



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 320 of 2016**

**FRANCIS MWANGI MUGO .....PLAINTIFF**

**VERSUS**

**DAVID KAMAU GACHAGO .....DEFENDANT**

**RULING**

***(Plaintiff filing suit over immovable property without first registering power of attorney; suit struck out with costs; held that since what was in issue was immovable property, the power of attorney first needed to be registered before the plaintiff could file suit)***

1. The application before me is that dated 4 January 2017 filed by the defendant. The defendant seeks to have this suit dismissed with costs on the argument that the plaintiff had no locus standi when he filed the case. The bone of contention is on a power of attorney that the plaintiff holds. It is the position of the 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.
2. This suit was filed on 4 September 2015 by one Francis Mwangi Mugo on behalf of Catherine Waithera Karanja, who it was said had donated a power of attorney to the said Francis Mwangi Mugo.
3. In his replying affidavit sworn on 10 March 2017, Francis Mwangi Mugo, has deposed that he filed this suit pursuant to a power of attorney dated 10 February 2015. He does not deny that at the time of filing suit, the power of attorney had not been registered, but he is of the view that failure to have the power of attorney registered is not fatal to the suit.
4. It is noteworthy to state that after this application was filed, he proceeded to register the power of attorney in issue on 6 March 2017.
5. In his submissions, Mr. Kabita, learned counsel for the applicant, inter alia submitted that the power of attorney having not been registered at the time of suit, was in contravention of Section 19 of the Stamp Duty Act, Cap 480, Laws of Kenya. He submitted that a power of attorney is not among the documents exempted from registration by Section 4 of the Registration of Documents Act, Cap 285, Laws of Kenya. He referred me to Section 9, which requires that a document must be registered within 2 months of execution, or if executed outside Kenya, it must be registered within 2 months of its arrival in the country. He submitted that the power of attorney was not registered within 2 months of its execution. He submitted that a court has a right to impound such unregistered document. He submitted that the plaintiff had an alternative to apply for leave to register under Sections 20 and 21 of the Stamp Duty Act but that there is no evidence that the plaintiff applied for leave before proceeding to register his power of attorney. He

pointed out that there is also a penalty for late registration but no evidence has been furnished of the same. He was of opinion that without a registered instrument, the plaintiff had no locus to file the suit.

6. On his part, Mr. Odhiambo learned counsel for the plaintiff, submitted that registration only goes to admissibility of a document and the case is yet to be heard. He submitted that the intention of the donor is not disputed. He was of the view that Section 19 of the Stamp Duty Act does not invalidate the power of attorney for not being registered but only makes it inadmissible in evidence. He pointed out that the power of attorney is now registered and the issue is now a mere technicality which should not lead to the striking out of the suit. He submitted that the Stamp Duty Act, under Section 19 (3) (c) allows one to remedy the position. He submitted that there is nowhere where it provides that a power of attorney must be registered for it to have effect. He relied on the cases of *Mara North Conservancy vs Koinanke Ole Nkoito & 3 Others (2011) eKLR* and *Westlands Residential Resort Limited vs Kawakanja Limited & 2 Others (2013) eKLR*.

7. Mr. Kabita, in rebuttal, submitted that the issue in the two cases are different from what we have in this case. He did not think that the issue is a mere technicality curable by Article 159 of the Constitution. He submitted further that even if it was a question of late payment, the plaintiff never sought leave to do so.

8. I have considered the application.

9. There is no question that Catherine Waithira Karanja, donated to Francis Mwangi Mugo, a power of attorney. The power of attorney is specific giving Francis mandate to file suit in respect of the land parcel Nakuru Municipality Block 1/1205 (Langalanga). The power of attorney is dated 10 February 2015. This suit was filed on 6 November 2015 before the power of attorney was registered. The power of attorney was later registered after this application was filed. The issue before me is one, should this suit be struck out for the reason that Francis never held a registered power of attorney at the time that he filed suit ?

