



**Kanyoni & 2 others v Nairobi City County; Mwangi (Interested Party); Falcon Properties Limited (Proposed Defendant) (Environment & Land Case 633 of 2009) [2024] KEELC 4458 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4458 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 633 OF 2009**

**JA MOGENI, J  
JUNE 3, 2024**

**BETWEEN**

**ALEXANDER KANYONI ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPH NJOROGE KIMANI ..... 2<sup>ND</sup> PLAINTIFF**

**STEPHEN KAMUNGE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NAIROBI CITY COUNTY ..... DEFENDANT**

**AND**

**EDWARD JANSON WANJHIA MWANGI ..... INTERESTED PARTY**

**AND**

**FALCON PROPERTIES LIMITED ..... PROPOSED DEFENDANT**

**RULING**

1. Before me for determination is the Interested Party/Applicant’s Chamber Summons Application dated 17/04/2024 filed pursuant to Order 1 Rule 3, Order 1 Rule 10 (2) and Order 1 Rule 14 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and all other enabling Provisions of the Law. The Applicant is seeking for the following Orders:
  1. That this Honourable Court be pleased to join the Interested Party and proposed 3<sup>rd</sup> Defendant herein as 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively in these proceedings.
  2. That this Honourable Court be pleased to grant leave to the Interested Party/Applicant to file a Statement of Defence and Counterclaim and that the draft attached hereto be deemed as duly filed.



3. That the costs of this application be provided for.
2. The Application is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Jane Waigwe Gathura, sworn on 17/04/2024 and Supplementary Affidavit sworn by Elizabeth Sudi, Advocate representing the interested party/applicant herein on 9/05/2024. I do not need to reproduce the same.
3. The Application is opposed. The Plaintiff/Respondent filed a Notice of Preliminary Objection dated 22/04/2024 which seeks to dismiss the Application dated 4/04/2024 with costs on the following grounds:
  1. The Interested Party has no locus standi to file the said application by dint of a power of attorney donated to him by a M/s Jane Waigwe Gathura on 17/06/2023 for lack of the requisite court's approval.
  2. This Honourable Court has no jurisdiction to entertain the Interested Party's application for having been filed by a person who has not been authorized by this court to file the same pursuant to the mandatory provision of Order 9 Rule 2 of the Civil Procedure Rules 2010.
  3. The application is therefore incurably defective for having been filed by the Interested Party acting upon a power of attorney without this court's approval contrary to the provisions of Order 9 Rule 2(a) of the Civil Procedure Rules 2010.
  4. The Interested Party's reliance on the Power of Attorney as conferring upon him the authority, capacity and locus does not expressly and impliedly confer such authority, capacity and or locus and hence this court has no jurisdiction to entertain these proceedings.
  5. In light of the above, the Interested Party's application is therefore incompetent, frivolous, bad in law therefore an abuse of the court process and should accordingly be dismissed with costs to the Plaintiffs.
4. The Court on 23/04/2024 gave directions that both the Notice of Preliminary Objection and the Application be canvassed by way of written submissions and a Ruling date was scheduled. By the time of writing this Ruling, it is only the Applicant who had duly submitted and I have considered them.

#### **Issues for Determination**

5. Having considered the instant Application, Preliminary Objection together with the Applicant's submissions, the following arise as the issues for determination before this court.
  - a. Whether the preliminary objection raised is merited based on law.
  - b. Whether the Application dated 17/04/2024 meets the threshold required for the joinder of a party.
  - c. Who should bear the costs of the Application?

#### **Analysis and Determination**

##### **Whether the Preliminary Objection raised is merited based on law.**

6. I have considered the Plaintiff/Respondent's application on a point of preliminary objection to the effect that the Interested Party/Applicant's Application be dismissed with costs for reasons that the same was incurably defective for having been filed by the Interested Party acting upon a power of



attorney without this court's approval contrary to the provisions of Order 9 Rule 2(a) of the Civil Procedure Rules 2010.

7. The issues for determination is a preliminary objection are now settled as per the Mukisa Biscuits' case. A party raising preliminary objection must confine itself to points of law, it should be on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained.

8. In the same case, Sir Charles Newbold P. added:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. In the instant suit the Plaintiff/Respondent has based its Preliminary Objection on the ground that the Interested Party's Application was incurably defective for having been filed by the Interested Party acting upon a power of attorney without this court's approval contrary to the provisions of Order 9 Rule 2(a) of the Civil Procedure Rules 2010.

10. On the other hand, the Interested Party/Applicant herein has contended that the Interested Party was joined as the Interested Party as the duly registered Attorney of Jane Waigwe Gathura to these proceedings by a Ruling delivered on 8/02/2024 finding that he is a necessary party to this suit. That the Preliminary Objection is fatally defective since it seeks that which I subject to the exercise of this Court's judicial discretion under Order 9 Rule 1(a) of the Civil Procedure Rules 2010. The Applicant deponed that the Plaintiffs acquiesced on their rights to question the Interested Party's participation as an Attorney when he joined the suit as an Interested Party and failed to object his joinder. That the Power of Attorney instrument has donated powers to the Interested Party to commence, prosecute, defend and appear in all suits, actions and proceedings and any other thing the Donor may be interested or concerned with the property and has not donated powers which are untenable in law. It is the Applicant's contention that any procedural defect can and should be cured by Article 159 (2) (d) of [\*the Constitution\*](#) of Kenya 2010 in the interest of the substantive justice of this case.

