



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 63 OF 2019(OS)

GUYO BASHORA DALA & 75 OTHERS.....APPLICANTS

VERSUS

RIVERSIDE FARM MALINDI LIMITED..... RESPONDENT

RULING

1. By a Notice of Motion application dated 29th August 2019, Riverside Farm Malindi Ltd (the Respondent) prays for an order of injunction to issue restraining the 76 Applicants herein from tilling, planting of crops, developing and/or remaining in or in any other way trespassing onto the Respondent's remaining portion of land being Plot No. M28 Malindi.

2. The application which is supported by an affidavit sworn by one David Pola Mramba as an Attorney of one of the Directors of the Respondent is premised on the grounds that:

i) The Respondent is the registered proprietor of all that piece of land known as Plot No. M28 Malindi;

ii) The Applicants were previously squatters on the land. They were fully compensated and settled on a portion of land excised from Plot No. M28 Malindi and therefore have no claim whatsoever on the remainder thereof;

iii) That after filing the suit and without any colour of right, the Applicants have trespassed into the Respondent's land and have evinced intentions to occupy and develop the same to the detriment of the Respondent; and

iv) Any developments by the Applicants will change the character of the Respondent's land thereby causing the Respondent irreparable loss and damage.

3. The application is opposed. By a Notice of Preliminary Objection dated and filed herein on 12th September 2019, the Applicants object to the application on the ground that the pleadings filed by the Respondent violate the provisions of Order 9 Rule 2(a) of the Civil Procedure Rules.

4. In further response and by a Replying Affidavit sworn and filed by the 1st Applicant-Guyo Bashora Dala on behalf of his colleagues, the Applicants aver that David Pola Mramba has no locus standi to swear an affidavit on behalf of the Respondent. They assert that the Special Power of Attorney annexed to the application does not donate any power to the donee in respect of the suit property and that the same is merely meant for filing of the Company's annual returns.

5. The Applicants further aver that they have been living on the suit property since time immemorial and assert that the grant of the prayers sought herein shall amount to their eviction before they can be heard.

6. I have perused and considered the application and the response thereto. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

7. By their Preliminary Objection herein, the Applicants contend that the participation of David Pola Mramba in these proceedings vide the Power of Attorney donated to himself by one Francesco Zinoni, a director of the Respondent is irregular and unlawful. It is their case that such participation without approval by the Court is not permitted in law.

8. As to appearances in Court by parties, their recognized agents and advocates, Order 9 Rule 1 and 2 of the Civil Procedure Rules 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 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; and

b) Where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney General or such officer, as the case may be may by writing under his hand depute an officer in the public service to make or do any such applications, appearance or act.

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

a) Subject to approval by the Court in any particular suit persons holding powers of attorney authorizing them to make such appearance and applications and do such acts on behalf of parties;

b)

9. 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.

10. As was stated by Mwangi J while considering the same provision in **Jack J Khangira & Another –vs- Safaricom Ltd (2012) eKLR:**

“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 the 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.”

11. In the matter before me, the impugned power of attorney dated 21st April 2004 reads as follows:

“Special Power of Attorney

I, Francesco Zinoni of Post Office Box No. 5932 Malindi in the Republic of Kenya do hereby Nominate and Appoint David Pola Mramba also of Post Office Box No. 5932 Malindi in the Republic of Kenya to be my true and lawful attorney in relation to my interest in the above mentioned companies for purposes of signing the companies annual returns for filing at the companies registry on my behalf and for me and in my name to do all such acts, matters or things as may be necessary or expedient for carrying out the powers hereby given, and I hereby undertake from time to time and at all times to ratify and confirm whatsoever my said Attorney shall lawfully do or cause to be done under or by virtue of this Power of Attorney.”

12. While the Respondent is one of the five companies mentioned in the power of attorney, it was clear to me as stated by the Applicants that the same relates to the filing of returns for the mentioned companies. The power of attorney neither makes any reference to the suit property nor gives power to the donee to prosecute and or defend any suits in relation thereto.

13. Given the fact that it does not give the donee power to litigate, I think it was critical that prior to its use for such purposes that an approval be sought from the Court. As matters stand presently, there is nothing to demonstrate that the donee has capacity to bring this application and or to act on behalf of the Respondent Company in these proceedings.

14. In the premises, I find merit in the Preliminary Objection and I strike out the Notice of Motion dated 29th August 2019 with costs.

Dated, signed and delivered at Malindi this 13th day of November, 2020.

J.O. OLOLA

JUDGE