



APPLICATION FOR ADULT GUARDIANSHIP/MANAGEMENT OR CURATORSHIP ORDERS; DOES A MENTAL DISORDER DIAGNOSIS AUTOMATICALLY NEGATE MENTAL CAPACITY?

INTRODUCTION

Over the last couple of years, there has been an increasing desire of family members to legally provide care for their kin who have received a medical diagnosis that they suffer from a mental disorder.

In the traditional African setting, we typically care for our loved ones as they age or become vulnerable by being plagued by mental diseases. In some unfortunate circumstances, such diagnosis meant doom for some people, they would end up locked in rooms within their homes, funds withdrawn from their accounts, their assets shared amongst their relatives as they count down days to their demise.

Not so now, more and more families have become aware that having a mental disorder diagnosis is not something to be ashamed of or hidden, they are aware that the law has given provision for how they can cater for their loved ones.

It is critical to have an understanding of who a person suffering from a mental disorder is

and for purposes of undertaking legal action to have them under guardianship or management orders, whether they lack the mental capacity to carry out their day-to-day affairs.

WHO IS A PERSON SUFFERING FROM A MENTAL DISORDER?

The Mental Health Act, Cap 248 Laws of Kenya offers the following definition: “...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 or substance abuse.”

Differing views may arise as to whether this definition is conclusive and I opine that it is not.

WHAT IS MENTAL CAPACITY?

The Supreme Court of Kenya in *Petition No. 10 (E013) of 2022, Hon. Lady Justice Mary Muthoni Gitumbi vs. The Tribunal Appointed to investigate the conduct of Hon. Lady*

Justice Mary Muthoni Gitumba, Judge of the Environment & Lands Court of Kenya stated as follows;

“...The Mental Health Act, Cap 248 does not define mental incapacity... this Act is silent on the resultant effect of mental capacity of persons with mental illness...”

Comparatively:

1. The Mental Capacity Act 2005 (UK Act) Section 1 provides the below guidelines where a nexus is to be found between a diagnosis of mental illness and its effect on one's mental capacity;
 - a) A person must be assumed to have capacity unless it is established that he lacks capacity.
 - b) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
 - c) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
 - d) An act done, done or made under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests.
 - e) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
2. Sections 2 (1) and (2) provide as follows;
 - a) A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an

impairment of, or a disturbance in the functioning of, the mind or brain.

- b) It does not matter whether the impairment or disturbance is permanent or temporary.

An interesting case that brings this home is Heart of England NHS Foundation Trust Vs. JB (2014) EWCOP 342

“...This case concerned a 62-year-old woman (JB) diagnosed with paranoid schizophrenia during her 20's. In 2013, JB developed ulcers on her feet and eventually her right foot became gangrenous. The medical advice was for an amputation which JB opposed but doctors attending her were in conflict as to whether she lacked capacity to make medical decisions. The NHS Trust applied to the Court of Protection for a declaration that JB lacked capacity to consent to medical treatment and that it would be in her best interest to have a through-knee amputation and for her to be sedated if she resisted...”

Peter Jackson, J held as follows;

“...There are some who, as a result of an impairment or disturbance in the functioning of the mind or brain, lack the mental capacity to decide these things for themselves. For their sake, there is a system of legal protection, now codified in the Mental Capacity Act 2005. This empowers the Court of Protection to authorize actions that would be in the best interests of the incapacitated person.

The Act contains a number of important general principles regarding capacity...

These principles reflect the self-evident seriousness of interfering with another person's freedom of action. Accordingly, interim measures aside, the power to intervene only arises after it has been proved that the person concerned lacks capacity. We have no business to be interfering in any other circumstances. This is of particular importance to people with disadvantages or disabilities. The removal of such ability as they have to control their own lives may feel an even greater affront to them than to others who are more fortunate...

The Judge concluded by finding that JB undoubtedly had a disturbance in the functioning of her mind in the form of paranoid schizophrenia (as to which she lacked insight), but that it had not been established that she thereby lacked the capacity to make a decision about surgery for herself. On the contrary, the evidence established that she had capacity to decide whether to undergo an amputation of whatever kind...

