



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT NO. 132 OF 1993

STEPHEN LOLO TATHI & OTHERS PLAINTIFF

VERSUS

MAHAHM MUSA KIOKO

ZIWANI MOSQUE & SCHOOL ASSOCIATION...DEFENDANTS

R U L I N G

The defence herein has objected to the production to what is termed as a driver of Attorney whereby a number of plaintiffs have endorsed their signatures authorizing 3 of the plaintiffs to testify on their behalf the document is listed as document number in the list of documents filed by the plaintiff. The grounds for objection are that:-

1. Not all plaintiffs have been signed and so the power of Attorney is ineffective.
2. The same was signed and filed when the matter had already been filed in court.
3. It is a registrable instrument and yet the same has not been registered under the cap 285 Laws of Kenya registration of instruments Act.
4. The appointees did not sign the instrument before a Commissioner for oaths as it is required by law.
5. It is not signed by the donor of the power (the person giving the power and the donee (the person receiving the power.
6. The plaintiffs cannot succeed under order 1 rule 8 as leave Act on behalf of the others has not been obtained herein.

The plaintiffs have opposed the objection on the grounds that:-

1. The donee is not supposed to sign the instrument as the person giving the authority is the one to sign.
2. The document authorizing the plaintiffs to act on behalf of the others does not require registration all that order 1 rule 12 require is that the authority be given in writing.
3. There is no representative action as the claim was presented in individual names and the witness giving evidence on behalf of the others is properly in the witness stand.

In reply counsel for the defendant submitted that calling into play of order 1 rule 12 of the CPR does not help the applicant as they cannot switch from a power of Attorney to an authority to Act. It is their stand that the plaintiffs counsel has to go back on to the driving board and come back with a proper instrument.

I have considered the arguments from both sides on the advisability of the document listed as no. 1 in the list of documents filed by the plaintiff and considered the same in the light of the provisions of the law relied upon by both counsels order 1 rule 12(1) stipulates that where there are more than one plaintiff any one or more than may be authorized by any other of them to appeal plead or act for such other in any proceeding. Order 1 rule 12(2) stipulates that the authority shall be in writing signed by the party giving it and shall be filed in the case. Through to the power of Attorney I find that the same is not signed by the persons giving it on the first page before the Commissioner of oaths. The endorsed on a separate page and there is no indication that the separate page is a continuation of the first page. It is therefore not properly draw.

Secondly it is correct that a power of Attorney in order to be effective it has to be registered. In accordance with section 4 of the Registration of Instruments Act cap 285 Laws of Kenya and so it cannot pass the test of being called a power of Attorney in the ready legal sense. In the premises the objection is upheld against the first document in the plaintiffs lists of documents that does not go to affect the proceedings adversely so far. The courts observation is that instead of filing a power of Attorney the plaintiffs lawyer should put in an authority to Act and attach the list with their signatures as attached to the purported power of Attorney. After replacing the purported power of Attorney with an authority to Act the parties will be at liberty to fix the matter for further hearing.

R. NAMBUYE

JUDGE – 18.7.2003