REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. PETITION NO. 40 OF 2015

IN THE MATTER OF SECTIONS 5, 26, 27, 28, 29, 31 AND 33 OF THE MENTAL HEALTH ACT, CAP 248, LAWS OF KENYA

IN THE MATTER OF G N M

AND

IN THE MATTER OF BARCLAYS BANK ACCOUNT G N M

BETWEEN

LUTHERAN SERVICES FLORIDA INC……...…….PETITIONER

-AND-

DIRECTOR OF MEDICAL SERVICES....….....1ST RESPONDENT

KENYA BOARD OF MENTAL HEALTH…...….2ND RESPONDENT

BARCLAYS BANK OF KENYA…….3RD RESPONDENT

RULING

1. The petitioner commenced this cause on 20th March 2015 by way of a petition dated 20th March 2015. The said petition is supported by an affidavit complete with annexatures. The petition was presented to court under a certificate of urgency, but without an interlocutory application.

2. The matter was placed before Ougo J on 25th March 2015, and was certified urgent. It was directed that the matter be heard on a date to be given at the registry. The petitioner was given a date the same day at the registry for the hearing of the petition on 7th April 2015. On 7th April 2015 the petition was placed before me when the 2nd respondent sought for time to file her papers in reply to the petition. The application for time was granted and the matter was fixed for hearing on 10th April 2015.

3. A reply to the petition was filed on 9th April 2015 in the form of an affidavit sworn on 9th April 2015. The 2nd respondent does not, in the said reply, oppose the petition, but acknowledges that the subject of the proceedings does hold an account with the bank, and the bank would not have resisted any court order that it releases the money it holds in the account. It is protested that the 2nd respondent has been

needlessly dragged to court.

4. When the matter came up for hearing on 10th April 2015, counsel for the petitioner moved the court informally, by way of an oral application for the amendment of the petition on record. She expressed herself to be moving the proposed amendment under section 100 of the Civil Procedure Act. She stated that she had been prompted to make the application by counsel for the 2nd respondent who had pointed her to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya, under which the orders of the foreign court that the petitioner seeks to have adopted could not be enforced.

5. Her plea was that the first prayer in the petition be amended so that instead of seeking the adoption of the orders of the Sarasota County Probate Court it should be expressed to be asking the court to find it fit to appoint the petitioner manager and guardian of the subject of the proceedings.

6. Counsel for the 2nd respondent in her address to court indicated that she was not opposed to the petition, but stated that she was under a duty to bring it to the attention of the court that the judgment sought to be adopted in the petition could not be so adopted in view of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act. She argued that the petitioner ought to have applied for appointment as manager and guardian of the subject. She did not address me on the question of the amendment of the petition, and left that issue to the court. She, however, insisted on costs.

7. I note that the petitioner concedes that the principal prayer in the petition before me is not grantable in view of the very clear provisions of the Foreign Judgments (Reciprocal Enforcement) Act which does not apply to orders of a foreign court with respect to the management of the affairs of a person who is incapable of taking care of his own affairs.

8. The relevant provision is at section 3(3)(f) of the Foreign Judgments (Reciprocal Enforcement) Act, which provides as follows –

> *'This Act does not apply to a judgment or order -*
>
> *(f) in proceedings concerning the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs.'*

9. Ideally, the enforcement of foreign judgments should be sought in a suit properly brought under the Foreign Judgments (Reciprocal Enforcement) Act. There is no provision in the Mental Health Act for a mechanism to enforce such judgments. The petition therefore as framed is incompetent.

10. Can the incompetence be cured by way of amendment? I think not. Amendment of pleadings is only available in circumstances where the proposed amendment is not fundamental in the sense of completely changing the character and essence of the suit. In this suit the amendment proposed would fundamentally change the entire pleading to the extent that the same would amount to a new suit altogether.

11. In the first place, the principal order sought in the petition is for adoption of a judgment of a foreign court; the proposed amendment would be for the appointment of the petitioner as the manager and guardian of the subject.

12. Secondly, the pleading as drafted names parties as would be the case in adversarial proceedings. Yet causes of this nature are not adversarial. It is not a dispute between two or more combatants to be determined by the court. The ideal situation should be that it is a cause where a party has come to court petitioning to be appointed to act on behalf of a person who is incapable. It should not name anyone as a party.

13. Thirdly, the petition has named persons as parties to the cause, who for all practical purposes have nothing to do with the main cause, the appointment of a manager and guardian of the subject. It is not

explained why the 1st respondent was named as a party to the cause, yet there is no pleading at all in the petition touching on the said 1st respondent. The 2nd respondent is named merely because it holds funds belonging to the subject, yet that has nothing really to do with who is appointed as manager of the affairs of the subject. In such cases the bank merely goes along with whatever orders the court makes with respect to such funds. The bank does not have to be made a party to the proceedings where is sought a manager is appointed for the purposes of the affairs of any of its customers who become incapable.

14. Finally, the persons who ideally should have been involved in the matter do not appear to be party to the proceedings. It is pleaded that the subject is a Kenyan citizen. He must, no doubt, have relatives in Kenya. It is not pleaded that efforts are made to trace his relatives in Kenya before orders are sought which, if granted, will have the effect of removing funds from his bank account to the hands of a foreign entity and to a lawyer for that entity. Certainly, this is a matter that should be handled with some amount of care as it concerns the property rights of an individual. If the subject is incapable, then his immediate relations should have a say on what is to happen to his property.

15. I doubt whether the amendment sought can be granted under section 100 of the Civil Procedure Act. Section 100 is designed to correct errors in proceedings, not pleadings. The court can correct any errors in its proceedings under section 100. Proceedings are the property of the court, the pleadings are not. The court can amend the proceedings because they belong to it, it cannot amend pleadings as they do not belong to it. Pleadings belong to the parties; ideally therefore pleadings can only amended by the parties.

16. For the reasons that I have given above, I have come to the conclusion that the amendment sought in the petition herein would fundamentally change the character of the entire suit. The proper thing to do in the circumstances would be to strike out the petition on record. It is hereby struck out. The 2nd respondent is shall costs of the suit to be taxed.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF April 2015.

W. MUSYOKA

JUDGE

In the presence of Mr. Nyabui for Mrs. Ligunya advocate for the petitioner.

In the presence of Mr. Mukara for Ms. Odera advocate for the 2nd respondent.