10. It will be observed that Mr. Kabita commenced his submissions by stating that a power of attorney is among the documents that require registration pursuant to Section 4 of the Registration of Documents Act. I have looked at that Section which is drawn as follows :-

4. *Documents to be registered*

*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:*

*Provided that the registration of the documents following shall not be compulsory—*

(i) *any composition deed;*

(ii) *any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;*

(iii) *any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;*

(iv) *Any endorsement upon or transfer of any debenture issued by any such company*

(v) *any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such*

*right, title or interest;*

*(vi) any lease or licence of land for any term not exceeding one year; or*

*(vii) any document registrable under the provisions of the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300):*

*Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this Act.*

11. Powers of Attorney are not specifically mentioned in the above provision of the law as requiring registration. However, all instruments which seek to declare certain rights or limitations over immovable property must be registered. Thus a power of attorney which confers upon the donor a right to deal with immovable property must be registered. Under the repealed Registered Land Act, Section 116 required that powers of attorney "which contain any power to dispose of any interest in land" be registered. There cannot be contention that any power of attorney allowing the donee to deal with land will need to be registered since land is immovable property. But I am not too sure of a power of attorney which is specific to doing certain acts that do not involve immovable property or indeed a power of attorney restricted only to filing a suit must be registered, although of course it is arguable that where the suit involves land, there will be a dealing over immovable property.

12. If the document is not registered, yet it requires registration, I do not think one can claim any rights under it unless and until it is registered.

13. The Stamp Duty Act has been cited, especially Section 19 and 20, and I think I better put these two sections down in full.

*19. Non-admissibility of unstamped instruments in evidence; and penalty*

*(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—*

*(a) in criminal proceedings; and*

*(b) in civil proceedings by a collector to recover stamp duty,*

*(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.*

*(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—*

*(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;*

*(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a*

collector for leave under [section 20](#) or of obtaining a certificate under [section 21](#);

(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in [subsection \(5\)](#), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.

(4) If any person is empowered or required by any written law to act upon, file, enrol or register a duplicate or copy of any instrument, and if the original of that instrument would require to be duly stamped if acted upon, filed, enrolled or registered by that person, that person may call for the production of the original instrument or for evidence to his satisfaction that it was duly stamped, and no person shall act upon, file, enrol or register any such duplicate or copy without production of the original instrument duly stamped or of evidence thereof.

(5) The penalty on stamping any instrument out of time referred to in paragraph (c) of subsection (3) shall be ten shillings in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such a period after the expiration of the time within or before which the instrument should have been stamped.

## 20. Stamping out of time

(1) Where an instrument is chargeable with stamp duty under this Act and should have been stamped before a certain event or before the expiration of a certain period, but has not been so stamped, a collector may give leave for the stamping of the instrument if he is satisfied—

(a) that the omission or neglect to stamp duly did not arise from any intention to evade payment of stamp duty or otherwise to defraud; and

(b) that the circumstances of the case are such as to justify leave being given.

(2) If the collector grants leave under subsection (1) for the stamping of an instrument, the instrument shall be stamped on payment of the unpaid duty including any additional stamp duty and of a penalty of one shilling in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such period after the expiration of the time within or before which the instrument should have been stamped:

Provided that—

(a) the penalty chargeable under this subsection shall not exceed one hundred per centum of the principal duty outstanding; and

(b) the collector the collector may remit the penalty under this section up to a maximum of one million five hundred shillings, but shall not remit any penalty exceeding that amount without prior approval from the Minister.

(3) If any person applying for leave under this section is dissatisfied with the decision of the collector upon that application, that person may require his application to be referred to the Minister, whose decision thereon shall be final for all purposes.

(4) Upon any application for leave under this section, the collector, or the Minister, may require sworn or other evidence in support of the application.

