



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**MISC. SUCCESSION CAUSE NO. E004 OF 2021**

**IN THE MATTER OF BAO (DECEASED)**

**AND**

**IN THE MATTER OF GPO (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL OUT OF TIME AND STAY OF PROCEEDINGS  
PENDING APPEAL**

**BETWEEN**

**JPO.....APPLICANT**

**VERSUS**

**WOO.....RESPONDENT**

**RULING**

1. The Respondent **WOO** is the brother to the deceased BAO while the applicant **JPO** is said to be a brother-in-law to the deceased.
2. This ruling determines the applicant's application by way of Summons dated 15.1.2021 brought under the provisions of sections 45,47,82 (b) of the Law of Succession Act, Cap 160 of Laws of Kenya and Rules 49 and 73 of the Probate and Administration Rules, 1980. The said Summons is supported by grounds and supporting affidavit of the applicant herein JPO, seeking for stay of proceedings in Ukwala **Succession Cause No. 17 of 2020** pending filing and hearing of an intended appeal from the Ruling and order of Hon C. Sindani, Principal Magistrate, delivered on 30<sup>th</sup> September, 2020, wherein the trial court dismissed the applicant's Summons for revocation of grant issued to the Respondent on account that the Objector/applicant herein had no locus standi in the matter.
3. The applicant further seeks for leave of this court to appeal out of time and orders to preserve the estate of the deceased for the ends of justice to be met.
4. The grounds upon which the orders are sought are on the face of the Summons and affidavit in support.
5. According to the applicant, the deceased's husband is held up in the United States of America and therefore cannot attend to these proceedings hence he gave authority to the applicant to act on his behalf by way of Power of Attorney. That the delay in filing the intended appeal is only 3½ months as the Ruling was made on 30.9.2020 which delay is not unreasonable.
6. It is deposed that on the date of Ruling, leave to appeal was sought and proceedings were applied for on 4.10.2020, and that copies of proceedings, Ruling and order were furnished on 11.11.2020 as per the annexed and we have annexed evidence.
7. The applicant complains that he was not listed as a beneficiary of the estate of the deceased BAO yet the grant is due for confirmation on 20/1/2021 in favour of the Respondent brother to the deceased B, whose estate, her deceased mother GPO had petitioned to administer but died before confirmation. It is further alleged that the deceased P had jointly with the Respondent herein intermeddled with the estate of the deceased BA.
8. On arguability of the appeal, the applicant annexed draft memorandum of appeal and asserted that the issues highlighted are arguable and need judicial interrogation. Further, that no prejudice will be suffered by the Respondent but that the Objector who is husband to the

deceased will suffer prejudice if the orders sought are not granted.

9. On stay of proceedings, it was asserted that summons for confirmations were due on 20.1.2021 and the Petitioner applied to amend the summons but withdrew. That the applicant had filed a protest to the Summons for Confirmation and therefore there was no protest hence the Respondent argued the Summons for Confirmation and Ruling is due as 24.2.2021. Mr. Oduol submitted that if proceedings are not stayed, the intended appeal will be rendered nugatory.

10. Opposing the Summons by the applicant, the Respondent filed a replying affidavit on 26<sup>th</sup> January 2021 deposing that no leave to file the intended appeal was filed. That the ruling to be appealed had not been annexed and that the delay in filing the appeal has not been explained. According to the respondent, what the applicant required was simply to seek for power of Attorney, upon which he could be enjoined to the Succession proceedings, as opposed to seeking to file an appeal and that despite the trial court finding that the applicant had no *locus standi* in the matter, the respondent went ahead and filed a protest to confirmation of the grant, wherein a ruling is due on 24/2/2021. Further, that if stay is ordered, the estate of the deceased would remain unadministered and that, that would be detrimental to the interests of the child left behind by BAO which child **BGO (BGO)** is aged 2 years and requires maintenance.

11. That as at the time of filing these proceedings, the respondent had not been admitted into the Succession proceedings to substitute GP hence he is not the administrator of the estate of the late BAO.

