



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Succession Cause 31 of 2006**

**IN THE MATTER OF: THE ESTATE OF NICOLE POLCINO (DECEASED)**

**AND**

**IN THE MATTER OF: ANNE WAUSI POLCINO .....APPLICANT**

**AND**

**IN THE MATTER OF: THE LAW OF SUCCESSION ACT CAP 160 LAWS OF KENYA**

**POLCINO COSIMO .....BENEFICIARY**

**RULING**

Polcino Cosimo, a beneficiary to the Estate of Nicola Polcino, deceased, took out a summons dated 21.5.2008 pursuant to Section 76 of the Law of Succession Act and under rule 44 of the Probate and Administration rules in which he sought for the grant of letters of administration made to Anne Wausi Polcino on 30<sup>th</sup> day of November 2006 to be annulled. The summons is supported by the affidavit of Giovanni De Caro sworn on 20<sup>th</sup> May 2008. When served with the summons for annulment of grant, Anne Wausi Polcino, hereinafter referred to as the Respondent filed a notice of preliminary objection dated 7<sup>th</sup> June 2008 to oppose the application.

The subject matter of this ruling is the aforesaid notice of preliminary objection. It is the argument of Mr. Buti, learned advocate for the beneficiary that the summons for annulment of grant should be dismissed because, Giovanni De Caro acted in excess of the power of attorney donated to him by Polcino Cosimo, the beneficiary herein. It is submitted that the donor of the aforesaid power of attorney never at any time or at all contemplated the filing of such proceedings now before court, hence the applicant lacks the necessary locus standi to institute the same.

Mr. Ambwere, learned advocate for the beneficiary urged this court to reject the preliminary objection on the ground that the same lacks merit. It is said that the beneficiary acted within the powers donated by the power of attorney.

I have considered the submissions of both learned counsels. I have also perused the summons for annulment of grant plus the supporting affidavit and the notice of preliminary objection. It is not in dispute that Polcino Cosimo, the beneficiary herein, donated a power of attorney to Giovanni De Caro dated 30<sup>th</sup> April 2008. It is also not in dispute that on the basis of that power of attorney, Giovanni De Caro took out the summons for annulment of grant in the name of Polcino Cosimo. What is in dispute is whether in taking out such proceedings he acted in excess of the power of attorney. In order to answer

this question, the court must construct and interpret the power of attorney given to Giovanni De Caro. The power of attorney is dated 30<sup>th</sup> April 2008. The same was registered on 16<sup>th</sup> May 2008. In the schedule of power it is stated as follows:

“this Attorney is limited to represent me in the High Court of Kenya at Mombasa in regard to Succession Cause No. 31 of 2006 in order to defend the application by Anne Wausi Polcino requesting the court to dispose of any property and to gain access to any Bank of the late Nicola Polcino.”

It is the submission of Mr. Buti that the power of attorney was limited to defending but it never contemplated the filing and prosecution of such an application like the summons for annulment of grant. In Odger’s Construction of deeds and Statutes 5<sup>th</sup> Edition by Gerald Dworkin (Sweet & Maxwell) 1967 at page 23 it is stated as follows:

“So with all the above-mentioned preliminaries settled the court is faced with the question – What does the deed mean? It must be noticed that this is not necessarily the same as What did the parties intend to say that which they have in fact said, so their words as they stand must be construed. The question is not what did the parties intend to say? that is precluded by the presumption that they have said what the intended to say. The question to be solved is, what have they said. What meaning is to be attached to the expressions they have used?

At page 28 it is said .....

.....” In other words, the intention of the parties must be discovered, if possible, from the expressions they have used.”

The privy Council in Bryant, Powis and Bryant Ltd =vs= La Banque Due Peuple. Bryant Powis and Bryant Ltd =vs= Quebec Bank [1893] A.C. 170 ( 1891 – 4) ALL E.R. 1253 stated as follows:

“Powers of attorney must be construed strictly, and, if a question is raised as to the authority conferred by the power, it must be shown that, on a fair construction of the whole instrument, the authority in question is conferred in express terms or by necessary implication.”

The privy Council also in the above-mentioned case at pages 1256 -7 adopted the views of Byles, J in Stagg =vs= Elliot [1862] 6 L.T. 433 as follows:-

“...that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.”

I will apply the above principles of interpretation in this matter. It is clear from the power of attorney that Polcino Cosimo gave Giovanni De Caro to defend the succession proceedings taken out by Anne Wausi Polcino which sought to dispose of any property or to gain access to bank accounts held by the late Nicola Polcino. One of the grounds raised in the summons for annulment of the grant is to the effect that Anne Wausi Polcino is seeking to unlawfully and unfairly dispose of the properties of the Estate without disclosing such plans to the beneficiaries. In the Blacks Law Dictionary 8<sup>th</sup> Edition the word ‘defend’ is stated to mean to deny, contest or oppose. One of the ways of defending and or opposing such proceedings is to file and prosecute applications to revoke the grant or to strike out any other proceedings which are calculated to dispose of any property or to block access to the money of the Estate of the late Nicola Polcino. In the end I am convinced the preliminary objection should be dismissed which I hereby order with costs to the beneficiary. The summons for annulment of the grant should be listed for hearing so that the same can be heard and determined on merits.

Dated and delivered at Mombasa this 11<sup>th</sup> day of July 2008.

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Ambwere h/b Mrima for objector and Mr. Buti for the beneficiary.