



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

Civil Appeal 21 of 2006

AHMED.....APPELLANTS  
SAID BIN MOHAMED ABDALLA SHARIFF ALBAI FATMA  
VERSUS-  
RASHID AZZAN RASHID throu'  
ATTORNEY HAMOUD RASHID  
HASSAN.....RESPONDENT

JUDGEMENT

1. This appeal emanated from the ruling of the Principal Magistrate delivered on 21/6/06 in PMCC 447/2005. The principal issue raised in the Lower Court and giving rise to the ruling was preliminary point taken on the validity of the suit which was premised on a Power of Attorney.
2. The appellants argument was that the suit was defective as the said Power of attorney was incurably defective for reasons that;-
  - a. It did not show who drew it and where – section 35(1) of the Advocates Act.
  - b. It adopts the format of an affidavit.
3. The appellant\'s complaint in this appeal is primarily that the court erred for failing ruling to find there was no power of attorney and that the magistrate misdirected himself with regard to the provisions of section 34 and 35 of the advocates Act.
4. The appellant filed submissions on the appeal. Having considered all the matters raised in this appeal I take the view that the same turns on the questions whether the power of attorney was proper and valid and ultimately, the suit properly filed. The question of authority to file suit is important and ought to be raised at the earliest opportunity as happened in this case.
5. A donee to a power of attorney is recognized agent under Order 9 rule 2 Civil Procedure Rules, and he may, subject to approval by the court in any particular suit be authorised “to make such appearances and application and do such acts on behalf of parties”. The Court however reserves the power to direct any such appearance be made by the party in person.
6. The power of attorney is a registrable instrument under the Registration of Titles Act(now repealed) under the which the suit property was registered. Section 50 thereof prescribes the form such an instrument should take: form M of the first schedule or one executed in “due and customary form and giving sufficient powers in the opinion of the registrar.....”

The purported special power of attorney exhibited in the Lower Court appears to take the form of an affidavit, rather than form M of the First Schedule. Moreover it does not take the "due and customary form" of the power of attorney as we know it.

However, it contains the essential ingredients as to the donor, donees, subject matter and nature of power donated. It is also attested, albeit as via the jurat form used in respect of affidavits. The power of attorney was apparently registered. To that extent it could be argued that it suffices, notwithstanding the patent defects in form. But that is not all. The appellants' objection made under section 34 and 35 of the Advocates Act do not appear to have received sufficient attention in the Ruling of the Lower Court.

Section 34 (1) (a) prohibits unqualified persons from drawing or preparing any document or instrument "relating to the conveyance of property". Section 35 (1) requires that such instruments be endorsed with the name and address of drawer in section 35(1). The Registrar is equally forbidden from accepting or recognizing any document/instrument referred to in section 34(1) unless the same is endorsed in accordance with section 35(i).

Looking at the impugned Power of Attorney, there is no doubt it is an instrument "relating" to conveyance of property" as contemplated in section 34(i) a of the Advocate act. On the face of it, one cannot tell whether it was drawn by a qualified person. That was not a matter of evidence. The statement by the Lower Court that "nothing in either section (34 & 35 Advocates Act) bars any person from donating a power of attorney(sic)" amounts to a misapprehension of the purport of the two sections as they relate to the objection before him. The Power of Attorney used to institute this suit was bad for failing to comply with section 34 & 35 of the Advocates Act.

10. Be that as it may, I have noted that the question of authority arose against before this court on 2/12/08 when the court allowed substantial of one of the original plaintiff as an administrator of the estate of the principal (dono) who had subsequent passed away.

11. I have anxiously considered whether the above substitution should be deemed to cure the deficiencies existing at the time of filing suit, as caused by a clearly defective Power of Attorney. Several factors persuade me that this is the most prudent course of action. These include the fact that this is an old case that has yet to be heard, the duty of this court in furthering the overriding objection in section B of the Civil Procedure Act and finally the fact that the appointment of the initial donee as the legal representative of the estate satisfactorily settles the question of his authority to participate in this case, at least since 2.12.08. It would be expensive, time consuming and unnecessary to require that a new suit be filed.

12. Hence, while upholding the arguments by the appellants I direct that the suit in the lower court be sustained and upon the Respondent regularizing his position therein as a legal administrator of the estate of the deceased, the suit be deemed as properly filed so that early hearing dates can be taken. The costs of this appeal and the ruling in the lower court are awarded to the appellant.

Delivered and signed at Malindi this 30th day of July, 2012 in the presence of Ms Nyamida holding brief for appellant, Mr Mouko for the respondent absent, c/c-Evans

C.W.MEOLI  
JUDGE