(5) When an instrument has been stamped by leave under this section it shall be deemed to have

*been duly stamped.*

*(6) Notwithstanding the provisions of this section, no bill of exchange or promissory note shall, except as provided in sections 21, 22, 34 and 36, be stamped after execution.*

*(7) In this section, “collector” does not include the Senior Collector of Stamp Duties.*

14. The above provisions provide for consequences for not paying stamp duty on documents that require stamping. There is leeway however to stamp a document late with some resultant penalties.

15. I think at this juncture, I must state that there is a difference between the requirement of registration and the requirement to pay stamp duty. Registration is a formal entry of a document in a specified register so that certain rights may pass by such entry or so that the public may be notified of the existence of the said document. Stamping is a question of revenue collection by the Government. It is normal for stamp duty to be paid on registration of a document, that is, for the Government to raise revenue by requiring that documents that need registration be stamped, but the two, that is stamp duty and registration, do not mean the same thing. It is indeed not always the case that stamp duty must be paid for all documents that require to be registered or that it is only registered instruments that attract stamp duty.

16. What Section 19 does, is to try to enforce the payment of stamp duty by placing a consequence if you do not pay it when required. Thus at Section 19 (1), the document cannot be received as evidence, unless the proceedings are to enforce its payment. Under Section 19 (2), a document chargeable with stamp duty cannot be acted upon unless it is duly stamped. Section 20 provides for late payment of stamp duty.

17. In our case, the argument of counsel is that the power of attorney was not registered before the case was filed. I think the same needed to be registered since it is a document relating to a dealing over immovable property. The power of attorney is also not exempted from stamp duty and therefore stamp duty needed to be paid. The law provides that one cannot act on a document that requires payment of stamp duty if stamp duty is not paid.

18. I think it cannot be belaboured that Francis Mugo Mwangi ought not to have filed this suit, since it related to rights over immovable property, before registering the power of attorney and paying stamp duty on it. Well, he did not but proceeded to file suit. He has now registered the instrument and has paid stamp duty on it. Should I allow the case to stand ?

19. In my view, I think courts need to be strict on some matters such as whether or not a person has capacity. If one has no capacity, whatever such person files, at the time he/she had no capacity is a nullity. My own view is that Francis Mwangi Mugo had no capacity when he filed this case. The documents filed before he registered the power of attorney are therefore invalid and that includes the plaint.

20. I have looked at the two cases cited by counsel for the plaintiff. In the case of ***Mara North Conservancy Ltd vs Koinanke Ole Nkoitoi & 3 Others (2011) eKLR*** the issue was on payment of stamp duty on a lease. There was an objection raised that the leases contravene Section 19 of the Stamp Duty Act. Payment was thereafter made. In the case of ***Westlands Residential Resort Limited vs Kawakanja Limited & 2 Others***, the issue was admissibility of a land sale agreement and the argument was that it cannot be relied upon because stamp duty had not been paid. I think these cases are distinguishable. As I said before, there is a distinction between mere payment of stamp duty and registration of an instrument. Stamp duty can be paid late as was the case in the case of ***Mara North Conservancy*** but I do not think the issue therein was on whether or not the lease had been registered. In our case, I think the more fatal omission is not necessarily payment of the stamp duty, important as it is, but the failure to register the power of attorney before filing suit, for to me, it is that act of registration which then vests the donee with capacity to deal with the immovable property claimed by the donor. The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity, for one cannot act for another without having the legal capacity to do so. I hold the view, that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to

have capacity to act.

21. I do not think capacity is a technicality curable under Article 159 of the Constitution. It is either you have it or you do not. You do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney. I therefore have no option but to strike out the suit with costs which shall be paid by the said Francis Mwangi Mugo.

22. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 25<sup>th</sup> day of May 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of:**

Mr. Kabita for the defendant/applicant

Mr. Bosire holding brief for M/s Henia Anzala & Co. Advocates for the plaintiff/respondent.

Court Assistant : Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**