



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO E064 OF 2021

CHARLES KIGWE WACHUKA

(suing in his capacity as the appointed Attorney of JOYCE WACHUKA KIGWE

and in his personal capacity) .....PLAINTIFF

VERSUS

ELIZABETH WAMBUI WACHUKA .....1<sup>ST</sup> DEFENDANT

JULIUS MWANGI ABIUD .....2<sup>ND</sup> DEFENDANT

DAVID KIOGORA MAINGI .....3<sup>RD</sup> DEFENDANT

ROSWE NGIMA MAINGI.....4<sup>TH</sup> DEFENDANT

PEERSON NJARAMBA MACHARIA.....5<sup>TH</sup> DEFENDANT

PERPETUA ANNETTE AKINYI AYATTA..... 6<sup>TH</sup> DEFENDANT

CHIRA GAD GITHAIGA.....7<sup>TH</sup> DEFENDANT

RULING

1. Urging this Court to strike out this suit with costs, the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection dated 16/7/2021 on grounds that;

a. The suit herein ought to be dismissed with costs to the 1<sup>st</sup> Defendant as the Plaintiff has no capacity as pleaded in paragraph 2 of the plaint to lodge proceedings under a purported power of attorney he purports to invoke which is NOT registered under Section 4 of the Stamp Duty Act, and by operations of Sections 19 and 20 of the Stamp Duty Act the said document is a nullity in law and incapable of founding the suit herein.

b. In the alternative, this Honorable Court has no jurisdiction under the Mental Health Act to entertain a claim by the Plaintiff on behalf of Joyce Wachuka Kigwe under these proceedings at all absent a declaration of unsound mind of the said Joyce Wachuka Kigwe.

c. The Plaintiff in filing this suit failed to abide by the provisions of Order 32 of the Civil Procedure Rules.

d. The Plaint violates Order 3 Rule 2(d) of the Civil Procedure Rules as NO demand letter was ever served on the 1<sup>st</sup> Defendant before action as by law demanded.

2. The Plaintiff opposes the Preliminary Objection. Notably the Plaintiff and 1<sup>st</sup> Defendant are siblings and children of the Joyce Wachuka Kigwe.

3. Parties elected to canvass the Preliminary objection by way of written submissions.

4. The 1<sup>st</sup> Defendant through the firm of J. Harrison Kinyanjui Advocates filed submissions dated 16/7/2021 that were highlighted on

27/10/2021. It was submitted that the Plaintiff's purported power of attorney is not registered under the Registration of Documents Act and no duty was paid on the said documents under sections 4, 19 and 20 of the Stamp Duty Act so as to confer any legal rights. That the Plaintiff's cause of action founded on want of capacity is a non-starter on account of the infirmities affecting the Power of Attorney. The case of **Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR** was cited in support of this proposition.

5. Additionally, the 1<sup>st</sup> Defendant added that the Plaintiff has failed to comply with Order 32 of the Civil Procedure Rules (CPR) which requires appointment of a guardian ad litem for a person of unsound mind. That it is incumbent upon the Plaintiff to get a medical certificate of his mother's alleged incapacity as stipulated under the Mental Health Act.

6. On the other hand, the firm of **Nganga Ngigi & Co. Advocates** filed submissions dated 22/11/2021 (*sic*) on behalf of the Plaintiff. He contended that he duly filed a copy of his stamped power of attorney. That such objection can only be raised at the hearing when evidence will be tabled to determine its validity or not. He insisted that the same power of attorney was admitted in Nbi High Court Succ. Cause No. 950 of 2010, Estate of Gladys Wambui Kigwe wherein the Plaintiff represented his mother Joyce Wachuka Kigwe.

7. On the issue of his mother's mental health, he stated that this Honorable Court can order his mother's personal doctor to table a report in that regard as provided for under section 19(3)a and 19 (2) of the ELC Act. He beseeched the Court to strike out the Preliminary objection.

