



REPUBLIC OF KENYA



KENYA LAW
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**In re NMK (Subject) (Miscellaneous Application 73 of 2017)
[2017] KEHC 921 (KLR) (23 November 2017) (Ruling)**

In re NMK [2017] eKLR

Neutral citation: [2017] KEHC 921 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

MISCELLANEOUS APPLICATION 73 OF 2017

JM NGUGI, J

NOVEMBER 23, 2017

Factors that a court should consider in an application for orders of custody management and guardianship over a person suffering from a mental disorder.

In a case in which an applicant sought orders of custody management and guardianship over a subject who owned land, the court held that an application brought under sections 26 and 27 of the Mental Health Act, the court was guided by three main factors: there had to be medical evidence warranting the determination by the court that the subject suffered from mental disorder; the person to be appointed to be either a guardian or manager had to be fit to be so appointed; and the court had to be satisfied that a proposed manager would utilize her powers for the benefit and welfare of the subject. The overriding principle was that the welfare and best interests of the subject must be the overall guiding principle. Ultimately the court held that the applicant was not a fit person to be appointed as either a guardian or manager to the estate of the subject because the applicant was not only advanced in age and showed worrying signs of old age; but was also unnecessarily combative and aggressive. It wouldn't serve the subject's best interests to appoint her as either guardian or manager.

Reported by John Ribia and Sandra Mosoti

Disability Law – guardianship - application for orders of custody, management and guardianship over a person suffering from mental a mental disorder - what factors should a court consider in an application for orders of custody management and guardianship over a person suffering from mental disorder – sections 26 and 27

Brief facts

The applicant sought orders of custody, management and guardianship over a person suffering from a mental disorder under sections 26 and 27 of the . She sought to be granted orders for custody management and guardianship over her daughter (the subject) and the property she owned. The subject was suffering from mental disorder. The applicant averred in 1998 she decided to subdivide her land to give all her children their own parcels. She parceled out two pieces for the subject which were the subject of the application.

The applicant was directed to serve all the living siblings of the subject with the application. It was there that the objectors to the application arose; the objectors were the two brothers of the subject. The objectors contended that the application was a ploy by the applicant and the subject's sisters to get control of the subject's land.



Issues

What factors should a court consider in an application for orders of custody management and guardianship over a person suffering from mental disorder?

Relevant provisions of the Law

Mental Health Act, Cap. 248 Laws of Kenya

Section 26 and 27

26. Order 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 and guardian of any such person.

(3) Whereupon 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.

27. Power of manager in respect of estate

(1) Where a manager is appointed under this Part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper regard being had to the nature of the property whether movable or immovable, of which the estate may consist:

Provided that—

(i)

(ii) no manager may invest any funds belonging to the estate of which he is manager in any company or undertaking in which he himself has an interest, nor on the purchase of immovable property under the authority of paragraph (d) of section 4(1) of the Trustee Act without the prior consent of the court.

(2) Where the person appointed to be manager of an estate or guardian of a person under this Part is unwilling to act gratuitously, the court may fix such allowance to be paid out of the estate of the person in respect of whom the manager or guardian has been appointed as, in the circumstances of the case, the court may think fit.

(3) Any manager appointed under any other law in force before the commencement of this Act shall be deemed to have been appointed under this Act as from such commencement, but shall not be required to file any inventory or statement under subsection (1) of section 33 if he has already done so before such commencement.

(4) For the purposes of this Act and the Penal Code (Cap. 63), a manager shall be deemed to be a trustee under any other law for the time being in force.

Held

1. All the parties were primarily concerned about the Subject's property and what would happen to it yet showed little or no interest in the welfare of the Subject. The motive of one of the objectors to the application was to dispose of the Subject's property.
2. The disposition granting custody, management and guardianship to the applicant against the subject's property was not measured to cater for the needs of the subject but the applicant's overall views about who should inherit the applicant's land. The applicant regarded the land belonging to the subject as the applicant's land to do as she wished.



3. The position appeared to be the same for the objectors. Each of them was primarily interested in the subject's land; with each giving proposals that the title should be registered in the joint names of all the siblings.
4. In considering an application brought under sections 26 and 27 of the , the court was guided by three main factors:
 - a. there had to be medical evidence warranting the determination by the court that the subject suffered from mental disorder;
 - b. the person to be appointed to be either a guardian or manager had to be fit to be so appointed;
 - c. the court had to be satisfied that a proposed manager would utilize her powers for the benefit and welfare of the subject.
5. The overriding principle was that the welfare and best interests of the subject must be the overall guiding principle.
6. While the court was persuaded by the medical report that indicated that the subject had developmental deficits which met the standard set in section 26 of the , the application appeared disingenuous and drove by the need to dispose of the subject's property. The subject had the same deficits when the applicant conveyed the properties in question to her. It appeared problematic at best to turn around twenty years later to bring the instant application.
7. The court was not satisfied that the application had been brought in the best interests of the subject or that the subject's property would be used in her best interests. It was on record from the applicant that she planned to convey the subject's property to her grandchildren and only leave a small portion to the Subject.
8. The applicant was not a fit person to be appointed as either a guardian or manager to the estate of the subject because the applicant was not only advanced in age and showed worrying signs of old age; but was also unnecessarily combative and aggressive. It wouldn't serve the subject's best interests to appoint her as either guardian or manager.

Application dismissed.

