



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C APPEAL NO. 3A OF 2017

LOICE WANJIRU MERU	1ST APPELLANT
KEZIA WANJIRU	2ND APPELLANT
ROWLAND MAINA MUCHIRI	3RD APPELLANT
JOHN MACHARIA MERU	4TH APPELLANT
VS	
JOHN MIGUI MERU	. RESPONDENT

RULING

1. On 4/5/2015 the Respondent filed a suit in Murang'a PMCC No 167 of 2015 as an Attorney of his Mother Ms Grace Wanjiru Migwi through a general power of Attorney registered at the Lands Office on the 8/4/15 as 408/4/2015. The Power of Attorney *inter alia* empowered and authorized the Respondent to demand sue and recover monies due and owing to her.
2. Armed with the Power of Attorney aforesaid, the Respondent filed suit in his own name seeking among other things, the refund of the ½ share of the rental income due to his mother that had been unlawfully deducted by the Appellants, purportedly, as unpaid costs of the upkeep of the building that they co-owned together that is to say L.R NO. LOC 13/Gitugi/1515/10. He posited that the mother had, from the records he kept, contributed faithfully for the upkeep of the building since 1987 and that she did not owe any monies to the Appellants in that regard. In the suit he sought a refund of all the unpaid rental income due to his mother; the Appellants be permanently enjoined from dealing with the suit property without her involvement and that in future all rental proceeds be shared equally amongst the co-owners.
3. In opposing the suit, the Appellants challenged the power of Attorney held by the Respondent as incompetent on account of the donor being senile and incapable of so granting the power of Attorney and opined that the Respondent has no locus to file the suit. Denying the Respondent's claim, the Appellants pointed out that infact the second half of the rental income was initially being remitted to Ms Tabitha Nyambura, the co-wife of Grace Wanjiru Migwi who later sold her shares to the partnership/co-owners.
4. It would appear that the said Grace Wanjiru Migwi passed away on the 2 /6/15 as per the limited grant of letters of administration ad litem issued on the 7/8/2015 to the Respondent as the personal representative but limited only to the purpose of substitution in the PMCC No 167 of 2015 at Murang'a.
5. On the 17/6/2015 the Appellants filed a Notice of Motion seeking orders that the suit be struck out on the grounds *inter alia* that the stratum of the suit collapsed upon the death of the donor of the Power of

Attorney to the Respondent; that the power of Attorney is now untenable in law and that the suit remains frivolous and vexatious. They argued that upon the death of the donor the suit abated by operation of law and therefore the same is incapable of being revived.

6. In opposing the application, the Respondent maintained that the suit has not abated. That the Respondent has triable issues which should go to full trial. That the power of Attorney is still valid as the Respondent is now the Personal representative of the donor as seen by the grant of letters of administration ad litem issued on 7/8/2015.

7. In their submissions the Appellants challenged the locus standi of the Respondent on account that his legal capacity to file suit was derived from a power of attorney which has now ceased/extinguished on the death of the donor. Further that the grant of letters of administration ad litem is for substitution of the plaintiff in the case. That since the Respondent had filed suit in his name, he cannot be heard to substitute himself when he is still alive. Further that in the circumstance the donor of the power of Attorney being deceased, cannot be substituted as the power of Attorney is extinguished on death of the donor and is rendered inoperative and invalid in law.

8. The Respondent submitted that the power of Attorney is still valid and the Respondent is now the personal representative of Grace Wanjiru Migwi. As to whether the suit is fit for striking out, whilst citing the case of **Shah Vs Mbogo & Anor HCCC No 1087 of 1965**, he maintained that the Court's discretion to strike out a suit is intended to be exercised to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake or error but not to assist a person bent on deliberately obstructing or delaying the cause of justice. The suit being premised on a claim on the rental income from the suit property, the issues raised in the suit are triable and the case should be allowed to proceed to trial so that the controversies can be determined on merit.

