



1. JACK J. KHANJIRA .....1<sup>ST</sup> PLAINTIFF

2. JOASH N. MORURI.....2<sup>ND</sup> PLAINTIFF

VERSUS

SAFARICOM LIMITED.....DEFENDANT

### RULING

#### Background

1. This is a Preliminary Objection seeking to bar a recognised agent under a power of attorney from abusing his office and to limit the scope of his lawful authority. The Plaintiffs in this matter claim to have developed a project called *Chemi-Chemi na Safaricom*, a proposed mobile money transfer system. They allegedly shared the project concept with the Defendant, with a view to implementing a joint venture. The Defendant, however, allegedly copied the Plaintiff's project, re-named it *M-Kesho* money transfer and rolled it out across the country. The Plaintiffs filed a joint plaint on 8<sup>th</sup> August, 2011. They share an address and are indicated to have drawn and filed the suit papers in person. They seek damages for the infringement of their moral and economic rights.

2. On 27<sup>th</sup> February, 2012, the 1<sup>st</sup> Plaintiff filed a copy of a Special Power of Attorney by which he donated certain powers to one Peter K. Kalama. Because it is the subject of the application herein, I set out herebelow the substantive powers granted under the power of attorney to Peter Kalama thereunder:

***"1. That Mombasa HCC Number 231 of 2011 is pending and I am unable to attend court and look after the case effectively;, and as such my attorney shall:***

- a) ***Represent me in court for all intents and purposes in connection with the above suit.***
- b) ***To file affidavits, give evidence and to give instructions for prosecuting the case.***
- c) ***To appear and appoint counsel to file written statements, plead or otherwise conduct the case wherever the attorney thinks proper to do.***
- d) ***To compromise and make statements with the opposite part (sic), and to withdraw the suit.***
- e) ***To do all lawful acts and things in connection with the case as effectively as I could do the same."***

3. The Power of attorney was executed on 6<sup>th</sup> December, 2011 and was duly stamped. It was registered as P.A Number 15847 on 14<sup>th</sup> May, 2012.

4. According to the court record, Mr. Kalama appeared in court on 1<sup>st</sup> March, 2012, 18<sup>th</sup> April, 2012, 24<sup>th</sup>

April 2012, 17<sup>th</sup> May, 2012 and on 3<sup>rd</sup> July 2012 for submissions. When he appeared on 17<sup>th</sup> May, 2012 for highlights of written submissions on a chamber summons, Mr. Nyongesa, the Defence counsel, took objection as the 1<sup>st</sup> Plaintiff, the donor of the power was in court. Counsel pointed out that the attorney had been a court clerk in Mombasa Courts, and appeared to be acting as a legal representative of 1<sup>st</sup> Plaintiff. The court directed that a formal application be made if counsel wished to pursue his objection.

### **Preliminary Objection**

5. On 7<sup>th</sup> June, 2012, the Defence counsel filed and served a Notice of Preliminary Objection under Order 51 Rule 14 of the Civil Procedure Rules. The objection is stated as being:

***"...on the manner of the appointment of an Attorney by the 1<sup>st</sup> Plaintiff and/or on the abuse of the special power of attorney donated on 6<sup>th</sup> December, 2011 by 1<sup>st</sup> Plaintiff to Peter Kalama as follows:***

***1. That the said Special Power of Attorney does not in any manner confer authority on the donee to act in the manner as though he were an Advocate or legal counsel for the Plaintiff.***

***2. That the continued participation of the donee...in the proceedings herein despite the very constant presence or attendance of the 1<sup>st</sup> Plaintiff in court constitutes an abuse for the purport and purpose for which the Special power of Attorney was made and donated.***

***3. That a donee under a Special Power of Attorney is an agent without conceived authority to act and appear in court for a party to a suit when such party is available and capable of attendance and participation in court on its proceedings on its (sic) own."***

6. The 1<sup>st</sup> Plaintiff filed a Reply to Notice of Preliminary Objection filed on 29<sup>th</sup> June 2012. It was signed for the 1<sup>st</sup> Plaintiff by Peter Kalama. The 1<sup>st</sup> Plaintiff stated that the objection was misconceived, lacked merit, was an abuse of the court process and had no legal basis. He urged it should be dismissed.

7. Mr. Nyongesa submitted that the Power of Attorney was within the spirit of Order 9 Rule 2A insofar as the 1<sup>st</sup> Plaintiff was unable to attend hearings. The intention of the Rules Committee in crafting Order 9 Rule 7, however, was not to avail a litigant the right to appoint an unqualified person to act as advocate. He argued that it would be an abuse of the court process if a person could appoint an unqualified person to act as legal representative by virtue of their knowledge or experience as a court clerk or court employee. He pointed out that the Reply to the Notice of Preliminary Objection had in fact been signed by the Attorney for 1<sup>st</sup> Plaintiff.

