



MBW v PWB (Petition E007 of 2022) [2024] KEHC 8023 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8023 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PETITION E007 OF 2022
FN MUCHEMI, J
JUNE 28, 2024
IN THE MATTER OF THE MENTAL HEALTH ACT (CAP 248) LAWS OF KENYA
AND
IN THE MATTER OF ING
AND
IN THE MATTER OF AN APPLICATION BY MBW TO BE APPOINTED
MANAGER OF THE ESTATE AND GUARDIAN TO THE SING

BETWEEN

MBW PETITIONER

AND

PWB RESPONDENT

JUDGMENT

Brief Facts

1. By a Petition dated 25th February 2022 filed in court on 15th March 2022, the petitioner invoked Sections 26, 27 and 28 of the *Mental Health Act*, Cap 248 Laws of Kenya and sought the following prayers:-
 - a. This Honourable Court declares by reason of mental incapacitation due to congenital cerebral palsy, Ishvan Nguitui Gichuki (the subject) incapable of managing his affairs.
 - b. That I.N.G. be an dis hereby declared to be suffering from mental disorder pursuant to Section 26 of the *Mental Health Act*, Cap 248 Laws of Kenya.
 - c. That M.B.W he and is hereby appointed as the legal guardian to I.N.G. and manager of his estate under Section 28 of the *Mental Health Act* to manage his estate including any such description of moveable or immoveable 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 receive any money or goods.

2. The respondent opposed the petition and filed a Replying Affidavit, Response to Petition and Cross Petition dated 25th January 2023.
3. The matter proceeded by way of viva voce evidence.

The Petitioner's Case

4. PW1, MBW, adopted her petition, further affidavit dated 4th January 2023, supplementary affidavit and witness statement both dated 7th March 2023. PW1 testified that the subject I.N.G is her nephew, her late brother Newton Gichuki Boore's son whereas the respondent is her sister. The witness further testified that she is the first born child whereas the respondent is the 3rd born child. PW1 further states that the subject suffers from cerebral palsy and cannot talk or take care of himself. She added that her siblings and herself never agreed that the respondent would be the sole custodian of the subject and further agreed that any of the siblings could stay with the subject at any time as need may arise. The witness further stated that it was at the chief's office that they decided to let the subject stay with the respondent after the respondent and their sister one Joyce Muthoni Wanjama disagreed and engaged in a physical fight.
5. PW1 stated that she has worked in a health care institution in the University of Nairobi, medical school for 40 years and is therefore in a position to assist the subject and ensure that he is well taken care of as recommended by the doctors. The witness further stated that she took the subject to a doctor at Lucy Kibaki Hospital where the doctor recommended exercise and speech therapy for him.
6. The witness stated that she has a permanent home in Umoja Nairobi, which she owns and that she is a pensioner and collects rental income from the various houses she owns. PW1 further stated that she is apprehensive that if custody is granted to the respondent, she and the subject may have nowhere to live as the respondent's home may be auctioned to satisfy a decretal amount in Nyeri CMCC No. E017 of 2022 in which the respondent is a judgment debtor.
7. On cross examination the witness stated that the medical report was done by one Leah Christabel who is a professional social worker serving in the national government. PW1 further testified that when Leah Christabel prepared the report she did not see the subject but got all the information from herself. The witness further testified that she used to accompany her brother the late father of the subject taking the subject for all his medical appointments.
8. The witness testified that she used to visit the subject at the respondent's house in Karunaini in Nyeri before she denied her access to visit him. PW1 stated that the respondent did not take the subject to hospital or help him do exercises or physiotherapy and his condition had deteriorated over the years. She further added that the therapy the subject needed could be done anywhere and not only in Nairobi.
9. PW1 further stated that the respondent's house was being auctioned for a debt of Kshs. 3 million following the determination of a case Cooperative Tribunal Case No. 740 of 2019.
10. The witness stated that her son Cyrus Boore passed away and that she raised and educated the respondent's son one Cyrus Murim following a request by her own mother. The witness further stated that the custody of the subject was given to the respondent temporarily after the respondent fought with their sister Joyce, at the chief's office on who of the two would take care of the subject. The respondent has currently lived with the subject for a period of three (3) years. The witness further testified that the said Joyce transferred the property of their late brother to herself fraudulently and therefore she is not an honest person.



