



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO. 77 OF 2013**

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

**AND**

**IN THE MATTER OF DR. BMG (SUFFERING FROM MENTAL DISORDER AS A RESULT OF ALZHEIMER'S DISEASE)**

**AND**

**IN THE MATTER OF MMG (PETITIONER/APPLICANT)**

**RULING**

1. The petition dated 19<sup>th</sup> August 2013 seeks following principal orders:-

- (a) That Dr. BMG (herein after referred to as the patient) be adjudged to be a person suffering from a mental disorder under section 26 of the Mental Health Act;
- (b) That MMG (herein after referred to as the petitioner) be appointed as the legal guardian of the patient;
- (c) That the petitioner be appointed as the manager of the estate of the patient, with the powers enumerated in the said petition; and
- (d) That the petitioner be authorised to stop any transaction on moveable and immovable assets belonging to the patient for the benefit of the said patient.

2. The petition is supported by an affidavit of the petitioner sworn on 19<sup>th</sup> August 2013. The patient is her husband, and they have between them four (4) children. She avers that the petitioner suffers from the Alzheimer's disease, which has affected his mental faculties, to the extent that he is now unable to communicate and to perform basic functions on his own.

3. On 25<sup>th</sup> September 2013, a motion was filed by the petitioner for interim relief, in terms of her being appointed the interim legal guardian of the patient and manager of his estate pending the hearing and determination of the petition. The assets that are said to comprise the estate of the patient are set out in an affidavit sworn on 23<sup>rd</sup> September 2013 in support of the application.

4. There is a response to both the petition and the motion. This is comprised in an affidavit sworn on 3<sup>rd</sup> March 2014 and filed herein on 4<sup>th</sup> March 2014 by UMG, hereinafter referred to as the respondent. A number of issues are raised. The deponent states that he holds a power of attorney executed in his favour

by the patient, that the bulk of the assets alleged to belong to the estate of the patient do not in fact belong to the patient and that urgency has not been demonstrated that the patient's condition has had a turn for the worse. It is disclosed that there is a suit filed by the petitioner against the respondent and another with respect to the assets mentioned in the motion. The said suit was said to be ELC No. 547 of 2011. It is averred that the suit herein is really not about the mental state of the patient but rather it is another avenue opened by the petitioner in her quest to have control of the assets that are the subject of her previous suits.

5. On 8<sup>th</sup> December 2014, the respondent herein filed a Preliminary Objection of even date, which challenged the jurisdiction of the court in view of a consent that had been entered into in ELC No. 547 of 2011 by the petitioner and the respondent referring all pending matters for arbitration. It was urged that the said consent order was valid and binding on the court.

6. The petitioner filed grounds of opposition on 16<sup>th</sup> March 2015 to the preliminary objection. The filing of such a process cannot be procedural for a preliminary objection raises points of law, the person responding should ideally just turn up in court and advance his arguments in opposition. Be that as it may, it is urged in the grounds of opposition that the consent order was limited to the issues raised in the suit where the same was recorded.

7. When the matter came up on 3<sup>rd</sup> March 2016 for hearing, I was urged to hear the preliminary objection first, which I obliged. The preliminary objection was argued by Mr. Ondieki for the respondent, while Ms. Wachanga responded for the petitioner. Mr. Ondieki argued that the case before me was convoluted. It was stated that there was previous litigation on the same assets, and argued that what was in dispute in the suit was ownership of the assets. It was said that the two suits revolve around the same assets. It was urged that there was a consent entered in the other suit to refer the matter to arbitration, and the said suit ought to be resolved first before the petition herein is heard and determined.

8. In opposition, Ms. Wachanga argued that the objection did not turn on a pure point of law, instead it was founded on facts so that the court would be obliged to go back to the pleadings to determine the same. She submitted that the suit was founded on the Mental Health Act which vested the court with jurisdiction to make the orders sought in the petition. She conceded the consent in the other suit, but stated that that consent was of utility only in the said suit. She argued further that the instant cause is not about ownership but management of assets.

9. I have carefully considered the pleadings herein and the oral arguments by counsel, and I am persuaded that the preliminary objection does not raise a pure point of law. The consent which is at the heart of the objection was not recorded in this cause but in another. That other cause has not been consolidated with the instant one, neither is the said consent pleaded by either the petitioner or the respondent in their principal papers filed herein. The objection cannot be disposed of with reference to documents filed in this cause, but rather by referring to documents filed in another suit. The consent order can only possibly be introduced into the instant cause as a matter of fact in an affidavit. The said consent order has not even been placed properly on record. There is no affidavit by either party introducing that consent in this cause. It was placed on record during argument when a photocopy thereof was handed over to the Judge by counsel. I have had occasion to peruse through it and noted that it makes no reference whatsoever to the instant suit.

10. To the extent that the preliminary objection is founded on the alleged consent order, it is my conclusion that the said consent cannot be a basis for making a finding at this stage that the instant suit is improper or ought to be stayed or struck out.

11. Issues were raised about the instant suit and the other suit turning on the same issues, in particular, the assets. Let me first start by stating that my reading of the petition before me is that the petitioner is principally seeking orders under the Mental Health Act. She would like the court to adjudge the patient to be suffering from mental disorder and, upon the making of that finding, to appoint her guardian of the patient. It cannot be said that these prayers touch on the property of the patient. It cannot even be concluded that these two principal prayers are remotely connected to the prayers in ELC No. 547 of 2011. I do note though that the petition does have prayers that relate to management of the patient's estate, but I

dare say that those prayers are secondary to the principal prayers mentioned hereabove. On the face of it therefore it cannot be that the suit herein is on all fours with ELC No. 547 of 2011. It cannot be described as an abuse of the court process.

12. There is material upon which it can said that some of the assets the subject of the instant suit are also the subject of ELC No. 547 of 2011. In my view, and in view of what I have stated so far, whether the petitioner can be granted authority over those assets is a matter that can be canvassed either at the hearing of the petition itself or upon an application properly brought by the respondent on the matter of the said assets. It is not something that can be dealt with summarily in a preliminary objection.

13. The short of it is that the preliminary objection dated 8<sup>th</sup> December 2014 is wholly without merit. It is hereby accordingly overruled. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>TH</sup> DAY OF NOVEMBER, 2016.**

**W. MUSYOKA**

**JUDGE**