



Hefti & another (Suing as administrators of the Estate of the late Daniel Bernhard Hefti) v Reinhard & 2 others (Land Case 75 of 2019) [2022] KEELC 2640 (KLR) (14 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2640 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 75 OF 2019
MAO ODENY, J
JULY 14, 2022

BETWEEN

ELSABETH REINHARD HEFTI 1ST PLAINTIFF

DANIEL BERNHARD REINHARD 2ND PLAINTIFF

**SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE DANIEL
BERNHARD HEFTI**

AND

JOYCE JEPLETING' REINHARD 1ST DEFENDANT

**CABINET SECRETARY IN CHARGE OF LANDS REGISTRAR OF TITLES,
MOMBASA 2ND DEFENDANT**

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 15th October 2021 by the 1st Defendant/Applicant seeking the following orders:
 1. That this Honourable court be pleased to admit Moses Kiprugut Ropas 1st Defendant suing/sued through the power of Attorney for Joyce Jepleting Reinhard.
 2. That the costs of this application be in the cause.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.



Applicant's Submissions

3. Counsel relied on the grounds on the face of the application and the supporting affidavit of Moses Kipkurgat Rop who deponed that the 1st Defendant who had donated to him power of Attorney had travelled to Switzerland and was unable to travel back for hearing.
4. The applicant further deponed that the 1st Defendant donated general powers to him which should be validated in court and sought for leave to be allowed replace Joyce Jepleting Reinhard as her Attorney.
5. Counsel submitted that the Plaintiff's Grounds of Opposition and Preliminary Objection are an afterthought and that the Plaintiff's counsel did not raise any objection to previous similar applications filed in Court of Appeal at Malindi vide ELC No. 156 of 2019 and High Court at Mombasa vide Succession No. 26 of 2020 Formerly Malindi P & A Cause No. 47 of 2008. It was counsel's submission that counsel for the Plaintiff should not use procedural technicalities to justify opposition and objections as per Article 159 (2) (d) of *the Constitution*.

Plaintiff's Submissions

6. In response to the application the Plaintiff filed Grounds of Opposition and a Preliminary Objection that the Power of Attorney attached to the Supporting Affidavit dated 15th October, 2021 has not been certified and that Moses Kiprugut Rop, an agent and/or representative of the 1st Defendant cannot replace the 1st Defendant in this suit. Further that Moses Kiprugut Rop, an agent or representative of the 1st Defendant does not have any or proper locus standi to bring the present application in so far as it relates to him being added as a substantive party.
7. Counsel submitted that the fact that Moses Kiprugut Rop holds a Power of Attorney entitles him and gives him the right to act in the name of Joyce Jepleting' Reinhard who is the donor of the Power of Attorney without necessarily being added as a party.
8. Mr. Kithi further submitted that for the said Moses Kiprugut Rop to be added as a party and in this case as a Defendant, they would need to be a specific claim or cause of action against him. Counsel stated that the pleadings are very clear that the cause of action here is against Joyce Jepleting' Reinhard and that there is no evidence that has been provided that the 1st Defendant was acting as an agent of Moses Kiprugut Rop and as such there are no legal grounds for the said Moses Kiprugut Rop in his personal capacity as a Defendant.

Analysis And Determination.

9. The issues for determination are whether the Preliminary Objection has merit and whether the application by the Applicant Moses Kipkurgat Rop should be admitted as 1st Defendant through the power of Attorney for Joyce Jepleting Reinhard.
10. Order 9 rule 1 *Civil Procedure Rules* provides as follows: -
 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 by 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;”



11. 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"

12. The provision speaks to two requirements namely, that the recognized agent should hold a power of Attorney, and secondly, that he/she can only act subject to the approval of the court.

13. In this case the 1st Defendant had been sued by the Plaintiff, the 1st Defendant is still a party to this suit and is out of the country. The 1st Defendant appointed Moses Kipkurgat Rop through a general Power of Attorney to act for her and it should be noted that the import of Order 9 Rule 7, is not to allow a party to a case the right to appoint an unqualified person to act as an advocate or a legal representative which would in essence be an abuse of court process. There are many unqualified persons masquerading with power of Attorneys in a bid to circumvent the rules and procedure to act as advocates which should be stemmed to bring sanity in the practice in the legal profession.

14. Power of Attorneys are legal instruments donated for either specific or general purposes which should not be abused.

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"

15. It follows that the Act prescribes a criminal sanction for the carrying out of any of the matters regulated by the Act under Section 31 of the [Advocates Act](#) which 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."

16. However, Section 83 of the [Advocates Act](#) gives exceptions in respect of persons acting for or in the name of another person and 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."

17. This section allows an unqualified person who has a power of Attorney to do what is specified in the instrument to conduct, defend and or otherwise act in relation to any legal proceedings.

18. The application that the Applicant has made does not sit well with this provision as it an application to replace the 1st Defendant as a party and not for approval to defend the suit, give evidence as an appointed attorney. The 1st Defendant is said to be in Switzerland and the court has not been told when she is likely to be available either in the country or to give evidence virtually which the court has embraced and accommodated parties.



19. In the case of *Jack J. Khanjira & Another V Safaricom Limited* [2012] eKLR Mwongo J elaborately - dealt with the issue of agents and unqualified persons acting for parties beyond the parameters of the power of Attorneys.
20. Similarly, in the case of *Carolyn Mpenzwe Chipande v Wanje Kazungu Baya* [2014] eKLR where Meoli J relying on *Jack J. Khanjira & Another V Safaricom Limited* [2012] eKLR (supra) stated that: -

"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..."
21. The Applicant in this case has applied to replace the 1st Defendant, is he asking for substitution of the 1st Defendant or a temporary replacement until the 1st Defendant is able to return to the country to handle her case.
22. I find that the application lacks merit and is therefore dismissed with costs. The Applicant has a power of Attorney to act for the 1st Defendant but not to substitute her in the proceedings unless that is specifically mandated.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