Having established that the Mental Health Act, Cap 248 Laws of Kenya did not proffer a definition and or guideline with regards to the Mental Capacity of a person diagnosed with a mental disorder, the Supreme Court of Kenya established the following guidelines;

1. Mental incapacity includes but is not limited to a person's inability to make a decision, understand information about a decision, remember information, use the information to make a decision, or communicate a decision.
2. Mental incapacity can result from mental illness but it does not

necessarily follow that mental illness equals mental incapacity.

3. Medical incapacity must be diagnosed by a qualified professional.
4. A court is bound to consider whether an employer caused the establishment of an independent medical board of duly qualified members to determine whether the employee is, by reason of an infirmity of mind, incapable of discharging the functions of the relevant office.
5. If an employee's mental illness is adversely affecting their ability to perform their duties, in some instances, the employer, following due process, may terminate the employee's contract of employment or recommend the employee's removal from office.
6. A court must consider the diagnosis by a qualified professional, and medical expert evidence and assess whether, on a balance of probabilities, the employee's mental illness affects their work duties.
7. Where a person is deemed to lack mental capacity, any interference with his or her fundamental rights and freedoms must be the least restrictive possible.

Summarized therefore is that while a diagnosis may have been received of a mental disorder, the diagnosis on its own is not sufficient for the Court to grant guardianship and/or management orders.

CONCLUSION

With the understanding that such a diagnosis can cause angst to the patient with reaching effects on their families, employment, social and economic lives, before one can make an application for the court to essentially take away the patient's autonomy and place such

responsibility on their guardian and/or manager, a conclusion after thorough examination of the medical documents, evidence by concerned persons has to be reached that due to certain medical diagnosis the patient has lost mental capacity, which varies from a case to case basis.

Our next article will pre-suppose a finding of lack of mental capacity. What next? What is the duty of the appointed guardian/manager or curator?

HOW CAN WE HELP?

At CM Advocates LLP, our Private Wealth, Family Law, Family Business & Global Mobility Advisory Services deeply understand the profound responsibility and sensitivity involved when considering legal care for a loved one facing a mental disorder diagnosis. We recognize that while providing support is paramount, respecting individual autonomy and navigating complex legal requirements demands expert guidance.

We offer specialized and compassionate support to families seeking to ensure the best interests of their vulnerable kin, particularly when the question of mental capacity arises. Our services include:

- **Determining Mental Capacity:** We provide expert legal counsel in assessing mental capacity, guiding families through the intricate process in line with the Supreme Court of Kenya's guidelines. We assist in understanding whether a diagnosis translates to an inability to make decisions, ensuring all legal requirements are met before considering an application for guardianship.
- **Applying for Guardianship/Management/Curatorship Orders:** Should a finding of lacking mental capacity be established, we provide step-by-step assistance in preparing and filing the necessary court applications for adult guardianship, management, or curatorship orders, ensuring compliance with all legal provisions.
- **Liaising with Medical Professionals:** We facilitate collaboration with qualified medical professionals to secure the comprehensive expert evidence required by the courts, ensuring that decisions are based on thorough and accurate assessments of mental capacity.
- **Protecting Autonomy and Best Interests:** Our approach strictly adheres to the principle of least restrictive intervention. We advocate for solutions that prioritize the individual's best interests while preserving as much of their rights and freedoms as possible, even when a guardian is appointed.
- **Guidance for Appointed Guardians/Managers or Curators:** For those granted guardianship or management orders, we offer ongoing legal advice on their duties and responsibilities, ensuring proper administration of the individual's affairs and compliance with court directives.
- **Navigating Complex Family Dynamics:** We provide empathetic support in situations where differing family views exist regarding a loved one's care, helping to mediate discussions and find common ground that serves the individual's welfare.

Navigating adult guardianship requires precision, compassion, and a thorough understanding of the law. Let us help you ensure that your vulnerable loved one receives the dignified and legally sound care they deserve.

Contact Person & Contributor



Nelima Walubengo-Tindi
Senior Associate
ntindi@cmadvocates.com

www.cmadvocates.com



I&M Bank House, 7th Floor, 2nd Ngong' Avenue Off Ngong' Road
Upperhill, Community | P.O BOX 22588-00505, Nairobi, Kenya
Email: law@cmadvocates.com