8. Citing the celebrated case of **Theuri vs Republic** [1990] KLR, counsel pointed out that the court had analysed the relevant provision of the Civil Procedure Rules for appointment of a recognised agent which does not include overriding the provisions of Section 85 of the Advocates Act. In this regard the attorney had abused the Special Power of attorney and should be stopped.

9. In response, Mr. Kalama, stated that the 1<sup>st</sup> Plaintiff had not been attending court, expect once. He argued that under Order 9 Rule 1 a person could be represented by an advocate or a recognised agent. Under Order 9 Rule 2(a) his agency was under the Special Power of Attorney. Citing **Mulla on Civil Procedure** 12<sup>th</sup> Edition Act V, 1908, he noted that Order III, therein, indicated that appearance may be in person or by recognised agent and that a recognised agent could in fact cross-examine a witness.

10. He also relied on **Johnstone Aggrey Ochola vs National Bank of Kenya** Civil Appeal 139 of 1999 where, at page 7, "**appearance**" is defined to include being ready to do something or other in relation to the progress of the suit. He was clear that he could not offer legal representation as an advocate does, but he should not be denied opportunity to appear in the name of a principal (**Jiwa vs Jiwa** [1990] KLR 284, 287. He distinguished the present case from **Theuri** in that in Theuri the Appellant was an unqualified

person running an office and collecting money from clients.

11. In his reply, Mr. Nyongesa stated that the **Johnstone Ochola** case was not relevant, and **Jiwa** dealt with substitution of parties, quite apart from appearance by recognised agent. He pointed out that in **Theuri** the court specifically held that the appointment of a person as attorney of another does not confer upon the donee of the power of attorney the right to appear in court and plead the donor's case.

12. The issue before me is whether a "**Recognised Agent**" under Order 9, acting pursuant to a donated power of attorney, can appear in court on behalf of a litigant acting in person and present. A corollary to that question arises, as to the extent to which a "**Recognised Agent**" can lawfully act for a litigant.

13. I think it is proper to preface this discussion with the underlying or foundational principles as to the right to a fair hearing and hence, as to the freedom of representation.

The right granted by the Constitution to a fair hearing is set out in Article 50. Under Article 50 (2) (g) of the Constitution, an accused person is singled out as having the right:

**"...to choose, and be represented by, an advocate, and to be informed of the right promptly."**

The criminal justice system gives that recognition. The civil Justice system under the Constitution does not donate a similar right to a litigant in civil matters to have an advocate. That is left to civil law and private law.

14. Next, at the statute level, the Advocates Act declares who is and who is not entitled in law to offer representation in the courts. Essentially, this is limited to those described as qualified persons or advocates. 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."***

The conditions are inclusive. All must be met to enable qualification

15. Section 34 of the Advocates Act, provides:

***"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"*** (Underlining mine)

The Act then prescribes a criminal sanction 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."*** (underlining mine)

Thus, the restrictions against unqualified persons acting are tempered by the provisions of Section 83 of the Advocates Act in respect of persons acting for or in the name of another person.

16. Section 83 of the Advocates Act provides the opening for unqualified persons to 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.."***

It is this provision, read with other statutes, that enables police prosecutors to undertake work in court. It also allows other special prosecutors from municipalities, or state departments and agencies to prosecute or to defend actions in court. Various statutes are in place to provide for this leeway.

17. In respect of recognised agents, their powers to act emanates, not from a statute, but from rules made by the Rules Committee under Section 81 of the Civil Procedure Act, and reflected in Order 9 of the Civil procedure Rules.

Order 9 rule 1 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.."***

18. The exception here clearly requires that where a statute provides for the making of any application to, or appearance at, or doing of an act in, any court, it maybe made or done by a party in person or by a recognised agent or advocate, except where otherwise expressly provided for by any statute. Since the Advocates Act prescribes all the regulated business and acts that can be done in court, the rule appears to me to be that: a recognised agent acting under Order 9 may carry on functions on behalf of and for the furtherance of the principal's case or suit only to the extent that such functions or actions are not in violation of any other law.

19. In **Theuri vs Republic** the rule is clearly discussed as not intended to violate the provisions of any other law. There, the court stated that if there was a contradiction between the Civil Procedure Rules and the Advocates Act, the Advocates Act would prevail. This is consistent with Section 31 (b) of the interpretation and General Provisions Act (Cap 2) which provides that:

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

The Civil Procedure Rules do not and cannot therefore confer upon any person any substantive legal rights which he otherwise does not have or grant such rights as are denied that person by other laws.