11. The provision of Order 9 Rule 1 Civil Procedure Rules is in following terms: -

“[Order 9, Rule 1.] Applications, appearances or acts in person, recognized agent or by advocate. 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;”

12. The provision of Order 9 Rule 2 of the Civil Procedure Rules, 2010 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; b. ....; c. ....;”

13. Under this Rule, there are two prerequisites. Firstly, the recognized agent should hold a Power of Attorney, and secondly, can only act subject to the approval of the court. Fortunately, the proper



construction of the above provision is not an unexamined question. Mwongo J. grappled with the proper application of the provision of Order 9 Rule 2 of the Civil Procedure Rules, 2010 in the case of Jack J. Khanjira and Anor – Versus - Safaricom Limited [2012] eKLR. In that case a suit had already been filed by the two Plaintiffs when one of them appointed an Attorney to act as his recognized agent. An objection was raised to the effect, inter alia, that the Power of Attorney held by the agent could not confer on the donee, as an unqualified person the right to act as an advocate, thereby overriding the provisions of Section 85 of the *Advocates Act*. Although the objection related to the scope of authority of a Donee who is otherwise unqualified to act as an advocate, the court’s consideration of the matter before it has many parallels with the case before us.

14. I am persuaded as Mwongo J. was that the starting point in interpreting the provision of Order 9 Rule 2 of the Civil Procedure Rule, 2010 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...” Also of significance to the matter before me is the proviso to Order 9 Rule (1) which states that:

“Provided that – a. Any such appearance shall, if the court so directs, be made by the party in person...”

15. The above proviso is in tandem with the provision of Order 9 Rule 2 (a) Civil Procedure Rules, 2010. A recognized agent makes application, appears or acts, subject to the approval of the court. This provision cannot be read to mean that the Power of Attorney itself ought to be approved by the court, even though such Power of Attorney may of necessity be reviewed by the court while dealing with the question of whether or not to approve the donee’s application for purposes of acting in the suit.

16. In this regard, this Honourable Court further quotes Mwongo J’s reasoning as to why this prior approval is necessary:

“Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the court. 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 recognized 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 recognized; it is the extent or scope of their agency that is recognized. That is to say, a recognized agent can perform only that which he is recognized or authorized 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 recognized agent should be subjected to the approval of the court as and when sought to be done.” [Emphasis added]

17. This is a practice that has gained currency in our courts until now. Mwongo J’s decision as reinforced by Mulla on Civil Procedure 12<sup>th</sup> Edition (Commentary on Indian equivalent of Order 9 Rule 1 of the Civil Procedure Rules) raises serious questions as to whether the scope of the recognized agent is limited directly by the technical wording of Order 9 Rule 1 and 2 to exclude filing of suits among acts that an agent can perform, or whether such agent is at liberty to do any and every kind of act, including filing pleadings, giving evidence, cross-examining witnesses etc.

18. The foregoing issue was not canvassed before me and there is not sufficient material to enable me draw any conclusions. Be that as it may, the wording of Order 9 rule 1 and 2 of the Civil Procedure Rules



leaves no doubt that the court has wide discretion in determining whether or not to allow an agent to appear or do any act in a suit. That discretionary power must be invoked by way of an application and is exercised judicially. No party should presume to act or appear before the court merely on the basis of the power of attorney without first obtaining the court's approval, howsoever sought. The Interested Party believed himself properly authorized by the Power of Attorney alone to act on behalf of the donor. That was an erroneous understanding of the rules.

19. In this present case, the Donee to the Power of Attorney filed an Application to be enjoined as an Interested Party, which Application was allowed on 8/02/2024 as the parties did not object. The Donee to the Power of Attorney thereafter filed the present Application seeking to be enjoined as a Defendant so that he could be able to produce evidence of ownership over the suit property and dispute the 1<sup>st</sup> Plaintiff's claim to the suit property. It is my considered view that the Interested Party misled the Court while applying for his joinder as an Interested Party through his Application dated 18/11/2023. There was no disclosure of particulars pertaining the power of attorney even if his Application for joinder was not opposed at the time.
20. For these reasons, I fully agree with the Plaintiffs that the donee under a Power of Attorney cannot act without first seeking the Court's approval, I would not go as far as concluding that an act, appearance or application would be rendered fatally defective. Rather than the impugned application, appearance etc. would have been irregularly done. In a proper case, the court might invoke its discretion under proviso (a) of Order 9 Rule 1 of the Civil Procedure Rules, 2010 by directing the actual party to appear or act in person rather than strike out the impugned process. Each case must be considered within its own circumstances. This Honourable Court's approval was all more necessary.
21. In the end, this Court is satisfied that the Interested Party has no locus standi to file the Application dated 17/04/2024 by dint of a power of attorney donated to him by M/s Jane Waigwe Gathura on 17/06/2023 for lack of the requisite court's approval. The recognized agent should hold a Power of Attorney and can only act subject to the approval of the court.
22. For the foregoing reasons, this Court finds that the Preliminary Objection dated 22/04/2024 is merited and is hereby upheld. The Interested Party/Applicant's Application dated 17/04/2024 is dismissed with costs to the Plaintiffs.
23. Orders Accordingly.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF JUNE, 2024.**

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**MOGENI J**

**JUDGE**

In the Virtual presence of: -

Ms. Mbiriwe holding brief for AGN Kamau for Plaintiffs

Ms Sudi for Interested party/Applicant

C. Sagina - Court Assistant

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**MOGENI J**

**JUDGE**

