

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ENVIRONMENT AND LAND COURT
ELC HCC NO. 178 OF 2011

JOHN KAMAU GACHINA.....PLAINTIFF

-VERSUS-

SOFIA SALIM KARAMA.....DEFENDANT

RULING

1. This ruling is on a Preliminary Objection raised by the plaintiff after the defendant informed Court through his advocate on record that he has donated a power of attorney. The donee is now to give evidence on his behalf. Mr Wachenje advocate for the plaintiff submitted that vide the defendant's list of documents filed on 23.11.2015, there was no indication the defendant would testify through his donee.
2. Mr Wachenje submitted that section 125, 126 and 128 of the Evidence Act requires persons to testify unless for the reasons stated in section 125 (1). The plaintiff submits that it is only the Court who can determine whether due to the defendant's age he needs to be given assistance from a professional. They object to Asha who is the daughter to the defendant and holding the power of attorney from testifying in this matter.
3. Mr Maosa advocate in response to the plaintiff's submission stated that the issue before Court is not competence of a witness but whether a party can appoint an agent. In his view, he submits that Order 9 rule 1 of the Civil Procedure Rules allow. That the agent will not bring any fresh matter except produce the bundle of documents. He submits the objection is not founded, the Power of Attorney is special to only this case. Lastly he submits that the plaintiff will not be prejudiced as he will have opportunity to field questions in cross – examination.
4. The black's law dictionary defines a power of attorney as “*an instrument authorizing a person to act as the agent or attorney of the person granting it*”. Order 9 rule 1 of the Civil Procedure Rules provides “*that any application to or appearance or act in any Court required or authorised by law to be made or done by a party in such Court may . . . be done by the party in person or by his recognized agent or by an advocate duly appointed.*” Order 9 rule 2 define recognised agents as ;

“2 (a) subject to approval by the Court in any particular such persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of parties.”

5. The rules therefore allow for holders of powers of attorney to “*act on behalf of parties*”. The reference made by the plaintiff to section 125 and 126 of the Evidence Act deals with competency of witnesses not acting through a recognised agent. Section 128 is not relevant to the instant issue as it deals with compellability of ordinary witnesses as there is nothing incriminating. The defendant is not being called upon to testify on behalf of the plaintiff.
6. The defendant already filed his documents and served the plaintiff. He has chosen to give his defence through a recognised agent. There is a provision the law allowing him to do so. I see no reason why the plaintiff should object to the manner chosen by the defendant to present his case. It is my considered opinion and I so hold that a party is at liberty to authorise a recognised agent to act on his/her behalf at any stage of the proceedings. Such appointment need not be on the basis

of incapacitation of the donor of a power of attorney but out of choice. Consequently I find no merit in the objection and hereby dismiss it accordingly.

Ruling dated and delivered at Mombasa this 15th day of July 2016

A. OMOLLO

JUDGE