12. That as the husband of the late BA is held in prison in the USA, it would not be in order to bar the respondent from being substitute in the matter as he is having custody of the deceased's child.

13. That the delay in getting the proceedings from the lower court was caused by the applicant as he only paid for them on 3/11/2020 despite asking for them on 4/10/2020.

14. The respondent denies being an intermeddler as the grant has not been confirmed and urged this court to dismiss the application by the applicant.

15. The application was argued orally, with MR. Oduol Advocate submitting for the applicant whereas Mr. Ashioya Advocate submitted on behalf of the Respondent

16. The submissions by Mr. Oduol reiterated the grounds and the supporting affidavit as reproduced herein hence there is no need to reproduce them here.

17. On behalf of the respondent, Mr. Ashioya submitted relying on his client's replying affidavit and giving the history of the matter pending before the lower court. Mr. Ashioya submitted that after the demise of BA, her mother, GP petitioned for letters of administration of her estate because SO is in the United States of America and he is in prison. That there is a child born out of association between B and S, now 3 years and was living with G. That B left behind Bank accounts and other properties and that the deceased G was to access the money to maintain her granddaughter as G was unemployed so she had no other source of income.

18. According to Mr. Ashioya, the present applicant filed an objection which was heard and struck out on 30.9.2020 by the lower court because the purported power of Attorney was not valid, not commissioned in the United States of America and not notarized in Kenya hence it was found inadmissible and could not confer authority to the applicant to appear in the matter.

19. It was submitted that the Applicant sat on his right to appeal until 4.10.2020 that he paid for proceedings and that there is no evidence in his affidavit that he made serious subsequent follow-up to get the proceedings. Counsel for the respondent therefore submitted that the delay is not excusable and even if it were, no good grounds have been furnished to this court.

20. According to Mr. Ashioya, nothing would have been easier for the applicant to regularize the power of Attorney, re-approach the court and re-agitate his case. He maintained that the application for leave to appeal out of time is not based on plausible grounds, and urged this court to reject it as it is likely to lead to a convoluted process, affecting/prejudicing the child who requires maintenance.

21. Counsel for the respondent argued that Section 4 of the Children's Act Mandates the court to always give paramountcy to the interests of the child and so he implored this court not to allow the child to be subjected to suffering.

22. He maintained that GP was the proper person to petition for grant because she lived with the child, but that G passed on after the objection had been dismissed and the Respondent filed an application for substitution because he is living with the child, but that the applicant raised objections which is unmerited as it contributes to the delay and cause the the estate of the deceased to remain unadministered.

23. Mr. Ashioya argued that the Ruling is on 24.2.2021 and that WO is not a party to the succession proceedings yet he has not been made a substitute to GP hence he has standi to be sued in this intended appeal which is likely to suffer the same fate in that If substitution is declined, then an appeal will have been lodged against a non-party.

24. On stay of proceedings in the lower court, Mr. Ashioya posed a question that if proceedings in the lower court are stayed, what would be the fate of the pending ruling since the applicant has not sought to arrest the delivery of the pending Ruling. He prayed for dismissal of this application with costs so that parties can go back to the lower court to ventilate issues. Mr. Ashioya maintained that the purported power of Attorney is not a valid document and is inadmissible as it has not been notarized so it is inapplicable locally.

25. In a rejoinder, Mr. Oduol Counsel for the applicant submitted that on the issue of the Respondent being improperly before court, on

21.1.2021 the matter was due for confirmation of summons for grant so the applicant filed a protest.

26. Regarding the Petition by the deceased GP, it was submitted that there is no reason why the deceased's husband was left out in the succession proceedings. Mr. Oduol submitted that the power of Attorney was properly commissioned and notarized and valid and that that issue was not raised in the lower court. It was further submitted that the right of appeal is a constitutional right and that the applicant will suffer substantial loss if the application is denied. Further, that the application is made without unreasonable delay and that provision for the child can be made from the Bank accounts.

## **DETERMINATION**

27. I have considered the application by the applicant, the replying affidavit and oral submissions by counsel for both parties.