9. On the 2/11/2015 the Learned Principal Magistrate delivered his ruling on the application and dismissed the same. Holding that a power of attorney is of a generic nature of agency, the legal provisions of an agent equally applies to the holder of the power of Attorney and the death of a principal therefore extinguishes the agency by operation of law. That a holder of Power of Attorney is precluded from effecting duties for which he is merely a substitute and that upon death of the principal the substitution or agency is extinguished by operation of law. The learned Principal Magistrate stated the law on abatement of suit as provided for under Order 24 rule 1 of the Civil Procedure Rules that on the death of a plaintiff the suit does not abate if the cause of action survives the deceased. Holding that the suit had not abated on account that one year had not lapsed since the death of the donor the learned Principal Magistrate noted that the Respondent had time within the period to put his house in order in respect to any other procedural shortcomings in his case.

10. Aggrieved by the decision of the Principal Magistrate, the Appellants filed an appeal and cited 6 grounds of appeal as follows;

- a) The Learned Principal Magistrate erred in Law and fact in finding that the suit has not abated with the death of the donor of power of Attorney.
- b) The Learned Principal Magistrate erred in law and fact in not finding that with the death of the donor of power of Attorney the suit died with her.
- c) The Learned Principal Magistrate erred in Law and fact in not finding that the Respondent could not substitute himself in the lower Court.
- d) The Learned Principal Magistrate erred in Law and fact in not finding that the suit in the lower Court was premised on a power of Attorney which was extinguished upon the death of the donor.
- e) The learned Principal Magistrate erred in law and fact in not finding that the suit in the lower Court is no more.

f) The learned Principal Magistrate erred in law in not ruling the grant of letters of Administration ad litem obtained by the Respondent could not diminish the fact that the suit had abated by the time the said letters were obtained.

The Appellants are seeking that the ruling in the lower Court be set aside and a declaration that the suit PMCC No 167 of 2015 Muranga abated.

11. I have condensed the grounds of appeal to three to wit; whether the suit abated on the death of the donor of the power of attorney; whether the Respondent can substitute himself as the plaintiff in the case whilst he is still alive, having filed the suit in his name and not the donor of the power of attorney; whether the grant of letters of administration ad litem did save the case from abating.

12. I have carefully considered and evaluated the rival submissions of the parties in determining the application.

13. The Appellants submitted that the Learned Principal Magistrate should have made a finding that on the death of the donor of a Power of Attorney, the power so donated becomes inoperative and invalid in law. That the plaintiff being appointed as a representative for purposes of substitution did not cure the incurable defect in the proceedings and did nothing to revive the case that was long dead. That the Respondent could not substitute himself in a case where he was the plaintiff, albeit under a power of attorney. That the grant of letters of administration ad litem did nothing to salvage the case as the doors had been slammed shut by the operation of the law and the grant could not unlock the same. That the ruling should be set aside and the suit declared to have abated.

14. The Respondent in his submissions stated that he is still the personal representative of the late Grace Wanjiru Migwi as demonstrated by the letters of grant of administration ad litem issued on the 17/8/2015. That the Appellants have not challenged the validity of the grant. That by virtue of Order 24 of the Civil Procedure Rules, the suit has not abated as the cause of action survived the deceased.

15. In response to whether the plaintiff could substitute himself, the Respondent maintained that the grant of letters of grant ad litem gave the plaintiff power for purposes of substitution in the case pending in the lower court. The said letters have not been annulled and the Respondent is within his right to proceed with the prosecution of the case and in any event the Respondent had time within the one year to put his house in order as held by the Court. He submitted that the case in the lower court still subsists by virtue of the substitution vide grant of letters ad litem.

16. Whilst placing reliance on Order 24 rule 1 of the CPR, he deponed that since the Court had given the Respondent to put his house in order the Respondent could amend the pleadings to cure any procedural defect if any. That rule 3 allows the legal representative of a deceased subject to the cause of action surviving him, to be made a party and proceed with the case. That such is the position in the case in the lower court. That striking out the suit in the lower Court would be draconian and drastic and urged this Court to allow the Respondent to be heard on the merits of the case. That the overriding objectives of the Civil Procedure Act is to facilitate the just expeditious proportionate and affordable resolution of the civil suits and this Court is enjoined to so exercise its powers to meet the ends of justice and give effect to the overriding objectives and not otherwise. Further he urged the Court to pay fidelity to substantive justice and not technical justice.

