



**Ngure & 2 others v Manjari (Miscellaneous Civil Application  
E037 of 2022) [2023] KEHC 22906 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS CIVIL APPLICATION E037 OF 2022**

**A MSHILA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**HELLEN WANGARI NGURE ..... 1<sup>ST</sup> APPLICANT**

**JOHN MARI NDUNGU ..... 2<sup>ND</sup> APPLICANT**

**PETER KARANJA NGURE ..... 3<sup>RD</sup> APPLICANT**

**AND**

**STEPHEN NGURE MANJARI ..... OBJECTOR**

**RULING**

1. Before court is a Notice of Preliminary Objection by the Objector to have the Power of Attorney dated July 5, 2022 be struck out on the grounds;-
  - a. That the Donee has no capacity to represent the 1<sup>st</sup> Applicant under the *Advocates Act*.
  - b. That Power of Attorney does not confer to the Donee power to act as an advocate and as such his representation is illegal.
  - c. That a Donee representation is an abuse of court process.
  - d. That the Power of Attorney dated July 5, 2022 should therefore be struck out with costs.
2. The Preliminary Objection was canvassed by way of written submissions.

**Objector's Submissions**

3. The Objector submits that the representation by the Donee is against the law as it goes against the principles set for one to qualify to act for another in a case. It was submitted that the Donee is not an advocate. Counsel placed reliance on Section 31(b) of the *Interpretation and General Provisions Act*, Order 9 rule 1 of the *Civil Procedure Rules* and Section 9 of the *Advocates Act*. The case of



*Jack J Khanjira & another vs Safaricom Limited* (2012) eKLR was also relied upon to support this proposition.

### Issues for determination

4. Having considered the Preliminary Objection and the submissions by the Objector, the main issue for determination is whether the Preliminary Objection herein should be upheld.

### Analysis

5. A proper preliminary objection must be on a pure point of law. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the locus classicus on preliminary objections in this region, Law JA stated:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

6. For a Preliminary Objection to succeed it must satisfy the following tests in that it should only raise a pure point of law, it is argued on the assumption that all the facts pleaded by the other side are correct and lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should dispose of the suit if successful.
7. In the case herein, the Objector contends that the power of attorney granted to Daniel Ng’ang’a Wanyoike by Hellen Wangari Muturi does not confer to the Donee power to act as an advocate as such the Donee’s representation was said to be illegal. Daniel Ng’ang’a Wanyoike the Donee herein avers that Hellen Wangari granted him the Power of Attorney as she is a hundred years so that he can safeguard her interests in the matter herein.
8. Section 9 of the [Advocates Act](#) provides that:

“Subject to this Act no person shall be qualified to act as an advocate unless:

- a) he has been admitted as an advocate, and
- b) his name is on the Roll of Advocates, and
- c) he has in force a practicing certificate, and
- d) he has in force an annual licence.”

9. The issue arising in this case is whether the Donee acting pursuant to a donated power of attorney can appear in court on behalf of a party acting in person. A party who wishes to appoint another person to act on their behalf must always ensure that the person appointed is qualified to act as an advocate.
10. Section 34 of the [Advocates Act](#), provides that:-

“No unqualified person shall, either directly or indirectly take instructions to draw or prepare any document or instrument.

.....



(l) relating to any other legal proceedings"

11. The Donee herein is not an advocate, yet he purports to appear on behalf of the Donor in the matter herein. It is important to note that the [Advocates Act](#) prescribes a criminal penalty for the carrying out of any of the matters regulated by the Act. Section 31 of the [Advocates Act](#) provides as follows:-

"(1) subject to Section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction."

12. However, unqualified persons can act for or in the name of another person as envisioned in Section 83 of the [Advocates Act](#). It provides as follows:

"Nothing in this Act or any rules made thereunder shall affect the provisions of any written law empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings.."

13. Order 9 rule 1 of the Civil Procedure Rules provides as follows:

"1. Any application to or appearance or act in any court required or authorised by the law to be made or done by a party in such court, may, except where otherwise expressly provided for by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by an advocate duly appointed to act on his behalf.."

14. Bearing in mind the above mentioned provisions it then means that a Donee is only allowed to carry out duties as stipulated in the power of attorney as long as the said duties are not in violation with any other law. The Civil Procedure Rules does not confer rights to unqualified person to act as an advocate. More so, the functions being undertaken by the recognized agent must also be approved by the court so as to limit the agent to only functions that are allowed by the law. Such approval has not been granted to the Donee by this court to allow him to perform any functions on behalf of the Donor. Reference is made to the case of [Carolyn Mpenzwe Chipande v Wanje Kazungu Baya](#) (2014) eKLR.

15. Section 31 (b) of the [Interpretation and General Provisions Act](#) (Cap 2) provides that:-

"No subsidiary legislation shall be inconsistent with the provisions of an Act."

16. Order 9 Rule 2(a) of the Civil Procedure Rules provides that:-

"2. The recognised agent of parties by whom such appearances, applications and acts may be made or done are -

(a) Subject to the approval by the court in any particular suit persons holding powers of attorney authorising them to make such acts on behalf of parties."

17. In the end therefore, this court is satisfied that the Power of Attorney as drawn does not grant the Donee powers to represent the Donor as the Donee is not a qualified advocate as such he is in violation of the [Advocates Act](#).



### **Findings and determination**

18. For the forgoing reasons this court makes the following findings and determinations;
- i. The Preliminary Objection is therefore found to have merit and it is hereby upheld;
  - ii. The Power of Attorney dated July 5, 2022 is hereby struck out from these proceedings;
  - iii. The Objector shall have costs borne by the Donee and Donor.
  - iv. This Ruling to be availed to the Law Society of Kenya-Kiambu Chapter.
  - v. Hearing November 1, 2023 on the application for transfer of this cause.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**A.MSHILA**

**JUDGE**

**In the presence of;**

Ngigi- Objector

Wanyoike – Donee for Hellen

Peter Karanja Ngure – present in person