28. In my humble view, the main issues for determination are whether the application for leave to appeal out of time is merited and secondly, whether this court should stay proceedings in Ukwala PM Succession Cause No. 17 of 2020 until the intended appeal is heard and determined.

29. The commencement point is leave to appeal out of time. Ordinarily, an appeal is a right afforded to parties in proceedings by statute and where no such right of appeal is express, then a party would be expected to apply for leave of the court making the order to file an appeal.

30. In the instant case, it is not clear whether the applicant had an automatic right of appeal but since these are succession proceedings, there is no bar in the Law of Succession Act to a party appealing against a ruling or order of the lower court to the High Court without necessarily seeking and or obtaining leave to appeal, unlike if the proceedings emanate from the High Court to the Court of Appeal. What is clear is that the applicant intended to appeal against the Ruling of Hon Sindani Principal Magistrate made on 30<sup>th</sup> September 2020 but that he did not appeal within thirty days of the said ruling hence the prayer for leave to appeal out of time.

31. The Ruling of 30<sup>th</sup> September, 2020 is expressed in the order dated 11<sup>th</sup> November, 2020 wherein the Hon Principal Magistrate ordered that:

i. The objector lacks *locus standi*;

ii. Summons for revocation and annulment of grant dated 17<sup>th</sup> July, 2020 is hereby dismissed with costs.

32. Other than the extract order, no pleadings or ruling of the subordinate court was annexed to the application for this court to appreciate the real issues and reasoning behind the order impugned, and therefore whether the intended appeal is arguable is not clear cut to this court. However, the respondent herein has annexed copies of Notice of Motion and Supporting affidavit filed in court for joinder to the Succession proceedings and Summons for Confirmation of grant in his favour, a grant which was issued to the deceased GPO, and he has proposed the mode of distribution of the estate of the deceased BAO.

33. However, Mr. Ashioya has raised very pertinent issues which are not disputed and there are whether the power of Attorney and authority purportedly given to the applicant herein to represent SO who is in the USA and who was the husband to BA...the deceased whose estate is in issue, was valid authority or power of Attorney granting the applicant locus standi in the proceedings on behalf of SO.

34. The second issue raised by Mr. Ashioya is that as the Respondent had not been admitted in the Succession proceedings to substitute his late mother who was the original petitioner for grant in the estate of BA, then he is a non-party yet hence no action can be brought against a non-party or a party who has simply sought to be enjoined to the Succession proceedings and a ruling thereof is pending.

35. On the issue raised by Mr. Ashioya that in any event, the applicant had and has no valid power of Attorney from SO authorizing him to represent the latter in the Succession proceedings hence this application, the applicant's counsel Mr. Oduol counsel for the applicant responded submitting that the respondent had not raised that issue before the subordinate court.

36. However, my view is that the issue can still be raised here because I can see on record annexed to the supporting affidavit of the applicant, Annexure "JP1" copy of Appointment of JO (POWER OF ATTORNEY) document dated 14/2/2020 in the City of Pennsylvania Signed by SO. It follows that that issue is alive before this court since the applicant could not have had the authority to file this application without the valid Power of Attorney. I can also see a document named "**AUTHORIZATION TO ACT**" filed in this court together with the draft memorandum of appeal and it is dated January 15,2020.[sic] The document is signed by SO and drawn by Mr. Oduol's Law Firm. However, the said document or authority is not notarized and therefore the question is whether such documents whose author is said to be out of the Country in the USA and in jail is validly before this court to give to the applicant power and authority to challenge any proceedings before the court where the estate of the deceased BA is involved, which estate consists of land and other movable assets.

37. It is not in dispute that the power of attorney was executed in Pennsylvania in the United states of America on 14<sup>th</sup> February 2020 before a Notary Public whose name cannot be read and that the same ought to have been registered within two months upon arrival in Kenya as stipulated in section 9 of the Registration of Documents Act and that the same was not registered by the applicant.

