

This provision has two prerequisites as set out by Meoli J, in *CarolyneMpenzweChipandev. WanjeKazunguBaya* [2014] eKLR.

“The recognized agent should hold a power of attorney, and secondly, can only act subject to the approval of the court...”

Other cases relied on by the 1st respondent are namely, *Angote J, in KasimuSharifuMohamed v. Timbi Limited* [2017] eKLR, *TsumaKengaMwidzembe vs. Kerembo Anthony Masha* (2016) eKLR, *CarolyneMpenzweChipande* (supra), as guided by the case of *Jack J. Khanjira and Anor v. Safaricom Ltd* (2012) eKLR. The 1st respondent therefore wants the court to find in the 1st respondent's favour and uphold the 1st respondent's preliminary objection.

The petitioner/applicant objected to the 1st respondent's preliminary objection dated 8th May, 2017 on the following grounds ; the preliminary objection is an abuse of the court as the same is aimed at wasting the court's time. The objection is misconceived and frivolous as the petitioner/applicant did not need leave of court before filing the petition/notice of motion. The preliminary objection cannot be the basis of striking out the petition/notice of motion dated 6th March, 2017.

The 1st respondent has prayed that the petition and notice of motion dated 6th March, 2016 be struck off on the basis that the petitioner being a donee of power of attorney failed to obtain leave prior to commencing the current proceedings contrary to Order 9 rule 2 of the CPA Rules 2010. It is expressly clear from the heading and averments in the petition that the petitioner has filed the petition in her capacity as the administrator of the estate of the late Wilson Kingori Wambui. Such capacity does not require leave of court. They submitted that the 1st respondent's preliminary objection is misconceived, lacks merit, is an abuse of the court process as it is only aimed at wasting time and clogging the path of justice. From the litany of suits evidenced in the petition and the Notice of Motion, it goes without say that the 1st respondent has engaged the petitioner in numerous suits not as a donee of power of attorney but as administrator of the estate of the late Kingori. The 1st respondent cannot now turn to allege that the petitioner is a donee of power of attorney. The purpose of leave is to ensure that agents or donee's of power of attorney are not overstepping the bounds of their mandate or the law i.e. performing only that which he is recognized or authorized to do in law.

The petitioner submitted that, order 9 rule 2 is a procedural provision that does not go to the substance of a suit unless specifically proved. As to what weight should be given to such a procedural requirement Article 159 (2) of the Constitution should be called to aid in determining whether to decide a suit on the basis of a preliminary objection under the said subsidiary provision. Sections 1 (A) and (B) of the Civil procedure Rules are also crucial in emphasizing the importance of furthering the overriding objective of justice.

That the affidavit in support of the petition is in the first person of the petitioner. It is deposed to by the petitioner who has fully disclosed that she frequently travels and as such she appointed Richard Njue Karugu under an instrument that was clearly disclosed to the court by the petitioner. The donee has not gone further than just signing the affidavit. The donee signed and did not depone to any issue in the affidavit. The affidavit is not sworn by the donee on behalf of the petitioner, but signed with the authority of the petitioner. Essentially the petitioner is the source of the information given and has sworn to it. The affidavit is a written statement made under oath – this is an affidavit sworn by one who is a petitioner in this matter.

The Petitioner states that even if the affidavit is struck out, the same cannot nullify the petition as it is not mandatory for a petition to be accompanied by an affidavit as provided for under Rule 11 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure rules 2013. The petitioner relied on the case of *Microsoft Corporation v. Mitsumi Computer Garage Ltd. & Another* (2001)eKLR

This court has carefully considered both the 1st respondent's and the petitioner's submissions. The 1st

respondent has prayed that the petition and notice of motion dated 6th March, 2016 be struck off on the basis that the petitioner being a donee of power of attorney failed to obtain leave prior to commencing the current proceedings contrary to Order 9 rule 2 of the CPA Rules 2010. The notice of motion as well as the petition upon which it is hinged was filed by a donee of the power of attorney without the leave of the court being sought and obtained in violation of the law.

It is the petitioner's submissions that the heading and averments in the petition that the petitioner has filed the petition in her capacity as the administrator of the estate of the late Wilson Kingori Wambui. Such capacity does not require leave of court. The petitioner submitted that the affidavit in support of the petition is in the first person of the petitioner. It is deposed to by the petitioner who has disclosed that she frequently travels and as such she appointed Richard Njue Karugu under an instrument that was disclosed to the court by the petitioner. This has not gone no further than just signing the affidavit. The donee merely signed and did not depone to any issue in the affidavit.

Order 9 Rule 2 of the Civil Procedure Rules provides: 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 appearances and applications and do such acts on behalf of parties.

In the case of Talmac limited Versus Roberto Macri and 4 Others (2017) eKLR the learned Judge, Angote J stated that approval by the court is required. In the case of Jack J. Khanjira and Anor v. Safaricom Ltd (2012) eKLR. The learned Judge, Mwongo J observed that for orderly representation in court every appearance, act or application by an agent should be subjected to prior approval by the court. I fully agree with the reasoning in these cases. The donee cannot act without approval of the court and cannot seek the same retrospectively. I find that the proposed donee in this matter has signed the affidavit deposed by the applicant/petitioner which goes to the route issues in this matter. The petition and application was filed without the leave of the court. I find the preliminary objection has merit and uphold the same. The court orders that petition and notice of motion dated 6th March, 2016 be struck off with costs to the 1st respondent.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH DAY OF SEPTEMBER 2017.

N.A. MATHEKA

JUDGE