



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**APPELATE SIDE**

**CIVIL APPEAL NO. 14 OF 2013**

(From the original civil suit No. 403 of 2012 of the Chief Magistrate's Court at Malindi before Hon. Nzibe - RM)

**CAROLYNE MPENZWE CHIPANDE .....APPELLANT**

**versus**

**WANJE KAZUNGU BAYA .....RESPONDENT**

**JUDGMENT**

1. This is an appeal against the ruling of the learned Resident Magistrate delivered on 15<sup>th</sup> March, 2013 upholding the preliminary objection raised by the defendant in CMCC No. 403 of 2012. The said ruling upheld the 3<sup>rd</sup> limb of the objection to the effect that the suit was irregularly brought by the donee of a power of attorney (POA) without prior approval by the court as stipulated under Order 9 rule 1(a) and 2(a) of the Civil Procedure Rules. The court found that the plaintiff lacked locus standi and ordered the suit struck out. The parties were represented by Mr. Lewa and Gekanana respectively both in the Lower Court and on appeal.

2. The appellant through the memorandum of appeal and submissions before this court attacks the findings above as an erroneous interpretation of Order 9(2) (a) of the Civil Procedure Rules and further asserts that the preliminary objection was not based on pure points of law. Additional arguments raised with respect to other limbs of the preliminary objection are of no consequence in this appeal as they were overruled by the Lower Court. As correctly submitted by the respondent this appeal can only be considered in respect of the limb upheld by the Lower Court – ground 3 of the objection.

3. The appellant's contention in that regard is that the question whether or not there had been compliance by the appellant with the provisions of Order 9 rule 1(a) and 2(a) of the Civil Procedure Rules were matters subject to ascertainment through evidence. Counsel for the appellant cited the locus classicus on the essence of a preliminary objection namely, **Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors Ltd. [1969]EA 696.**

4. According to the appellant, the POA filed is sufficient evidence that the appellant has the necessary locus standi to file the primary suit. On the proper construction of Order 9 rule 1(a) and 2(a) of the Civil Procedure Rules it is their position that the court's approval is not a condition precedent, requiring filing of a formal application by the donee prior to filing of the suit. Moreover, they argue, the provision is a procedural technicality which does not affect the substance of the suit. As to the weight to be given to such a procedural requirement Article 159(2) of the Constitution was called to aid. Sections 1(A) and (B) of the Civil Procedure Rules were also cited in emphasizing the importance of furthering the overriding objective. In closing the appellant's argue that the court ought not have entertained the objections as the same was not pleaded by the respondent.

5. For their part, the respondent's counsel oppose the appeal and argue that the interpretation of Order 9 rule (2) of the Civil Procedure Rules adopted by the Lower Court was proper and that the limb of the objection upheld consisted of a pure point of law. The respondent takes issue with the appellant's failure to proffer an alternative interpretation of the rule even while faulting the learned magistrate's approach. With regard to Article 159 of the Constitution and Section 1(A) and (B) of the Civil Procedure Act, the respondent contends that these provisions do not abolish rules of procedure.

6. I have considered the parties' respective submissions in the appeal. Broadly speaking three issues stand out for consideration and determination. These can be stated as follows:

1. Whether the limb of objection upheld by the Lower Court could properly be raised as a pure point of law and in light of the objector's pleadings.
2. Whether Order 9 rule 2(a) of the Civil Procedure Rules should be construed as precluding recognized agents from appearing or taking action without the court's prior approval.

3. Whether failure to comply with Order 9 rule 2(a) renders the action defective and liable to be struck out.

7. With regard to the first question, it is beyond disputing that the same constitutes a matter of fact and law, but no advantage avails to the appellant on that account. The emphasis at this stage that the issue is a matter of fact, in this case not ascertained, is in my considered view spurious. The conduct of the appellant clearly discloses this fact: upon being confronted with a serious objection as to the propriety of the photocopied POA filed, the appellants promptly filed the original POA. However, the said power of attorney was not accompanied by the appropriate order of the court approving the filing of the suit by the donee. It is therefore mischievous of the appellant to assert that such a matter must await determination by evidence.

8. It is true that preliminary objection ought to consist of points of law which would dispose completely of the matter. As a minimum the factual basis ought not to be disputed. I cannot find any suggestion before the Lower Court and before this court that the appellant contested the facts relating to the absence of the court order. Indeed the gist of their submissions indicate that the position they adopted on appeal was that approval is not a condition precedent to the filing of the suit and could be sought after the fact. The appellant's submissions in the Lower Court did not address this issue at all, while the submissions of the advocates for the respondent suggest that the approval envisaged in Order 9 rule 2 of the Civil Procedure Rules refers to the court's approval of the power of attorney.

9. This was the gist of the appellant's submissions in the Lower Court:

**“With regard to ground 3 of the preliminary objection, we do submit that the suit herein is very regular and does not contravene the provisions of Order 9 rule 1(a) and 2(a) of the Civil Procedure Rules as alleged in the preliminary objection...As a recognized agent of RUTH ROSA ROCHI – BANZ (on the strength of the power of attorney on record) this suit was filed by the plaintiff is therefore properly before the court as provided in Order 9 rules 1 and 2 of the Civil Procedure Rules”(sic)**

In the Mukisa Case upon which the appellant has placed reliance, the court stated inter alia that:

**“A preliminary objection is in the nature of what used to be a demurer. It raises a 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...”**

In the circumstances the learned magistrate was entitled to surmise that no approval order existed authorizing the appellant to file the suit.

