



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 56 OF 1995**

**IN THE MATTER OF THE ESTATE OF DAVID WANG'ANG'A GICHUHI (DECEASED)**

**JACOB GICHUHI WANG'ANG'A .....APPLICANT**

**VERSUS**

**HANNAH WANJIRU WANG'ANG'A.....RESPONDENT**

**RULING**

1. David Wang'ang'a Gichuhi took out summons dated 9<sup>th</sup> October, 2020 in which he sought the annulment of the confirmed grant issued to Hannah Wanjiru Wang'ang'a. In the alternative he prayed for the appointment of an interim guardian/manager for the estate of the deceased. He also sought that the Administrator of the estate of David Wang'ang'a Gichuhi the deceased herein be directed to provide a full inventory of the accounts of the estate among other orders. He filed the summons on behalf of Jacob Wang'ang'a Gichuhi pursuant to a Power of Attorney registered on 17<sup>th</sup> October, 2016 as P/A 66587/1.
2. Upon being served with the summons, Hannah Wanjiru Wang'ang'a hereinafter referred to as the Respondent, filed a notice of preliminary objection dated 25<sup>th</sup> January, 2021 in opposition to the application. The ground raised by the respondent is that the applicant David Wang'ang'a lacks any locus in law to institute the present application since he is not a beneficiary of the estate of David Wang'ang'a Gichuhi (deceased). She contends that the application is therefore bad in law, is incompetent and should be struck out with costs.
3. The Preliminary Objection thus forms the subject matter of this Ruling. The matter proceeded by way of written submissions and the Advocates on record for the parties made their arguments in support of their respective cases. M/S Mungai Kalande Advocates for the respondents submitted that the grant in issue was confirmed on 24<sup>th</sup> May 1996, amended on 25<sup>th</sup> September, 1996 and rectified on 30<sup>th</sup> June 2004. Therefore, the alleged Power of Attorney registered in 2016 cannot be applied retrospectively.
4. The respondent further submitted that Jacob Gichuhi Wang'ang'a being a son of the deceased and a beneficiary to the estate of the deceased, has always participated in these proceedings and therefore had an opportunity to object to the confirmation of grant at an earlier stage. Counsel for the respondent asserted that Jacob Gichuhi is still alive and of sound mind and capable of representing himself in these proceedings through Counsel. As such he is the one who should depose the facts upon which he seeks the revocation of grant and not his son.
5. It was argued that David Gichuhi Wang'ang'a was not a dependant of the deceased within the meaning of the Law of Succession Act and lacked the *locus standi* to bring this application. Reliance was placed on the case of **Alfred Njau & Others v City Council of Nairobi IKAR 229** as cited in the Court of Appeal at Mombasa in **Civil Appeal No. 30 of 2013 Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR**, which discussed the principle of locus standi.
6. On whether the preliminary objection is proper, it was submitted for the respondent that the main ground of the objection was a point of law which as argued may dispose of the suit. Counsel cited the case of **Hassan Ali Joho & Another v Suleiman Said Shabal & 2 others SCK Petition 10 of 2014**. It was argued that the preliminary objection filed herein is on a point of law only and is not meant to delay the course of justice.
7. M/S Moka Advocates for the Applicant submitted that **Section 76** of the Law of Succession Act grants powers to any party interested in the estate of a deceased to bring an application as contemplated under the section and/or Rule 17(1) of the Probate and Administration rules. He argued that the summons was brought by the Applicant on behalf of his father who is a beneficiary of the estate of the deceased as contemplated by Section 29 of the Law of Succession. That the Applicant's father, Jacob Gichuhi Wang'ang'a had donated his rights to his son through a registered power of attorney and therefore the summons is rightfully before court. It was submitted that the Powers donated by the Power of Attorney had not been challenged and therefore the Notice of Preliminary objection should fail. They cited the case of **Ibrahim v Hassan & Charles Kimenyi Macharia, interested party [2019]eKLR**.
8. Having considered the parties' respective submissions as reproduced above, the key issue for determination is whether the Preliminary Objection succeeds. The circumstances in which a preliminary objection may be raised was explained in the celebrated case of **Mukisa**

**Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696**, as follows:

**“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

9. The basis of the preliminary objection filed by the Respondent is that the Applicant lacks *locus standi* to file an application for annulment of a grant. The definition of the term *locus standi* in the Black's Law Dictionary 10th Edition at page 1084 is,

**“the right to bring an action or to be heard in a given forum.”**

10. The respondent argued that the Applicant could not bring an action on behalf of his father who participated in the suit from inception up until the grant was confirmed. Counsel for the respondent asserted that the Power of Attorney which is purported to have donated the powers to the Applicant to Act was registered in 2016 and yet the grant was confirmed on 1996. Consequently, the power of Attorney cannot act retrospectively and is null in these proceedings.