11. PW2, Naomi Wambui Maina testified that she is the last born of the family and stated that the custody of the subject was given to the respondent by the family on temporary basis until the succession cause of their late brother was completed. The witness further stated that the subject initially stayed with Joyce but when they visited the area chief's office as a family, the respondent accused Joyce of practicing witchcraft which resulted in a fight at the chief's office. That fracas led to the family to shifting the custody of the subject from Joyce to the respondent.
12. PW2 further stated that the respondent had never taken care of any child in her life and that the respondent's late son was brought up by the petitioner. PW2 stated that the petitioner took in one Warutumo and adopted him as well as taking him to school. The witness further testified that the petitioner has been like a mother to all of them since she is their elder sister. PW2 further testified that their mother took care of the respondent's last born daughter.
13. PW2 stated that the best person to take care of the subject was the petitioner as she took care of her own son and her adopted son whereas the respondent only wanted the subject to stay with her to use him as a cash cow and to get income from the larger family to maintain herself.
14. On cross examination, the witness said that the family gave financial assistance to the respondent to meet the expenses of the subject which they get from the estate of their late brother whereby the administrators are the petitioner, the respondent and Watson Wahinya Boore. The witness said that all the siblings could take care of the subject but some of them were not in a position for example their brother Watson who was not married and it would be difficult to take up the custody of the subject. As for her, PW2 said that her marriage was on the rocks and she would not be in a good position to take care of the subject. PW2 stated that the petitioner is possessed of the skills to take care of the subject as she interacted with a medical institution for many years. It was further stated that the respondent took care of the subject's home for 3 years but the result was deterioration of the subject's health.
15. PW3, Charles Warutumo Kinyanjui, testified that he met the petitioner in 1974 through her cousin one Gitahi Gichoru at the time he was aspiring to join National Youth Service. He did not meet the minimum requirement but the petitioner and her cousin encouraged him and helped him get a job as a houseboy in the petitioner's house and she paid for his schooling at City High School and Pumwani Secondary School. The witness further testified that the petitioner instilled Christian values in him and she treated him the same way she treated her own children.
16. PW3 further testified that the respondent went to the petitioner's house when she was pregnant with her son Cyrus. Later on, the respondent left her baby in the custody and care of the petitioner. The witness further stated that the petitioner is not perfect but she is kind hearted, loving, caring and understanding. Further that any child would bond with the petitioner easily because of the love and constant attention and support she accords anyone under her care, whether biological or an adopted child According to PW3, the petitioner would be best suited to take care of the subject.

The Respondent's Case

17. DW1, Phoebe Wanja Boore relied on her replying affidavit, her response to the petition and cross petition dated 25/1/2023. DW1 testified that the subject suffers from cerebral palsy and cannot manage himself or explain himself in any way.
18. DW1 testified that following the funeral of their brother on 26th February 2020 the family and her two aunts agreed that she take custody and responsibility of the subject which decision was informed by the fact that her place was found to be the most convenient and comfortable for the subject due to the central, location of her home compared to those of her other siblings. The witness said that the



subject was bequeathed land by his late father which is located in the area where she lives. The witness further added that they severally attended meeting at the Chief's office as a family and discussed the succession issues of their brother Gichuki, the father of the subject. Everyone agreed that the subject continue living with her as the caregiver.

19. The witness further testified that the petitioner has not shown any special circumstances of her being appointed as the guardian of the subject and any of the four other siblings can be guardians of the subject including herself. Further, she stated that none of her siblings laid claim over the subject as they were attending the family meetings.
20. DW1 stated that the petitioner is only interested in the entitlement of the subject because of their brother's estate which the petitioner filed without their knowledge or consent in Nyeri CM Succession Cause No. E53 of 2020. Furthermore, the witness stated that the petitioner never had any interest in the subject and neither did she visit the subject at the respondent's home since she took custody of the subject. DW1 further argued that following the revocation of the grant in Succession Cause No. E53 of 2020, the court appointed herself, the petitioner and Watson Wahinya Boore as the administrators of the estate and thus it is not clear why the petitioner seeks to be appointed a guardian of the subject.
21. The witness testified that their mother requested the petitioner to take care of her son so that she could attend college for a period of two years. DW1 further added that the petitioner had a son of similar age to hers and therefore their mother thought it would be a good idea for the petitioner to take care of both of them at the same time. The witness further stated that when she completed her studies, she let her son remain with the petitioner as she did not want to disrupt his studies. Later on, the respondent provided for the maintenance of her son and paid his school fees until her son was through with school. DW1 testified that she brought up her daughter solely and her daughter only visited her grandmother and did not live with her.
22. DW1 further testified that she lives on LR No. TETU/KABAGE/550 with the subject, a property registered in her name and measuring 6 acres where she does dairy and agricultural subsistence farming. The witness stated that they never lack for food and they live in a spacious house where the subject's bedroom is ensuite. Further, the subject has his own poultry, sheep and goats which keep him busy which the petitioner cannot provide as she stays in Umoja Estate in Nairobi.
23. On cross examination, the witness stated that she took the subject to hospital for treatment and examination on 28/4/2021 and from that time no one takes the subject for therapy. The witness further testified that she had a son, Cyrus who died in 2014 and that her son used to live with the petitioner during the school term as he attended school in Nairobi. During school holidays, her son stayed with her. DW1 stated that she used to receive the fees structure and other school documents and pass them over to the petitioner. She further stated that her second child, Shelmith did not stay with the petitioner but she raised her second born child since birth. She further stated that she has lived with the subject for four years since his father died.
24. DW1 testified their younger sister one Naomi PW2 sued her for damages for defamation and she paid damages of Kshs. 371,000/- as ordered by the court.
25. The witness further testified that the petitioner sought for her to be arrested and taken to civil jail and the petitioner went to her house and took the subject to the police station. The witness stated that her arrest was calculated to remove the subject from her care. DW1 further testified that it was her mother and other siblings who agreed that the subject be given to her to take care of.