10. As to the question whether the preliminary objection (in this case the 3<sup>rd</sup> limb) was pleaded, there is no requirement that such objection be pleaded. Being a point of law a preliminary objection can be raised at any point. In this case, the appellants were given notice of the preliminary objection and it is also evident from the defence filed that the defendant was taking issue with the capacity of the appellant to bring the suit.

11. I now turn to the second issue raised by this appeal. Order 9 rule 1 Civil Procedure Rules is in following terms:

**“[Order 9, rule 1.] Applications, appearances or acts in person, recognized agent or by advocate.**

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

**Provided that—**

**(a) any such appearance shall, if the court so directs, be made by the party in person;”**

12. Order 9 rule 2 of the Civil Procedure Rules on the other hand describes categories of recognized agents to include:

**“a) Subject to approval by the court in any particular suit, persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of the parties;**

**b. ....;**

**c. ....;”**

There are two prerequisites under the rule: The recognized agent should hold a power of attorney, and secondly, can only act subject to the approval of the court. The appellant has strongly argued that the appellant was entitled by virtue of holding the POA to file the suit, without necessarily seeking prior approval by the court.

d. Fortunately, the proper construction of the above provision is not an unexamined question. Mwongo J. grappled with the proper 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 was raised to the effect, inter alia, 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 Section 85 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 of the matter before it has many parallels with the case before us.

e. I am persuaded as Mwongo J. was that the starting point in interpreting Order 9 rule 2 of the Civil Procedure Rules is to consider the provision of Order 9 rule 1 which limits the scope of the recognized agent to application, act or appearance authorized by law to be done by a party "except where otherwise expressly provided for by any law for the time being in force..." Also of significance to the matter before us is the proviso to Order 9 rule (1) which states that:

**"Provided that –**

**a. Any such appearance shall, if the court so directs, be made by the party in person..."**

15. The above proviso is in tandem with Order 9 rule 2 (a) Civil Procedure Rules. A recognized agent makes application, appears or acts, subject to the approval of the court. This provision cannot be read to mean that the power of attorney itself (as suggested by the respondent) ought to be approved by the court, even though such power of attorney may of necessity be reviewed by the court while dealing with the question of whether or not to approve the donee's application for purposes of acting in the suit.

16. In this regard, can do no better than quote Mwongo J's reasoning as to why this prior approval is necessary:

**"Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the court.**

**The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in court, they must periodically obtain the approval of the court to do such acts. It is for the court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognized; it is the extent or scope of their agency that is recognized. That is to say, a recognized agent can perform only that which he is recognized or authorized to do in law.**

**In this regard, I would go as far as to say that, for orderly representation in court, every appearance, act or application by a recognized agent should be subjected to the approval of the court as and when sought to be done."**

17. I fully adopt the above reasoning in this case and add that an agent cannot do the act and then retrospectively seek the court's approval. This provision is not a technical requirement of procedure as suggested by the appellants but one that goes to the root of the capacity of the recognized agent to bring the suit or to act on behalf of the real party. What might qualify as a procedural matter would be the mode of seeking such approval. To my mind this will depend on the nature of the intended act, appearance or application.

18. In the present case, the donee to the POA filed a substantive suit on behalf of the real plaintiff. This is a practice that has gained currency in our courts until now. Mwongo J's decision as reinforced by Mulla on Civil Procedure 12<sup>th</sup> Edition (Commentary on Indian equivalent of Order 9 rule 1 of the Civil Procedure Rules) raises serious questions as to whether the scope of the recognized agent is limited directly by the technical wording of Order 9 rule 1 and 2 to exclude filing of suits among acts that an agent can perform, or whether such agent is at liberty to do any and every kind of act, including filing pleadings, giving evidence, cross-examining witnesses etc.

19. The foregoing issue was not canvassed before me and there is not sufficient material to enable me draw any conclusions. 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 invoked by way of an application and is exercised judicially. No party should presume to act or appear before the court merely on the basis of the power of attorney without first obtaining the court's approval, howsoever sought. The appellant believed himself properly authorized by the power of attorney alone to act on behalf of the donor. That was an erroneous understanding of the rules.

20. For all these reasons, I do agree with the reasoning of the learned magistrate and her conclusion that the donee under a power of attorney cannot act without first seeking the court's approval. As to the consequence of default by a donee in seeking such approval, I would not go as far as concluding that an act, appearance or application would be rendered fatally defective. Rather that the impugned application, appearance etc would have been irregularly done. In a proper case, the court might invoke its discretion under proviso (a) of Order 9 rule 1 of the Civil Procedure Rules by directing the actual party to appear or act in person rather than strike out the impugned process. Each case must be considered within its own circumstances.

21. In the circumstances of this case, the dispute disclosed in the pleadings pits two alleged beneficiaries of the donor to the POA against each other as they tussle over the suit property, a motor vehicle. The court's approval was all the more necessary. The learned magistrate was entitled to strike out the suit. Although this was a drastic order to make, there is still room for the real party to bring her claim, hence she will not be unduly prejudiced. This appeal therefore lacks merit and is dismissed with costs.

Delivered and signed at Malindi this 18<sup>th</sup> day of July, 2014 in the presence of: Mr. Shujaa holding brief for Mr. Lewa for appellant, Mr. Obaga holding brief for Mr. Gekanana for the respondent.

Court clerk – Samwel.

**C. W. Meoli**

**JUDGE**