38. According to Black's Law Dictionary, a Power of Attorney is:

***"An instrument authorizing a person to act as the agent or attorney of the person granting it."***

39. The power of attorney in Kenya is used to allow another person to act as if it was the person that is giving the power of attorney.

Examples are in transactions for sale of land, registration of intellectual property, filing of lawsuits, signing off on documents, opening of a bank account etc.

40. A power of Attorney can be specific or general in its nature. When a Power of Attorney is Specific, it is executed only for a particular purpose.

41. The question is whether an unregistered power of attorney to deal with immovable property namely LR [...] DOHO/UKWALA is valid in law or whether it be used to transact business on behalf of the Donor Mr. SO. In other words, what legal effect does it have on subsequent transactions? Does a holder of such a document have *locus standi* to prosecute a suit on behalf of the donor? See in **Kenneth Omollo Simbiri & another v Daniel Ongor [2020] eKLR** where Dr. M.A.Odenyi J of the Environment and Land Court, Eldoret, cited Ombwayo J in **Sanjay Varma & 2 others v Jackson Eshiwani Likoye & 7 others [2020] eKLR** where Ombwayo J. held as follows and I concur:

*“The powers of attorney that the 1<sup>st</sup> Plaintiff sought to produce were executed in the United Kingdom and not registered in Kenya as required under Section 44 (4) of the Land Registration Act, therefore he lacked the capacity to be enjoined in the suit and the evidence he tendered ought to be disregarded.”*

*Section 44(4) provides that an instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe. There was no evidence that this requirement was complied with.*

42. Dr. Odenyi J stated:

*“Further, section 9 of the Registration of Documents Act Cap 285 provides that every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after its arrival in Kenya. There is further no evidence that this provision was complied with.*

*Section 4 of the Registration of Documents Act Provides that:*

*“All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:”*

43. Dr. Odenyi J further added that:

*“A Power of Attorney being one of the said documents that confers rights, it then follows that as the instant Power of Attorney in issue herein was dealing with immovable property hence it needed to be registered before it could be used.”*

44. On whether the issue of the registration of the power of attorney could be raised at that stage in the proceedings, the learned Judge stated:

*“The issue that the appellant has issue with is that the point of registration of the power of attorney was never raised in the pleadings or at the time of admitting the document as an exhibit. The respondent submitted that it is trite law that a point of law can be raised at any time before judgment.*

*In the Court of Appeal case of John K. Malembi v Trufosa Cheredi Mudembei & 2 others [2019] eKLR the court held that:*

*“An issue urged in this appeal is that the trial judge considered matters not raised in the pleadings. The appellant contends that the issue of validity or otherwise of the sale agreement between the appellant and the deceased was never pleaded by either party. That the judge erred in considering the issue and invoking the provisions of the Section 3 (3) of the Law of Contract Act when the matter had never been pleaded.”*

*“On our part, we find it was proper for the trial court to suo motu raise and determine the issue of its own jurisdiction. The suit before the trial court was instituted on 23/10/2000 at the High Court prior to the 2010 Constitution before and establishment of the Environment and Land Court. We are of the view that the learned High Court Judge misdirected himself that he had jurisdiction pursuant to Paragraphs of the Practice Directions on Proceedings in the Environment and Land Court vide Gazette Notice No. 5178 dated 25/7/2014.”*

*“Regarding new issues that may arise in the course of a trial, the Court of Appeal in Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR held:*

*“Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in Odd Jobs v Mubia [1970] EA 476, “a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”*

*In the present case, the Respondent did not raise the issue of the legality of the power of attorney or the standing of the*

***Appellant's Attorney in their statement of defence or during the hearing. The court is under an obligation to evaluate the case in its totality and if there is any anomaly or illegality with the process which is mandatory in nature then the court cannot sanitize such anomaly or illegality even though it was not raised as an issue for determination. The court also has an obligation to frame issues from the pleadings or summarize the issues put forth by the parties.***

***The parties might ignore pertinent issues which the court may find to be the real issue for determination. This does not mean that the court would be dealing with unpleaded issues for determination. I find that the trial Magistrate was right in finding that the suit was incompetent as the power of attorney was not registered as required. The issue could be raised at any time and even if it was not raised the trial Magistrate in evaluating the evidence in totality would have noticed the anomaly and flagged it out."***

45. The Court of Appeal in **Anacleth Kalia Musau v Attorney General & 2 Others [2020] e KLR** upheld the decision of this court (ABURILI J) that a court of law can on its own motion consider a point of law which the parties have not raised and determine a suit on the basis of that point of law.

