes.58,000.00 per month. She averred that if the application was allowed, she would take care of the balance with her own money as she is presently employed by Leinmach House, Nyali and earns Kes.55,000.00 per month as a salary.
7. She further deposes that her husband, DNC, supports her wish to take care of E during the mother’s sunset years.
8. The Petition was heard on the 1st and 8th of February 2024. The 1st Witness was PMK. He is 31 years old. E is her elder sister. He testified that he resides in Meru. His mother resides in Mombasa with E and her family. He expressed his support for the application.
9. The second witness was TN. He, P, is E’s younger brother and also resides in Meru. He is 27 years old. He testified that he last saw his mother in January 2024. She was unwell and couldn’t take care of herself. He supported the prayers in the petition as it would enable E to access E’s pension so that she could use it to treat their mother.



10. E was the 3rd Witness. She came to open Court with her mother. She testified that she resides in Nyali, off Mt. Kenya Road. She is 33 years old. E started ailing in 2016. In 2020, her condition deteriorated. As a result, E had her brought to Mombasa so that she could take care of her. The mother was diagnosed with vascular dementia. She sought to have her mother declared as a person with mental health problems and for her to be appointed as a legal manager so that she could access her pension at Mwalimu Sacco. She undertook to make up for the difference between the pension and the treatment cost as she is employed and has a reasonable income.
11. The three witnesses were aware that proceedings under the *Mental Health Act* do not amount to succession proceedings and that if the Court issued the orders prayed for, E wouldn't have the power to sell or alienate her assets without the consent of the Court.
12. The 4th and last witness was Dr. Iham Mohamed. Dr. Mohamed is a psychiatrist working with the Coast General Hospital. She testified that she examined E and prepared a medical report. In her professional opinion, E has vascular dementia with psychotic depression. The said condition presents memory problems, disorganization, hallucination, talking to self and confusion. The doctor's diagnosis was that vascular dementia is incurable and that she would not recover from it.
13. The Court observed E during the hearing. She was disoriented and did not appear to be aware of her surroundings.
14. Appointment of a manager of the estate of a person with mental illness is made under section 27 of the *Mental Health Act*, as amended in 2022. A manager's duty is to safeguard the property of the person with mental illness. An appointment, once made, must be published in the Kenya Gazette (section 27(4) of the said Act). Any person with probable cause may object to the appointment within 14 days of the publication of the notice of appointment in the Kenya Gazette. Section 28 (4) of the said Act provides that:-

“a manager shall perform the manager's duty under this Act responsibly taking into account the best interests of the estate of the person who is suffering from mental illness”
15. Under the *Mental Health Act*, the application for administration may be made by a “supporter” or “representative” of the person with mental illness, in that order. I am satisfied that E's children are her representatives under the said Act and can file the instant petition.
16. The property that the proposed legal guardian/manager will be in charge of is the bank account in which E's pension is deposited. I have previously listed the names of her close relatives. I have had sight of the medical reports.
17. In *re CWN (a person suffering from mental disorders) [2022]*eKLR, the Court stated:-

“The Petitioners have sought to be declared as guardians and managers of the patient. To merit the above orders, the petitioners must adduce evidence sufficient to satisfy the Court, firstly that the patient is a person suffering from a mental disorder under the *Mental Health Act* and secondly, that the patient is incapable of managing her own affairs.”
18. I would add that the third test is whether the application is in the best interest of the person with mental illness. People with mental illnesses have diminished abilities to manage their affairs. Their situation is analogous to that of children. The court must, therefore, be sure that the application was filed in the interest of the patient. Thus, the orders that the court issues must be aimed at achieving the said goal.



19. I have read the reports of Dr Salim Said Ahmed and Dr Ilham Mohamed. I had the opportunity to observe the E in Court in close quarters. I am satisfied that she has a mental illness. From the witnesses' testimonies, the patient cannot manage her own affairs. Therefore, it will be in her best interest to appoint a manager/guardian ad litem to manage her estate. The manager/guardian ad litem will ensure that she receives the most appropriate care possible. For this to be possible, E must have access to E's account
20. I am satisfied that Elizabeth suffers from mental health problems. She is in need of care and protection, which her daughter E is ready and willing to provide. As Elizabeth has a pension that is paid through her bank account, it is only fair and just that Eunice has access to her mother's said account so that she can provide for the mother without overburdening herself and her family. I, therefore, allow the prayers in the petition.
21. I am therefore satisfied that a case has been made for the appointment of EMK as the manager/guardian ad litem of the patient. I, therefore, order and direct as follows: -
1. EMK is hereby appointed as the manager/guardian ad litem of the patient, ERW;
 2. The manager/guardian ad litem shall manage the estate of the patient in particular: -
 - a. Bank account no. 30XXXXXX02 held at Mwalimu National Sacco Ltd, Mombasa Branch, with the right, inter alia, to make withdrawals.

For the best interest of ERW. She shall, however, not have the power to sell, charge or otherwise alienate the immovable property of the person with mental illness without the leave of Court;
 3. Pursuant to section 27 (4) of the *Mental Health Act*, the appointment of the manager/guardian ad litem shall be published in the Kenya Gazette by the Court;
 4. The manager/guardian ad litem shall file the inventory/statement of account of the estate of ERW within six months of her appointment;
 5. No order as to costs.
22. Orders accordingly.

DATED AND SIGNED THIS 23RD DAY OF FEBRUARY 2024 AT MOMBASA.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Njoroge for the Petitioners; and

Arthur – The Court Assistant.