26. DW1 further testified that the loan she owed to Wananchi Sacco was borrowed against her shares and her land is still intact and has not been sold in recovery of the said loan. The respondent said that she currently lives in a three bedroom house with the subject.
27. DW2, Watson Wahinya Boore adopted his written statement dated 24th February 2023 and testified that the subject stayed with the respondent since the death of his brother, February 2020. DW2 further testified that once the family started pursuing matters relating to the succession of their brother, they went to the office of the area chief of Kimathi location with a view of obtaining a letter that would enable them commence the succession proceedings. The witness further stated that it was at the meeting that they all agreed that the respondent would maintain custody and responsibility of the subject.
28. DW2 stated that custody and responsibility ought to be granted to the respondent as the family had already agreed to it and that the respondent and the subject have already formed a special bond in the past three years. Further, the subject is comfortable and very much at home with the respondent and that he is accustomed to his surrounding environment. The witness testified that moving the subject to Nairobi would destabilize him as the petitioner is a total stranger to him. That notwithstanding, the witness stated that the petitioner is not interested in the subject but rather in the property the subject will inherit from his father's estate.
29. On cross examination, the witness testified that the family appeared before the area chief and agreed that any of them could stay with the subject. As for the witness, he was not in a position to stay with the subject as he did not live with his wife and the subject would require personal care which he was not in a position to give. He further said that he lived about 4 km from where the respondent resides and he sometimes helped her in taking the subject to hospital.
30. DW2 stated that the respondent had brought up her own children and that the respondent's son one Cyrus had stayed with the petitioner when he attended school. The witness further testified that the subject used to stay with their sister Joyce but the family later decided to shift custody to the respondent.
31. DW2 further stated that the petitioner had brought up her own children on her own and none of the siblings assisted her. He further stated that she lived in a one bedroom house in Nairobi, which she owned, since 1979.

The Petitioner's Submissions

32. The petitioner submits that it is not in doubt that the subject suffers from mental disorder and the court had the opportunity to see him in court and empathized with his current condition. From the perusal of the respondent's documents, it is clear that the subject has not been taken to any hospital for medication or therapy due to his condition since he started living with the respondent.
33. The petitioner relies on Article 53(2) and 260 of *the Constitution*, Section 2 of *Persons with Disabilities Act* and Section 20 of the Children's Act and submits the letter from Nile Road Special School dated 13th October 2020 shows that the subject has already mastered activities of daily living, beadwork threading, gardening, poultry keeping and music because he was interacting with other students like him, he was being given medication and therapy was being done. The petitioner argues that from the way he looked in court, he could barely do anything for himself since medication and therapy had been halted explaining the deterioration in his health. Further in her letter dated 7th March 2023, Leah Cristabel, a community social worker, indicated that she, Mary Wangare Kamau (community health volunteer) and Gibson Omore Mwanda (occupation therapists) working at Mama Lucy Kibaki



hospital are willing to assist the subject to enable him become stable and able to run his day to day activities.