Citations

Statutes

1. — section 26,27 — Interpreted

Advocates

None mentioned

RULING

1. The applicant has approached the court under sections 26 and 27 of the [Mental Health Act](#) for the following two orders:
 - a. That EWK be appointed manager over the estate of NMK (hereinafter, the“subject”) who suffers from mental disorder;
 - b. That EWK be appointed manager over the Estate of NMK with general powers to deal with the estate. The estate comprises of:
 - i. Title No Githunguri/Kanjai/ [Particulars withheld] and
 - ii. Title No Githunguri/Kanjai/[Particulars withheld]



2. The application was supported by the affidavit of the applicant. For the main part, the affidavit evidenced a medical report by Dr Jumba Joseph on the subject and copies of titles to the two properties owned by the subject over which the applicant prays to be appointed the manager.
3. The advocate for the applicant appeared before me on 11/05/2017 accompanied by both the subject and the applicant. Having seen the subject and noted her condition, I dispensed with any further need for her to attend court. I then directed that the applicant serves all the living siblings of the subject with the application. This is because it occurred to me that these are possibly the only close relatives who might have an interest in the matter or who may assist the court in making a proper determination of the application.
4. Consequently, five siblings appeared before me on 12/07/2017 having been duly served. A sixth sibling, CNK, who lives in Denmark was not present but the advocate for the applicant indicated that she was aware of the application and in support of it. She later filed an affidavit to that effect.
5. It quickly became obvious that there was a deep disagreement in the family regarding the application. All the sisters of the Subject (and the applicant – who is the subject’s mother) were in support of the application. On the other hand, the subject’s two brothers – HMK and KKM – strongly objected to the application. The two brothers filed replying affidavits in opposition to the application.
6. Having noted the disagreements in the family and having given an opportunity to the family to mediate the issue and having formed the opinion that any further mediation would be futile, I allowed the parties to present *viva voce* evidence on the twin questions before the court.
7. The applicant relied on her supporting affidavit sworn on 04/05/2017. She also relied on the affidavits by her daughters as follows: That of CKK sworn on 02/06/2017; that of CWL sworn on 24/05/2017; that of CM sworn on 02/06/2017; and that of CNK sworn on 20/07/2017.
8. The applicant testified that the Subject was one of her children and that the subject has had developmental issues throughout her life. The subject also underwent heart surgery in 1998. It was her testimony that the subject is incapable of taking care of herself or her affairs hence the need for the application.
9. The applicant testified that in 1998 she decided to subdivide her land to give all her children their own parcels. She parceled out two pieces for the subject which are the subject of prayer 2 in the Application. She testified that the two objectors – HMK and KKM – have absolutely no relationship with the Subject and have never helped or assisted her in any way.
10. On their part, HMK and KKM, were both categorical that the present application is but a ploy for the Applicant and their sisters to get control of the Subject’s land so that they can dispose of it. They make this position in their affidavits on record as well as in their oral testimony in court. They appeared to waver on the question of whether the Subject is sufficiently unwell for a Guardian and Manager to be appointed over her affairs. For example, under cross-examination, HMK stated: “[Subject] is okay compared to other children I know...She can cook for herself. She can wash her clothes. She is not crippled.”
11. What became clear during the hearing was that all the parties were primarily concerned about the Subject’s property and what would happen to it. There was little or no interest in the welfare of the subject. For example, in cross-examination, the applicant stated thus:

I want the land belonging to M [the subject] back so that I divide it among my grandchildren. I have already subdivided my other pieces of land. I would like the shamba



to be registered in the name of the grandchildren....I will leave half-an-acre with the house to her [subject] – and to any of her siblings who can take care of her.

12. It is quite clear from this answer that the real motivation for the present application is to dispose off the subject's property. It is readily clear that such disposition is not measured to cater for the needs of the subject but the applicant's overall views about who should inherit the applicant's land. In forming these views, it was obvious to the court that the applicant still regards the land belonging to the subject as the applicant's land to do as she wished.
13. The position appeared to be the same for the objectors. Each of them was primarily interested in the subject's land – with each giving proposals that the title should be registered in the joint names of all the siblings. HMK explicitly wondered why their mother was subdividing land to relatives who do not need it since the targeted beneficiaries do not live in Kenya.
14. 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 a 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.
15. The overriding principles in applying all these factors is that the welfare and best interests of the subject must be the overall guiding principle.
16. In applying these principles to the present case, I am inclined to decline both prayers by the applicant. I have come to this conclusion for at least three reasons.
17. First, while I am persuaded by the Medical Report by Dr Jumba Joseph that the subject has developmental deficits which meet the standard set in section 26 of the *Mental Health Act*, the application being made at this point appears disingenuous and driven by the need to dispose off the subject's property. This is because the Subject had the self-same described deficits when the applicant conveyed the properties in question to her. It appears problematic at best to turn around twenty years later to bring the present application.
18. Second, and related, I am not satisfied that the application has been brought in the best interests of the subject or that the subject's property will be used in her best interests. Indeed, I have it on record from the applicant that she plans to convey the subject's property to her grandchildren and only leave a small portion to the subject.
19. Third, after observing the applicant in court as she gave her oral evidence, it was readily obvious to me that she is not a fit person to be appointed as either a Guardian or manager to the estate of the Subject. The applicant is not only advanced in age and showed worrying signs of old age, but was also unnecessarily combative and aggressive. I am not persuaded that it will serve the Subject's best interests to appoint her as either Guardian or manager.
20. In the circumstances, I am unable to grant the orders sought in this Application. The same is dismissed.
21. Orders accordingly.

DELIVERED AT KIAMBU THIS 23RD DAY OF NOVEMBER, 2017.



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JOEL NGUGI
JUDGE