8. The main issue for determination is whether the Preliminary objection is merited.

9. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

**“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

10. At page 701 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 usually on the assumption that all the 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...”**

11. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

12. The Preliminary objection is mainly based on the Plaintiff's lack of capacity to sue in the manner he has done. Alternatively, the 1<sup>st</sup> Defendant is of the view that this Court lacks jurisdiction under the Mental Health Act to entertain a claim on behalf of Joyce Wachuka Kigwe without a declaration of her alleged mental incapacity.

13. On the issue of capacity to sue, at paragraph 2 of his plaint dated 2/7/2021 the Plaintiff described himself as the son and appointed attorney of his mother Joyce Kigwe. He annexed a copy of a general power of attorney dated 10/7/2013 to his List of Documents dated 2/7/2021. He further averred in his further affidavit sworn on 22/10/2021 that the said Power of attorney was admitted in Succ. Cause No. 950 of 2010 being succession proceedings of the late Gladys Wambui (Joyce Kigwe's mother) in his favor and on behalf of his mother. A copy of the Ruling in the said succession cause was attached.

14. As already been stated, the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party. The Plaintiff has adduced a copy of power of attorney which he insists is unrevoked and thus valid. The 1<sup>st</sup> Defendant impugns the Power of Attorney on account of want of registration and payment of stamp duty. She does not deny its existence. It is my view therefore that a detailed analysis of validity or otherwise of the Power of Attorney would require examination of evidence. For the Court to pronounce itself on whether or not the stamp duty was paid, it would have to inquire and make investigations on the facts, thereby removing the objection from being a pure point of law.

15. The second ground in the objection is drafted in the alternative challenging this Court's jurisdiction to entertain a prayer for declaration of insanity under the Mental Health Act. It is trite that jurisdiction is everything and without it, a Court must down its tools. A perusal of the Plaintiff's case as contained in the Notice of motion and plaint both of even date, do not disclose such a prayer. The Plaintiff seeks orders for interim injunction, inhibitions and ultimately cancellation of titles. I understand the Plaintiff's case to be that the titles in the names of the Defendants are vitiated by the mental incapacity of his mother, a claim that he has to proof by adducing evidence at the trial.

16. The 1<sup>st</sup> Defendant relied on case of **Francis Mwangi Mugo** supra to urge the Court to uphold the objection. That decision is only persuasive to this Court. Be that as it may, the same is distinguished from the instant suit. The gist of the case was on a power of attorney that the Plaintiff held albeit unregistered which fact the Plaintiff eagerly conceded. However, he later registered the power of attorney during the pendency of the suit. The Court held that despite the subsequent registration, the Plaintiff lacked mandatory capacity to file his suit abinitio and thus proceeded to strike out the suit with costs.

17. In the instant case, the Plaintiff has demonstrated on a balance of probabilities that he has a registered power of attorney. It is the

position of the 1<sup>st</sup> Defendant that at the time of filing suit, the Plaintiff did not hold a valid power of attorney because the same had not been registered. The only way to determine the veracity of her allegation is by way of evidence thus ousting the preliminary objection from being a pure point of law. The Court takes note that the document shows it was registered on 10/7/2013 and as IPA 60207/1.

18. In the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR** the Court reiterated that a preliminary objection should be founded upon **a settled and crisp point of law**, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

19. Having now considered the objection, the rival affidavits and all the material before me, I am of the firm view that the instant Objection fails to meet the said threshold. The same is dismissed with costs to the Plaintiff.

20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**DELIVERED ONLINE IN THE PRESENCE OF;**

**MS. WAINAINA HOLDING BRIEF FOR NGIGE FOR PLAINTIFF**

**MR. HARRISON KINYANJUI FOR 1ST DEFENDANT**

**SUIT WITHDRAWN AGAINST 2ND DEFENDANT**

**MS. NJAGI FOR 3RD AND 4TH DEFENDANTS**

**MS. GATHONI FOR 5TH DEFENDANT**

**MRS. KEAH FOR 6TH AND 7TH DEFENDANTS**

**MS. PHYLLIS MWANGI – COURT ASSISTANT**