Analysis & determination

17. Section 75 of the Civil Procedure Act read together with Order 43 Rule 1 (b) of the Civil Procedure Rules provides for appeals that accrue by right. This appeal is majorly centered on striking out the suit on grounds that the said suit had abated and it is therefore clear that the leave of the trial magistrate was not required before this appeal could be filed.

18. In principle every person who is a party in a civil proceeding is entitled to represent himself personally or through an agent. Order 9 rule 2 provides for recognized agents as thus;

“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 appearances and applications and do such acts on behalf of parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

19. In the instant case the Plaintiff had a proper power of attorney to act for his mother in this suit. Therefore, he was acting for a disclosed principal. This was disclosed both in the plaint and the registered power of Attorney on record. There was no uncertainty as to whose Attorney he was acting for. There were sufficient disclosures to put the defendant on notice as to the party on the opposite side and her claim against the defendant. That being the case I note that he filed the suit in his name and not in the name of his mother. In my view this is a procedural defect that is not fatal to the case. For purposes of the suit in the lower Court the party is the Attorney suing pursuant to a power of Attorney donated by his mother Grace Wanjiru Migwi.

20. In answer to grounds 1, 2, 4 & 5, the question for determination is whether the suit did abate on the death of the donor of the power of attorney. The test on whether a suit has abated or not depends on whether the suit is considered personal to the party. Causes of action relating to contracts and property are viewed as independent of the party and do not abate when the party dies. However, in suits that are personal to a party such injuries, libel, slander and malicious prosecution, the suits abate on the death of the party. This suit involves property and therefore is not personal to the party. However, it is trite law that suits must be prosecuted by and against living persons.

21. Order 24 rule 1 -3 of the Civil Procedure Rules states that the death of a plaintiff shall not cause the suit to abate if the cause of action survives or continues. Where a sole plaintiff dies and the cause of action survives, the Court on application made in that behalf shall cause the legal representative of the deceased to be made a party and shall proceed with the suit. The substitution must be done within a period of one year. However, the Court is clothed with discretion to so extend the time for substitution on good reasons.

22. I agree with the learned Principal Magistrate that a power of attorney is extinguished on the death of the donor. It is plainly clear on record that upon the death of Grace Wanjiru Migwi, the power of attorney donated to her son the Respondent stood extinguished by operation of law. That was the effect of her death on the Power of Attorney. However, her demise did not extinguish the cause of action. It being not personal to the party, the cause of action survived the donor of the extinguished power of Attorney. Upon her death the Respondent applied for letters of grant of administration ad litem which were duly granted by the Court permitting him to so substitute the deceased party. The Respondent is now appearing as the personal representative of the deceased party and not as an Attorney. That satisfies the provision of Order 24 rules 1-3.

23. In answer to ground 3 of the Memorandum of appeal, I note that the wording of the grant of letters of administration ad litem stated the purpose as for substitution in CMCC NO 167 of 2015. There is no reason advanced by the Respondent why he did not file the suit in her mother's name. However, taken that the plaintiff brought the suit in his capacity as a holder of a power of Attorney on behalf of her mother and not on his own, and noting that the cause of action survived her, he is right to apply for substitution of the deceased party, his mother in whose authority he had filed the suit in the first place. As earlier pointed out any procedural defect can and should be cured by Article 159 (2) (d) of the Constitution in the interest of the substantive justice of the case.

24. In response to ground No 6, I see no reason to fault the Learned Principal Magistrate in holding that the suit did not abate for the reasons advanced above.

25. In conclusion the Appeal is not merited and must fail. It is hereby dismissed with costs to the Respondent.

DATED, DELIVERED AND SIGNED THIS 23RD DAY OF NOVEMBER 2017.

J.G. KEMEI

JUDGE