20. Order 9 Rule 1 is almost in *pari materia* with Order III rule 1 of the Indian Code of Civil Procedure. **Mulla** on the Code of Civil Procedure, in a commentary on Order III Rule 1 as discussed in the **Theuri** case states, states:

***"The right of audience in court, the right to address the court, the right to examine and cross examine witnesses are all parts of pleading and that is not included in the expression 'appearance application or act in or to any court.' The word 'act' in juxtaposition with the words 'appearance' and 'application' is used in a technical sense and not in its ordinary sense as being referable to any action by any party."***

The judges in **Theuri** concluded that it could never have been the intention of the Rules Committee, by making Order III Rule 1 (current Order 9 Rule 1), to authorise holders of powers of attorney to appear or make applications or act otherwise than in the technical sense.

21. I think that Order 9 Rule 2(a) gives instructive guidance as to who is a person appointed as an attorney. And such persons would do well to keep mind the guidance given in Order 9 Rule 2, which

provides:

***"2The 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."*** (underlining mine)

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

22. 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 recognised 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 recognised; it is the extent or scope of their agency that is recognised. That is to say, a recognised agent can perform only that which he is recognised or authorised 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 recognised agent should be subjected to the approval of the court as and when sought to be done.

23. In determining the scope of the mandate of a recognised agent acting under a power of attorney, careful scrutiny of the instrument itself is essential. In the present case, the donor granted Mr. Kalama powers to:

- a) represent him in court, for **all intents and purposes in connection** with the suit. This is a power only properly available to an advocate.
- b) **give evidence** - this is obviously impossible, as no person can substitute his evidence for another
- c) **appear .... plead** or otherwise **conduct** the case - these unless used in a technical sense are beyond the scope of the authority of a recognised agent.

Mr. Kalama is not, and cannot be entitled in law to exercise the above powers.

24. In **Theuri**, the following actions of the attorney were found to be contrary to the law: drawing a notice of appointment; inviting counsel to fix a hearing date; issuing a chamber summons; appearing before a judge, filing a civil case. Theuri was charged and convicted for these acts.

25. In closing, it may be of some use to mention the place of a recognised agent in other jurisdictions. I have picked the United Kingdom which has the concept of **McKenzie friends**. These are persons, professional or not, who may attend a trial as a friend of a party, may take notes, and may quietly make suggestions and give advice to that party. See **McKenzie vs McKenzie** [2970] 23 All CR 1034

26. In **McKenzie** a husband in a petition against his wife for divorce had his legal aid terminated. The trial started two days later. Having no legal aid, he turned to a young visiting Australian barrister called Hanger. Hanger voluntarily assisted the husband in conducting his case. The court soon disallowed Hanger who was prompting and making suggestions to the husband. This aspect, amongst others, was appealed against. The Court of Appeal held that there was nothing wrong in Hanger sitting quietly beside the husband and from time to time giving quiet advice and prompting.

27. Again, in England, although there is a statute namely, the Legal Services Act, that makes specific provision as to rights of audience, Lord Woolf M.R. said in **DvS (Rights of Audience)** [1997] 1 FLR

724, that "it would be in appropriate, having regard to the stringent requirements as to training and conduct upon those who gain normal rights of audience from authorised bodies, to grant rights of audience to unqualified persons who have set themselves up as providers of advocacy services, whether for reward or not."

28. In our case, it may be noted the when making his prayer to dismiss the Preliminary Objection, Mr. Kalama sought dismissal with costs. When the court inquired on the costs *quantum*, Mr. Kalama said his costs would be about Kshs. 5,000/- to 10,000/- or thereabouts. That suggestion on costs betrays the true intent of what Kalama was doing, for how would costs be lawfully assessed other than under the Advocates Remuneration Order? I seriously doubt a recognised agent can recover costs in this way, and my sense is that Kalama has been acting on the basis that he would be paid.

29. In conclusion, I find that the actions of Mr. Kalama in drawing or signing instruments, assuming audience before the court and in exercising the wide functions under the Special Power of Attorney, including seeking costs, were functions or actions in violation of the Advocates Act in respect of unqualified persons. Accordingly, the approval of this court is hereby withheld in respect of, and he is hereby barred from exercising, the powers in paragraphs (a) (b) and (c) of the Special Power of Attorney which are discussed in Paragraph 23 of this Ruling.

The Preliminary Objection is allowed with costs.

Orders Accordingly.

**Dated, signed and delivered this 27<sup>th</sup> day of September, 2012**

**R.M. MWONGO**  
**JUDGE**

**Read in open court**

**Coram:**

1. Judge: Hon. R.M. Mwango

2. Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

- a).....
- b).....
- c).....
- d).....