34. The petitioner argues she is the best suited person to take care of the subject as she has interacted with medical doctors most of her life being a permanent and pensionable senior secretary, she has a permanent abode in Nairobi, an environment the subject has lived almost all his life and her access to medical doctors, therapists and social workers who have interacted with the subject while he was in Nairobi. The petitioner further submits that she took care of the respondent's first born child from birth, educated him and knew him as her son until his death and that she has taken care of almost all of her siblings including PW3 who testified to living comfortably with her for sometime until he got to his feet.
35. The petitioner relies on the cases of Re N. M. K [2017] eKLR and Re Estate V. F. M.(Patient) [2020] eKLR and Section 102 and 105 of the *Children Act* and submits that the best interests of the subject are paramount in granting him a guardian. The petitioner submits that the medical report from P.G.H Nyeri dated 21st August 2020 where the subject was examined in the presence of Dr. Mithamo, Dr. J. M. Ndegwa and Dr. Kagathi proves that the subject is a person living with a disability and incapable of managing his own affairs independently and responsibly.
36. The petitioner prays in the alternative, for the court to defer judgment and let her be granted at least 12 months to stay with the subject and the court to re-evaluate his condition at the end of the period and then make a determination on the best suited person to be granted permanent custody of the subject as the respondent has been with him since 2020 and has not been concerned about his well-being.

The Respondent's Submissions

37. The respondent submits that it is not disputed that the subject is a person suffering from a health condition to the extent that he requires a manager to manage his estate/affairs and that the subject has been under her exclusive care and custody since 26th February 2020 which acquisition of exclusive care and custody was so acquired through agreement of all family members.
38. The respondent relies on Section 2, 26, 27 and 28 of the *Mental Health Act* and the cases of Re N.M.K [2017] eKLR and Re Estate of V.F.M (patient) [2020] eKLR and submits that the best interests of the subject are paramount when considering a guardian or manager.
39. Relying on Section 107, 109 & 112 of the *Evidence Act* and the case of *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi Nyr CA Civil Appeal No. 342 of 2010*, the respondent submits that she adduced evidence as to why her son Cyrus Muriithi Wanja had gone to live with the petitioner. Further, she states that she has lived with the subject for the last four years and there has been no formal complaint on the status of the subject. The respondent has further given a background of the family members who are available to be appointed legal guardians of the subject who are also his aunties and uncles and it is not clear why the petitioner feels that she is the only one capable of being so appointed.
40. The respondent further submits that although the petitioner claimed that the subject requires medical attention which the respondent has not been allegedly providing, she did not provide any medical proof of the kind that is required by the subject which the respondent failed to provide. The respondent argues that it was incumbent upon the petitioner to bring forth expert evidence on the medical needs of the subject and show how the respondent has not been providing. The petitioner has not demonstrated that it would not be in the best interest of the subject to continue being in the custody of the respondent and why the respondent should not be appointed legal guardian. As such, the respondent submits that the petitioner has not met the threshold of that is required of showing



that she is placed to have legal guardianship and custody and management of the subject's affairs better than herself or any other person in the family.

41. The respondent submits that she has in the last three years through mutual agreement with the family members got custody of the subject and described how she developed a bond with the subject and provided photos of how she has brought up the subject into a fine gentleman, she has described the house she has put up and where she resides with the subject who has the benefit of an ensuite bedroom. The respondent further states that she is still on the parcel of land that the petitioner claims has severally been put on auction and avers that the same is still her home.
42. The respondent further submits that it would not be in the best interests to move the subject from the home he has known for four years as that would destabilize him.
43. The respondent states that the petitioner's prayer for deferment of judgment and re-evaluate the condition of the subject in twelve months cannot be introduced during the submission stage as she did not have the avenue to oppose the said prayer. The respondent urges the court to disregard the same.

Issues for determination

44. The main issues for determination are:-
 - a. Whether the subject should be declared as suffering from mental disorder pursuant to the *Mental Health Act*, Cap 248.
 - b. Who should be appointed as guardian to the subject as well as 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.

45. The *Mental Health Act* provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons.
46. 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."
47. 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.
48. According to the Persons with Disability Medical Assessment Report by Dr. Mithigo, Dr. J.M. Ndegwa and Dr. Peter Kagathi the subject has been suffering from congenital cerebral palsy and was recommended by the said doctors that he is eligible for registration as a person with disability. The subject was found to suffer from intellectual incapacity and cerebral palsy. Pursuant to that the subject was registered as a person with disability by the National Council for Persons with Disabilities under registration number NCPWD/P/526810 and issued with a card on 2/10/2020.
49. Based on the said medical assessment report, the affidavits on record and the testimonies of the parties, it is apparent and it is not contested that the subject suffers from a mental disorder which has occasioned the diminution of his mental incapacity and adversely affected his cognition and his ability to take care of himself and his affairs. The family members unanimously agree that due to the subject's condition he is unable to manage his affairs. Thus, it is my considered view 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 his own affairs.

Who should be appointed as guardian to the subject as well as manager of the Estate of the subject.

