



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CIVIL CASE NO. 62 OF 2007**

**ALFRED NGUTUKU WAMALWA.....PLAINTIFF**

**VERSUS**

**JUSTUS MBOYA OGONYO**

**THE LAND REGISTRAR BUNGOMA DISTRICT**

**GILBERT WANYONYI JUMA**

**JOSEPH MULAMA OKENO.....DEFENDANTS**

**RULING**

1. The 1<sup>st</sup> Defendant/Applicant has filed a notice of motion brought under Order 2 Rule 15 (1) (d), Order 9 Rule 2 and Order 24 of the Civil Procedure Rules 2010. Through the motion, he seeks for prayers;

(a). That the application be certified urgent and be heard on a priority basis.

(b). That the Honourable court be pleased to order that the suit herein has abated as against the Defendants.

(c). And that in the alternative and without prejudice to limb (b) herein, the Honourable court be pleased to find that the Donee's Power of Attorney is hereby revoked with the demise of the Donor who passed away on the 27.7.2013 and consequently the suit herein stands dismissed.

(d). And further in the alternative without prejudice to limbs 'b' & 'c' herein the Honourable court be pleased to order that the Plaintiff's power of attorney does not meet the requirements of the law and consequently strike out this suit for being an abuse of the process of court.

(e). costs.

2. The application is premised on the affidavit sworn by one Justus Mboya Ogunyo in which he deposes that the Donor of the Power of Attorney one Fronica Nyanguka owori passed on. There is annexed a certificate confirming death took place on 27.7.12 and on the grounds that;

i). That the plaintiff herein sued the Defendants as a Donee of the Administratrix of the estate of one Alexander Owuor Olile.

ii). That the Donor Administratrix one Fronica Nyanguka Owori passed away on the 27.7.12.

iii). That it is now over one year since the alleged Donor passed on and to which the suit against the Defendants abated by the 27.7.13.

iv.) That the pendency of this suit is prejudicial to the 1<sup>st</sup> Defendant the Plaintiff having placed an inhibition to the 1<sup>st</sup> Defendants title Number E.BUKUSU/S.NALONDO/4270 which is waiting the determination of this suit.

v). That the alleged Power of Attorney does not meet the requirements of the Law and consequently this suit amounts to an abuse of the court process.

3. The 1<sup>st</sup> Defendant depones further that it is over a year since the donor of the power of attorney passed on hence the suit as against him and his co-defendants has abated. Alternatively that the donor having died, the power of attorney stands revoked. He asked this court to strike out the suit.

4. The motion is opposed by the Plaintiff/Respondent who has sworn a replying affidavit to challenge the issues put forth by the 1<sup>st</sup> Defendant/Applicant. He confirms the donor of his power of attorney, Fronica N. Owori died on 27.7.2012.

5. From the records, the power of attorney was donated to him on 15.5.2007. The Respondent depones that upon the death of the donor, a Michael Masinde Walekhwa applied and got limited grant within a year but which grant had an error on the face of it. The grant had to be returned to court for rectification. He depones the error on the initial grant caused the delay in substitution.

6. The application is brought under Order 2 Rule 15 (b) (d) which provides for striking out of pleadings if it is an abuse of the process of the court. Order 9 Rule 2 provides for recognized agents of parties by whom appearances, applications and acts may be done and in rule 2 (a), holders of power of attorney is one of them. Order 24 generally provides what happens to suits in the event of death or bankruptcy of parties. Under Order 24 (1) the death of a plaintiff does not cause a suit to abate if the cause of action survives the deceased. However, under Order 24 (3) (2) if no application is made for substitution within one year that suit abates.

7. In the ammended plaint annexed to this motion, Paragraph 4 thereof it is pleaded; ***“That the Plaintiff is a Donee of the Administratrix of the estate of one ALEXANDER OWUOR OLILE who passed away on 20<sup>th</sup> November 2001.”*** Paragraph 7 ***“That on the 1.2.2002, a title deed was issued to unknown person as the proprietor had passed away.”***

8. On the death of the said Administratrix ( Fronica N. Owori), a Michael Masinde Walekhwa took out letters of administration in respect of her estate (Fronica Nyangoka Owori). In the plaint, it is alleged the parcels of land in dispute belonged to Alexander Owori Olile – deceased. In order to preserve the estate of the said Alexander Owuori Olile – deceased Michael Masinde or any other person applying for grant ought to apply for limited grant in respect of the estate of the said Alexander who was the original owner of the suit parcels that were subsequently transferred to unknown persons.

9. Consequently upon the death of the Administratrix (Fronica Owori), all actions she had undertaken as an administrator but which were pending upon her death must and can only be continued by the new administrator of the estate of Alexander Owuori- deceased and not the administrator of Fronica Owori’s estate. It follows that the power of attorney donated by Fronica Owori- deceased as the administratrix of the estate of Alexander O. Olile – deceased was therefore cancelled with her death and can only be revived by her successor in administration of the estate of Alexander Owuori- deceased. The grant obtained and copy shown to the court is issued in respect of estate of Fronica Owori- deceased and not

of the estate of Alexander. My understanding is that action survived Alexander Olile and not Fronica Nyanguka Owori-deceased as she had not acquired the registration of the suit parcels in her name.

10. In the absence of a grant obtained for estate of Alexander O. Olile- deceased, the current Plaintiff cannot remain a recognized agent as provided under Order 9 Rule 2. He has no one with legal capacity to extend the life of the power attorney donated to him on 15.5.2007. This suit has no legs to remain standing on as there is no legal representative to the estate of Alexander Owuori- deceased one year from the date of death of the administratrix. In case the Plaintiff needs to resuscitate the claim against the Defendants he shall move the court appropriately. In light of the provisions of the law explained above, I find this application as merited is allowed. The suit is therefore struck out with costs to the 1<sup>st</sup> Defendant.

**DATED, SIGNED and DELIVERED** this 1st day of April 2014

**A. OMOLLO**

**JUDGE.**