



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 201 OF 2013

TSUMA KENGA MWADZEMBA.....PLAINTIFF/RESPONDENT

=VERSUS=

KAREMBO ANTHONY MASHA.....DEFENDANT/APPLICANT

RULING

1. This Ruling is in respect to a Notice of Preliminary Objection dated 21st February, 2014 and filed by the Defendant.
2. The Defendant has averred in the said Notice of Preliminary Objection that the Plaintiff's suit is a non stater in law and fatally defective because it has been brought in contravention of Order 9 Rule 1(a) and 2(a) of the Civil Procedure Rules.
3. The Defendant has further averred that the Plaintiff does not have the locus standi to prosecute this suit.
4. The parties filed their respective submissions in respect to the said Preliminary Objection.
5. The Defendant's counsel submitted that the Plaintiff has admitted he filed this suit as an authorised agent by virtue of the power of attorney; that for a person holding a power of attorney to represent the donor, he must seek the prior approval of the court and that the Plaintiff did not seek the approval of the court before commencing these proceedings.
6. The Plaintiff's counsel submitted that Margaret Helbling Kabibi allowed the Plaintiff through a special power of attorney to represent her and take care of her interests in Kenya; that the Defendant has trespassed on the land owned by Ms Helbling and that the Plaintiff has a cause of action against the Defendant.
7. Counsel submitted that the Plaintiff's act of filing this suit on behalf of her sister is a matter which does not go to the root of the case and that the requirements provided for under Order 9 are matters of procedure which do not go to the root of the case.
8. In the Complaint, the Plaintiff has defined himself as the donee of a Special Power of Attorney donated to him by one Margaret Kabibi Helbling, the registered proprietor of parcel of land number Kilifi/Mtondia/116 (the suit property).
9. The Defendant has objected to the filing of this suit because the Plaintiff did not obtain the leave of the court before he instituted the suit.
10. It is not in dispute that on 6th October, 2012, Margaret Kabibi Helbling Unda (the donor) appointed the Plaintiff (the donee) as her lawful attorney to represent her and take care of her interests in Kenya relating to proceedings in her name.
11. The said special power of attorney was duly registered by the Registrar of Documents on 16th October 2012.
12. Order 9 Rule 2(a) of the Civil Procedure rules provides as follows:

“The recognised 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;”

13. The special power of attorney that the Plaintiff relied on in filing this suit authorised him “to institute, file or defend proceedings” in the donor's name.
14. Did the Plaintiff need the leave of the court to file the current suit, notwithstanding the fact that the donor had expressly allowed him to do so vide a power of attorney?
15. The Blacks's Law Dictionary, 9th Edition, defines a power of attorney as **“an instrument granting someone authority to act as agent or attorney-in-fact for the grantor.**

A special power of attorney on the other hand has been defined as “A power of attorney that limits the agent's authority to only a specified matter.”

16. Order 9 Rule 1 of the Civil Procedure Rules allows an act to be done by a party in person, or by his recognised agent. However, where a recognised agent is a holder of a power of attorney, Order 9 Rule 2 (a) requires that the person gets the approval of the court.
17. It is therefore obvious from the reading of that provision that one cannot appear as an agent of the Principal on the basis of a power of attorney without the approval of the court. This is the position that was taken **by Mwongo J and Meoli J in the cases of Jack J Knangira & Another Vs Safaricom Ltd (2012) eKLR and Carolyne Mpenzwe Chipande Vs Wanja Kazungu Baya-HCCA No. 14 of 2013 (Malindi)** respectively.
18. The Plaintiff in this matter should have sought the leave of the court before commencing these proceedings. That is what the law requires and the same cannot be said to be a technicality.
19. The Plaintiff has to satisfy the court why the registered proprietor cannot file the suit in person, and once the court is satisfied, it will allow him to act as a recognised agent by filing the suit.
20. For the reasons I have given above, I allow the Defendant's Preliminary Objection dated 21st February 2014 in the following term:-

(a) The Plaintiff's Complaint dated 11th November 2013 and the pending Application(s) be and are hereby struck out with costs to the Defendant.

Dated, signed and delivered in Malindi this **6th** day of **May**, 2016.

O. A. Angote

Judge