



**Ali & another (Omar Khamis Balleth (Deceased) Previous Attorney/Agent of 2nd Applicant (Suing Thru' Attorney/Agent) Al-Leith Omar Balleth) v Fundi & 40 others (Environment & Land Case 127 of 2014) [2024] KEELC 3419 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 127 OF 2014**

**EK MAKORI, J  
APRIL 24, 2024**

**BETWEEN**

**ALI SWALEH ALI ..... 1<sup>ST</sup> APPLICANT  
MOHAMMED KHAMIS BALLETH ..... 2<sup>ND</sup> APPLICANT  
OMAR KHAMIS BALLETH (DECEASED) PREVIOUS ATTORNEY/AGENT OF  
2ND APPLICANT (SUIING THRU' ATTORNEY/AGENT) AL-LEITH OMAR  
BALLETH)**

**AND**

**MUGERWA KATANA FUNDI & 40 OTHERS ..... RESPONDENT**

**RULING**

1. This suit is concluded. There is a judgment in place delivered on the 28<sup>th</sup> day of June 2018 (Olola J.). An Originating Summonses filed by the plaintiffs was dismissed. A counterclaim filed by the defendants was upheld with the final verdict that the plaintiffs were to vacate the suit property within 90 days after the judgment of this Court or face forcible eviction.
2. Mr. Ogeto has brought an application firstly to have his firm allowed to come on record since the matter is already concluded and, in that motion, dated October 27, 2023 he also seeks that the applicant herein be substituted as an Attorney of one Mr. Omar Khamis Balleth (Deceased) Previous Attorney/Agent of 2<sup>nd</sup> applicant (Suing Thru' Attorney/Agent) Al-Leith Omar Balleth.
3. Mr. Michira has raised a Preliminary Objection stating that the Power of Attorney donated to the former representative died with him. The donor of the Power of Attorney is the only one who can donate the same to another party but no such transfer or conferment can be endorsed by this Court. It is not demonstrated why the 2<sup>nd</sup> applicant who donated the initial Power of Attorney cannot attend



Court. Besides no application was made by the applicant to Come on record as a representative of the 2<sup>nd</sup> applicant.

4. The only issue to decide in this matter is whether once a donee dies, substitution can be made, with the attendant costs.
5. I think there are no such arrangements in law. Olola J. in his judgment in this matter discussed the issue of the initial Power of Attorney and found that it was illegally and dubiously obtained. Counsel who is said to have prepared and or witnessed it one Mr. Henry Muranje advocate disowned it. He appeared before the judge.
6. A Power of Attorney terminates in the following situations: when the donor or donee passes away; the subject matter to which the power of attorney relates is destroyed and ceases to exist; either party notifies the other in writing that the Power of Attorney is revoked; if the Power of Attorney is general, it expires if and when an expiration date is specified; and if the donor becomes legally incapacitated.
7. The creation of a Power of Attorney brings in the principal-agent relationships. The donee is empowered in the agency relationship to transact for the donor. See *Mayfair Holdings Ltd v Ahmed* [1990] eKLR:

“I turn now to the law of agency. The general proposition is that “whatever a person who is *sui juris* can do personally he can also do through his agent” – per Stirling LJ in *Bevan v Webb* [1901] 2 Ch D 59 at p 77. The reason is set out in *Story on Agency* 9th Edition where the author says at the beginning:

“ In the expanded intercourse of modern society, it is easy to perceive that the exigencies of trade and commerce, the urgent pressure of professional, official and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life, must require the aid and the assistance and labours of many persons, in addition to the immediate superintendence of him whose rights and interests are to be directly affected by the results.”

The relationship of principal and agent can be created in many ways, for example by a verbal telephone conversation, by fax, telex, or even by circumstances from which agency can be implied. The execution of power of attorney is but one of the ways in which the relationship can be so created, and if the authority of an agent is required to be conferred by deed or an instrument under seal, as where the agent is given power to execute a deed, then the necessary authority has to be conferred by a power of attorney. However, although under section 3(3) of the *Contract Act*, cap 23, a contract for the disposition of an interest in land must be evidenced by writing (as under its similar counterpart in the United Kingdom, section 40(1) of the *Law of Property Act* (1925), writing is not necessary for the appointment of an agent to sell or purchase land, so that the agency in this case (if it existed) could have been created independently of a power of attorney.”

8. In this case the donee has died and we are not told why the donor cannot appoint or appear himself in this matter the agency between the donor and the donee was severed by death. It cannot be substituted.
9. The Preliminary Objection is upheld. The application dated October 27, 2023 is hereby dismissed with costs.



**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

M/s Rutoh holding brief for Michira for the Respondent

Court Clerk: Happy

In the Absence of:

Mr. Ogeto for the Applicants