11. According to Black's Law Dictionary, 10<sup>th</sup> Edition at page 136 a Power of Attorney defined as:

**“An instrument granting someone authority to act as agent or attorney-in-fact for the grantor”**

In context a power of attorney is used to allow another person to act as if it was the person that is giving the power to act on their behalf. Examples are in transactions for sale of land, registration of intellectual property, filing of lawsuits, signing off on documents, opening of a bank account. A Power of Attorney can either be specific and is only executed for a particular purpose, or it can be general.

12. An examination of the special Power of Attorney on record reveals that it was drawn in the presence of Shako and Company Advocates and was presented for registration on 31<sup>st</sup> March 2016. It was subsequently registered on 30<sup>th</sup> June, 2016 as PA/66587/1 as a General Power of Attorney. **Order 9 of the Civil Procedure Rules** provides for recognized agents and advocates. **Rule 1** provides that an application, appearance or act in court is done by a party acting in person, his recognized agent or by an advocate duly appointed to act on his behalf. Recognized agents, pursuant to **Rule 2(a)**, are persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties. It reads:

**2. The recognized agents 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 authorizing them to make such acts on behalf of parties."**

13. There are two requirements under the rule: The agent should hold a Power of Attorney, and secondly, can only act subject to the approval of the court. This is an essential requirement provided under the Law. To my understanding this will depend on the nature of the intended act, appearance or application.

14. Mwongo J. discussed the application of **Order 9 Rule 2** of the Civil Procedure Rules in **Jack J. Khanjira and Anor v Safaricom Ltd [2012] eKLR**. In that case a suit had already been filed by the two plaintiffs when one of them appointed an attorney to act as his recognized agent. An objection arose that the Power of Attorney held by the agent could not confer on the donee, as an unqualified person the right to act as an advocate, thereby overriding the provisions of the Advocates Act. Although the objection related to the scope of authority of a donee who is otherwise unqualified to act as an advocate, the court's consideration on the issues raised has many similarities with the case before this Court.

15. In the present Cause the donee of the Power of Attorney is a son of a beneficiary of the estate of the deceased. He filed the summons on behalf of his father. The issue of the requirement for leave of Court was not canvassed as a ground in the preliminary objection. Be that as it may, the wording of **Order 9 rule 1** and **2** of the Civil Procedure Rules leaves no doubt that the court has wide discretion in determining whether or not to allow an agent to appear or do any act in a suit. That discretionary power must be exercised judiciously. No party should presume to act or appear before the court merely on the basis of the Power of Attorney without first obtaining the leave of the Court.

16. Whilst that is the legal position, failure to seek the approval of the Court to do the acts specified in the section of law does not necessarily render the act or appearance fatally defective. Failure to seek approval of the Court did not deprive him of his capacity as donated by his father in the General Power of Attorney to do all other acts within the scope of law.

17. Despite the fact that the approval of this court was not sought before David Wang'ang'a Gichuhi took out summons for revocation of grant, there being no prejudice caused to the respondent, on account of that failure, I find and hold that the failure did not affect his capacity to sue on account of the general Power of Attorney given to him by his father.

18. The respondent argued that the Power of Attorney has been made to act retrospectively having been registered in 2016 while the Succession Cause began in 1995. It was also argued that the donor of the Power of Attorney was capable of depositing on his own behalf. The Court is yet to have sight of the arguments to establish whether or not the orders sought are available to the Applicant. He may have the power to act under the Power of Attorney but the power to decide on the claim lies with the Court.

19. The upshot of the above analysis and evaluation of the submissions of parties, the law and the circumstances of the case before me, is that

the Preliminary Objection dated 25<sup>th</sup> January, 2021 fails and is consequently dismissed. No orders as to costs.

**SIGNED AND DELIVERED IN VIRTUAL COURT THIS 26<sup>TH</sup> DAY OF MAY, 2021.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Applicant**

**In the presence of .....Advocate for the Respondent**