46. ***Having said all the above, it is clear that the applicant has no valid power of attorney and or authorization to represent SO in the Succession proceedings and in this court. Therefore, this court is left with no option but to dismiss this application.***

47. It is however not open to any party to meddle in the estate of a deceased person by selling or purporting to sell any part of it as that is a criminal offence. The law is clear that where beneficiaries are minors, then a continuing trust is established and all assets must be held in trust for the minor and not to be misapplied except for the benefit of the minor until she is of age. Under section 113 of the Children's Act, the court may make orders concerning the welfare and upbringing of a child and persons qualified to apply for such orders include the child, parent, guardian or custodian of the child, a relative of the child, the Director and an authorized officer. What that means is that it is not open for any person administering an estate where the beneficiary is a minor to take advantage of a child and any of the persons named in the Act can intervene on behalf of the child to protect its interests.

48. From the application filed by the respondent WOO in the lower court, this court finds that there is a legitimate concern that he is proposing to distribute the estate of the deceased BA to persons other than the minor and to the exclusion of her father SO without involving her husband SO and father of the child and who is out of the country and according to the said respondent, SO is in jail.

49. Therefore, albeit the child **BGO** is said to be in custody of the Respondent herein, as the matter involves a minor whose mother and guardian grandmother are both deceased and the father lives outside the country, and is said to be in jail, it is important that this court protects the interests of the minor as contemplated in Article 53(2) of the Constitution and sections 113 and 114 of the Children's Act. Under section 114 (d) and (f) of the Children's Act, this court can make a **child assessment order** or **wardship order**.

50. ***Accordingly, and in the interest of and for the welfare of the child BGO, I direct that any grant issued or to be issued to any person in respect of the estate of the deceased BAO can only be confirmed in the names of three or more persons who shall hold the said estate in trust for the minor child BGO.***

51. The above order is necessitated by the fact that a continuing trust will be an assurance that specific persons are legally liable for the child's property in the estate and whatever monies will be taken out of the estate in the name of the upkeep for the child, will actually be applied to her upkeep and nothing else.

52. ***In that regard, this court further directs the Director of Children's Services, Siaya County to be the Child's guardian ad litem, to undertake a preliminary inquiry to establish the whereabouts of the minor child BGO and the conditions under which the said child is living and report to Ukwala Children's Court, and to ensure that a continuous trust in favour of the child BGO in terms of section 58(2) Law of Succession Act is established in the Succession Proceedings before Ukwala Principal Magistrate's Court.***

53. The section provides:

***"Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises, the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion.***

54. As the matter has been determined on the preliminary issue, I need not delve into matters of stay of proceedings as the same are pending ruling before the trial court. However, this ruling shall be served upon Ukwala PM's Court and the Director Children's Services, Siaya County, forthwith for noting and necessary action.

55. Costs follow the event. However, as the applicant had no authority to appear and as the respondent's application to be enjoined to the Succession proceedings is pending ruling before the trial court, the dispute being one over an estate of a deceased person and the beneficiary being a minor, I order that each party shall bear their own costs of this application as dismissed.

56. This file is closed and ruling to be transmitted to Ukwala PM's Court and to the Director, Children's Services, Siaya.

Orders accordingly.

**Dated, Signed and Delivered at Siaya this 8<sup>th</sup> Day of February 2021 virtually in open court.**

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Mr. Oduol Advocate for the applicant

Mr. Ashioya Advocate for the Respondent

Respondent also present in court

CA: Modestar and Mboya