



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 151 OF 2018

VICTOR GIRI KOGO (Suing as an agent of **GEOFFREY MICHAEL**

TRIMBY and **MARGARET LESLEY TRIMBY** being the registered

Trustees of **NEEMA SCHOOL (KENYA) TRUST**.....**PLAINTIFF**

VERSUS

WALTER CHIPA MKINDO.....**DEFENDANT**

RULING

This ruling is in respect of a notice of a preliminary objection dated 4th November 2020 by the defendant on the following grounds:

- a. THAT the suit herein is a non-starter in law and or fatally defective as it has been brought in contravention of Order 9 Rule 1 (a) and 2 (a) of the Civil Procedure Rules;**
- b. THAT the Plaintiff has no Locus standi to bring this suit;**
- c. THAT this suit is an abuse of the court process and should be struck out with costs to the Defendant.**

Counsel agreed to canvas the preliminary objection vide written submissions which were duly filed

DEFENDANT'S SUBMISSIONS.

Counsel submitted that the issue for determination is whether the Plaintiff has complied with Order 9 Rule 1 (a) and 2 (a) of the Civil Procedure Rules which 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;**

Order 9 Rule 2 (a) on the other hand adds that: -

"The recognized agents of parties by whom such appearances, applications and acts may be made or done are:

- b. 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 parties;"**

Counsel further submitted that the Plaintiff did not seek Court's approval before commencing this suit and relied on the case of **Tsuma Kenga Mwadzembe vs Karemba Anthony Masha [2016] Eklr** where Angote J struck out the suit and stated as follows;

"The Plaintiff in this matter should have sought the leave of the court before commencing these proceedings. That is what the law requires and the same cannot be said to be a technicality."

"The Plaintiff has to satisfy the court why the registered proprietor cannot file the suit in person, and once the court is satisfied, it will allow him to act as a recognized agent by filing the suit."

Counsel also cited the case of **Jack J. K Nangira and another Vs Safaricom Limited [2012] eKLR** where Mwangi J held that:

"I think that Order 9 Rule 2(a) gives instructive guidance as to who is a person appointed as an attorney. And such persons would do well to keep mind the guidance given in Order 9 Rule 2, which provides:

"2The recognized agent of parties by whom such appearances, applications and acts may be made or done are -

a. Subject to the approval by the court in any particular suit persons holding powers of attorney authorizing them to make such acts on behalf of parties."

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.

22. 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".

Counsel also relied on the case of **Carolyne Mpenzwe Chipande Vs Wanja Kazungu Baya [2014] eKLR** where Meoli J held that:

" 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 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, however sought "

Mr. Nyachiro submitted that the purported agent one VICTOR KOGO did not seek approval and leave of the court to represent the donors Geoffrey Michael Trimby and Margaret Lesley Trimby who purportedly executed the power of attorney outside the jurisdiction of this court.

Further that it is not clear where parties reside and the reasons why they could not plead on their own and chose to appoint an agent. Counsel submitted that there is no document placed before this court to show that there is a trust deed which in turn confers them powers to appoint the agent.

Mr. Nyachiro also submitted that there is no evidence to show that the purported donors are the only trustees of NEEMA SCHOOL(KENYA) TRUST and whether the necessary resolution was made to empower them appoint the plaintiff/ agent herein. Further that by an agreement dated 26th May, 2010 expressly stated that the defendant herein is an automatic member of Board of Governors, hence it was not in order that a board member is kept in the dark on the appointment of an agent.

It was counsel's submission that the plaintiff/respondent has conceded that the pleadings are improper and will seek to make an application to rectify vide amendment of the plaint. Counsel therefore urged the court to uphold the objection and strike out the plaintiff's suit with costs.

PLAINTIFF'S SUBMISSIONS

Counsel submitted that the preliminary objection does not satisfy the well-established principles for granting the drastic Orders sought and that the alleged contravention of Order 9 Rule 1(a) and 2(a) of the Civil Procedure Rules does not render the suit non-starter in law and fatally defective.

It was counsel's submission that the alleged procedural defect is curable by way of an amendment as it merely touches on the form of the suit and not on the substance. Further that there is a power of Attorney by one Geoffrey Michael Trimby and Margaret Lesley Trimby appointing one Victor Giri Kogo to be their attorney and/or agent in the case hence the said Victor Giri Kogo is therefore recognized in law and has locus standi.

Counsel admitted that that an error had occurred during the preparation of the pleadings whereof, instead of indicating Geoffrey and Margaret suing through their agent Victor, he indicated that it was Victor who was presenting the suit.

Counsel relied on the case of **Margaret Wamboi Kinuthia v Patrick Nd'ung'u & Another (2015) eKLR** where Nyamweya J (as she then was) held thus:-

“It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated in **D.T Dobie & Company (Kenya) Ltd v Muchina (1982) KLR 1 at Pg 9 by Madan J.A** as follows; -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurably by amendment. if a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

Counsel therefore urged the court to dismiss the Defendant’s Preliminary Objection with costs.

ANALYSIS AND DETERMINATION

The issue for determination is whether the plaintiff has locus standi to bring this suit bring this suit is a representative capacity on behalf of Michael Trimby and Margaret Trimby registered Trustees of NEEMA SCHOOL KENYA TRUST and whether the plaintiff has complied with Order 9 Rule 1(a) and 2 (a) of the Civil Procedure Rules.

In the case of **Geoffrey Ndungu Theuri v Republic [1990] eKLR** Mbaluto J (as he then was) held that:

“Mulla on the Code of Civil Procedure at page 668, in a commentary on order III rule 1 of the Indian Code of Civil Procedure, which is similar to our order III rule 1 says:-

“The right of audience in court, the right to address the court, the right to examine and cross-examine witnesses are all parts of pleading and that is not included in the expression “appearance, application or act in or to any court.” The word ‘act’ in juxtaposition with the words

‘appearance’ and ‘application’ is used in a technical sense and not in its ordinary sense as being referable to any action by any party.”

With respect we would agree with the above interpretation. It could never be the intention of the Rules Committee by making order III rule 1 to authorize holders of powers of attorney to appear or make applications or act in court otherwise than in the technical sense. Quite clearly therefore the appellants drawing of legal documents and appearances in court are not protected by order III rule 1.

Order 9 Rule 1 (a) and 2 (a) is clear on applications and appearances of authorized agents om how persons who would wish to be recognized as such to follow the laid down procedures.

In this case counsel for the plaintiff admits that there was an error which he submits that can be remedied by amendment and further cited the provisions of Article 159 (2) of the Constitution that justice shall be administered without undue regard to procedural technicalities.

The issue of locus standi and power to act on someone’s behalf goes to the core of the suit and cannot be wished away by Article 159 of the Constitution, the court must have the right plaintiff and defendant in court. The court does not want to envisage a situation where it has aided an illegality to transfer a person’s land in the name of turning a blind eye to serious errors and anomalies. Why did the plaintiff not do it right in the first instance?

In the case of **Guyo Bashora Dala & 75 others v Riverside Farm Malindi Limited [2020] eKLR** Olola J held that:

“My reading of the above provisions especially Rule 2 thereof is that where one decides to appear in Court through recognized agent, such an agent should not only hold a power of attorney but also that he can only act in such proceedings subject to the Court’s approval”.

Counsel admitted that there was no such approval by the court and would be seeking to amend the error.

I find that the preliminary objection has merit and is therefore upheld. The upshot is that the plaintiff’s suit is struck off with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF OCTOBER, 2021

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.