



**In re EMM (Miscellaneous Application E014 of 2023)
[2023] KEHC 23450 (KLR) (13 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E014 OF 2023**

G MUTAI, J

OCTOBER 13, 2023

N THE MATTER OF THE MENTAL HEALTH ACT (CAP 248 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF EMM (PERSON SUFFERING FROM MENTAL DISORDER)

AND

**IN THE MATTER OF AN A PETITION BY JOSEPHINE KAVUNA
MWINGA TO BE APPOINTED AS GUARDIAN AD LITEM OVER THE
AFFAIRS AND MANAGEMENT OF THE ESTATE OF THE SAID EMM**

JOSEPHINE KAVUNA MWINGA.....PETITIONER

IN THE MATTER OF

JKM PETITIONER

JUDGMENT

Introduction

1. The Petitioner is the wife of EMM (hereafter “E”). The Petitioner and E got married on September 28, 2005 under the customary laws of the Kamba people. Their union has been blessed with 3 issue, JKM, DNM and SNM aged 15, 14 and 12 respectively. All the issues are male.
2. The Petitioner avers that E has been diagnosed as suffering from schizoaffective disorder. The prognosis given by Dr. Mwangome of the Coast General Hospital is that the said condition is progressive and irreversible. Given his condition the Petitioner states that E is incapable of leading an independent life as his judgment “is both socially and occupationally impaired”. She therefore seeks to be allowed to administer his estate so that she can effectively take care of both the said patient and their three children.
3. The Applicant states that E has both movable and immovable assets under his name including a bank account number 02XXXX14 held at the Equity Bank, Moi Avenue Branch, Mombasa.



4. Vide a Petition dated 28th April 2023 the Petitioner sought 3 orders to wit: -
 1. The patient EMM be and is hereby adjudged to be a person suffering from mental disorder under section 26 of the *Mental Health Act*, cap 248 of the Laws of Kenya;
 2. That Josephine Kavuna Mwinga be and is hereby appointed guardian ad litem of EMM;
 3. That Josephine Kavuna Mwinga be and is hereby appointed the Manager of the estate of EMM which includes movable or immovable properties, money debts and legacies with power to execute, sign all deeds and instruments relating to or evidencing the title or right to any property including spousal consent or giving right to receive any money or goods and proceed to take over and or institute litigation or claims and also to include not only such property as has originally been in possession or under the control of any such person but also any property or for which the same has been converted or exchanged and anything required by such conversion whether immediately or otherwise; and
 4. That the costs of this application be provided for from the estate of EMM.
5. The Petitioner attached to the Petition her national identity card, affidavit of marriage sworn on July 26, 2007 by E and the birth certificates of their children. She also attached 2 medical report, both prepared by Dr. Charles Mwangome and dated August 30, 2019 and April 19, 2023. In the said reports the doctor found that E is impaired socially and occupationally and cannot lead an independent life. He recommended the appointment of a caretaker, who he felt ought to be his wife, to administer his estate and property.

Proceedings Before Court

6. The Petitioner initially sought leave to file the Petition. The leave was granted by this Court on May 17, 2023. On June 20, 2023 I directed that Elphus be taken to coast General Hospital for examination by a psychiatrist. I heard the matter on September 28, 2023. The person with mental disorder, that is to say E, was present during the hearing.
7. The Court interviewed E. He was agitated and spoke animatedly about his life. He advised the Court to seek further education. He claimed to have a masters degree in what he called Basement Studies. In my opinion E is clearly unwell.
8. The Petitioner Josephine Kavuna Mwinga was the only witness. She relied on her affidavit and produced the documents in her bundle. At the end of the hearing I was requested to order that E, being a person suffering from Mental disorder, be admitted to Port Reitz Hospital, Mombasa. Upon considering the matter and having regard to the state of the patient I allowed the said oral application.
9. The assets of the patients as far I can tell from the proceedings are :-
 1. Bank account No. 02XXXX14 Equity Bank, Moi Avenue Branch;
 2. Movable assets; and
 3. Immovable assets.

The Applicable Law

10. 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 Patient. The appointment of a Manager 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. 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”

11. 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. Josephine Kavuna Mwinga is not a “supporter” of the patient as she wasn’t appointed in writing as such. It is however my finding that being the wife of the patient he is a “representative” within the meaning of the Act and therefore has the locus standi to file the instant petition.

Analysis of the Facts and the Law

12. *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.”

13. I would add that the third test is whether the application is in the patient's best interest. People with mental illnesses have diminished capacities 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 patient's interest. In addition, the orders that the court issues must be aimed at achieving the said goal.
14. E is said own movable and immovable properties. He is also said to have a Bank account No. 02XXX14 with Equity Bank, Moi Avenue Branch. The Petitioner wants to access the said account so that she can pay take care of her children and also the Patient.
15. I observed the Patient in court. He was clearly unaware of his surroundings. I am persuaded that he suffers from a mental illness.
16. I have read the two reports written by Dr. Mwangome as well as that done by a clinical officer at Port Reitz Hospital and also by Ms. Nancy Kipkemoi, a clinical officer at Port Reitz Sub Country Hospital. I am satisfied that E has mental illnesses. From the testimony of the petitioner and the reports of the medical professionals, the patient is unable to manage his own affairs. It will therefore be in his best interest that a manager/guardian-ad-litem is appointed to manage his estate. The manager/guardian ad litem will ensure that he receives the most appropriate care possible and that his estates is not wasted. I take note of the fact that the 3 issues named above are still in school and require funds to enable them continue schooling.

Disposition

17. I am therefore satisfied that a case has been made for the appointment of the petitioner as the manager/guardian ad litem of E. I, therefore, order and direct as follows:-
 1. The applicant, Josephine Kavuna Mwinga, is hereby appointed as the manager/guardian ad litem of the patient, EMM;
 2. The manager/guardian ad litem shall manage the estate of the patient in particular his interests in: -



- a. Bank account number 02XXXXX14 Equity Bank, Moi Avenue Branch, Nairobi
- b. Movable assets; and
- c. Immovable assets.

For the best interest of the Patient. She shall however not have the power to sell, charge or otherwise alienate the immovable property of the patients without 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 the patient within 6 months of the date of her appointment; and
5. I make no order as to costs.

Orders accordingly.

DELIVERED AND DATED THIS 13TH DAY OF OCTOBER 2023 AT NAIROBI VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Ndambuki for the Applicant

Mr. Arthur Ranyondo – Court Assistant