50. 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. In this case, the family members are split over the management and authority of the subject's properties which he has inherited from his late father.
51. The court in *Re N.M.K [2017] eKLR* considered what should guide a court when applying Section 26 and 27 of the Act and stated:-

In considering an application brought under Sections 26 and 27 of the *Mental Health Act*, the court is guided by three main factors:-

- a. There must be medical evidence warranting the determination by the court that the subject suffers from mental disorder;
- b. The person to be appointed to be either guardian or manager must be fit to be so appointed;
- c. The court must be satisfied that a proposed manager will utilize her powers for the benefit and welfare of the subject.

The overriding principles in applying all these factors is that the welfare and best interests of the subject must be the overall guiding principle.

52. Similarly in *Re Estate of V.F.M (Patient) [2020] eKLR* the court held:-

For the court to grant the application for appointment of a manager of the estate and guardian to the patient, the petitioner/applicant is duty bound to prove that:-



- a. There exists medical proof by show of evidence confirming that the subject suffers from mental disorder.
 - b. The petitioner/applicant seeking to be appointed as manager or guardian must be legally fit to be so appointed.
 - c. That due to the subject's mental disorder, he or she is incapable of managing his/her own affairs independently and responsibly.
 - d. That the proposed manager/guardian will manage the subject's property effectively and efficiently for the benefit of the estate and welfare of the subject.
53. From the record, it is not in dispute that the subject is currently living with the respondent. PW1, PW2 and DW2 told the court that initially the subject was living with their sister one Joyce Muthoni Wanjama but she illegally transferred her brother's property to herself and a fight broke out between her and the respondent at the Chief's office which led to the subject being moved to the respondent's care and custody. From their testimonies, it is also evident that the siblings agreed that any of them could take care of the subject but PW2 stated that she could not take care of the subject as her marriage was suffering. DW2 said that he did not live with his wife keeping in mind that the subject needed personal care which he was unable to provide.
54. On further perusal of the record, although the respondent claimed that she regularly takes the subject for medical check-ups and therapy, she did not produce any evidence in support. Nowhere has the respondent provided that she has enrolled the subject in a special needs school. Nor has the respondent shown that she has engaged a therapist to attend to the subject. For a child with a condition, regular medical therapy is a necessary requirement to keep the body healthy due to his limited movements. From the hearing of the petitioner and the respondent it was clear that the petitioner exhibited the best interests and welfare of the subject. She explained that the subject needed to attend hospital and therapy to progress and has gone a step further to engage a community social worker to assess the subject's situation.
55. The petitioner testified that she has taken care of other children in her own home including the late son of the respondent. The respondent fell short of explaining why her late son had to stay with the petitioner in Nairobi throughout his school life while she was well and in Nyeri county which has good schools. The evidence of the petitioner was corroborated by her own sibling PW2 and a grown up young man who has been brought up by the petitioner until he was through with his college studies. The young man testified of the motherly character and caring ability of the petitioner.
56. The respondent on the other hand has not portrayed herself as a motherly and honest caregiver especially for a special child like the subject who suffers from cerebral palsy which condition has rendered him physically handicapped. The subject requires a lot of motherly and compassionate care which the respondent has not demonstrated she is capable of giving.
57. This court cannot lose sight of the fact that the parties herein as well as DW2 are in a succession battle in court of the estate of the deceased father of the subject, Nyeri Succession Cause No E053 of 2020 of which is still pending in court. In my view, the succession of the subject's father could have triggered the filing of this petition and the cross-petition by the parties. The subject is entitled to a share in his late father's estate and it will have to be managed by one of the deceased's siblings with a view of benefiting the subject. It is imperative to note that the subject requires care of a close relative due to his condition.



58. The respondent's land where she currently lives with the subject has been under threat of being auctioned for repayment of a debt. This is a risk that cannot be taken lightly given the fact that the subject should not be exposed to a situation where he may find himself without a shelter.
59. I have considered the evidence on record and all the factors that require to be given the due attention of the court. I come to the conclusion that this petition has merit and is allowed in the following terms:-
- a. That the subject is hereby adjudged as a person suffering from a mental and physical disorder pursuant to section 26 of the *Mental Health Act*.
 - b. That the petitioner Mary Ann Boore Wangima is hereby appointed as the legal guardian of the subject Ishvan Nguitui Gichuki to take care of him and to manage his personal property and legal affairs, if any.
60. I find no merit in the cross petition and it is hereby dismissed.
61. That being a family matter, there shall be no order as to costs.
62. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY JUNE 2024.

F. MUCHEMI

JUDGE

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