



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**CIVIL CASE NO. 310 OF 2007**

**ANTHONY MAINA NJIIRI (suing as attorney for JAMES NJIIRI).....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA**

**LTD.....DEFENDANT**

**R U L I N G**

This application is brought by way of a Notice of Motion dated 27<sup>th</sup> May, 2010, and taken out under Order VI Rule 13(1) (A) of the Civil Procedure Rules. By the application, the defendant moves the court to grant the following orders –

- 1. That the plaint herein dated 20<sup>th</sup> June, 2007 and filed in court on the same day be struck out.**
- 2. That the cost of this application and of the suit be borne by the Plaintiff.**

The application is based on the grounds that –

- 1. The Plaintiff does not have authority to institute this suit in his own name.**
- 2. The Plaintiff has no locus standi to bring the actions pleaded.**
- 3. The Plaintiff does not disclose any course of action vested in the Plaintiff**

Opposing the application, the Plaintiff filed only one ground of opposition which was that the Plaintiff being the donee of a duly registered power of attorney from **James Mwangi Njiiri** had the requisite locus standi to file this suit.

Through their respective Advocates, each of the parties filed written submissions. After considering the pleadings and the submissions by counsel, I find that the only issue arising for determination is whether the suit is properly commenced in the name of the right party.

A copy of the general power of attorney which is the subject of this application is attached to the Plaintiff's application dated 20<sup>th</sup> June, 2007, and filed in court on the same date. The preamble thereto reads as follows –

**“KNOW ALL BY THESE PRESENTS:**

**That I, James Mwangi Njiiri an adult residing at 4640 Zion Avenue #D3, San Diego, California 92120, United States of America, do hereby revoke all powers of attorney heretofore made by me and by these presents do make, constitute and appoint Anthony Maina Njiiri of P.O. Box 1071-00621, Village Market, Nairobi, Kenya as my true and lawful Attorney-in-Fact (“Agent”), for me and in my name, place and stead to do and perform all things that I could do myself in the transaction of any of my business, on such terms and in such manner he may deem appropriate in his capacity as Attorney-in-Fact. My Agent’s powers shall include, but not be limited to, the following...”**

After setting out the various matters to be covered by the power of attorney, the donor proceeds to make a proviso towards the end of the document in the following words -

**“PROVIDED: however, that all business transacted hereunder for me or on my account shall be transacted in my name, and that all endorsements and instruments executed by my attorney-in-fact for the purpose of carrying out the foregoing powers shall contain my name, followed by that of my Attorney-in-Fact and the designation “Attorney-in-Fact (“Agent”)...”**

The wording of this proviso is clear that the person who should be named as Plaintiff is the donor himself followed by the words in the proviso. But this is not what happened. The Plaintiff as appearing on the Plaintiff is not the donor, but the donee. That is a contravention of the express mandate given to the donor as stated in the power of attorney. The proper Plaintiff in this matter ought to be the donor by name, followed by the words which he has prescribed. As it stands, however, the Plaintiff as of now is the donee and not the donor as intended in the Power of Attorney. There is no privity of contract between the donee, as Plaintiff, and the Defendant.

For the above reasons, I am persuaded that the Plaintiff as appearing in this case is not the proper Plaintiff, and that the application to strike out the case should succeed. The plaint dated 20<sup>th</sup> June, 2007, and filed in court on the same day is accordingly hereby struck out as prayed, with costs of the application and of the suit to be paid by the Plaintiff.

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 2<sup>nd</sup> day of December 2010**

**L NJAGI**

**JUDGE**