



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA, SICHALE, J.J.A)

CIVIL APPLICATION NO. 1 OF 2014

BETWEEN

CORNEL L. SHISANYA.....APPLICANT

AND

1. IRENE JULIET OTINGA

2. JAMES MICHAEL LUYALI

3. ALEX SHIVACHI LUYALI

4. LYDIAH SYLVIA LUYALI

5. GODSWILL TSAVAI LUYALI

6. PURITY MUSERE LUYALI

7. LEVIS LUYALI

8. BEATRICE LUVUNO LUYALI

9. OROBA MATISTA LUYALI..... RESPONDENTS

(An application for stay of the consent entered by the Deputy Registrar of the High Court dated 9th June, 2010 and 18th August, 2009 and Justice Ojwang' entered on 7th October, 2009

in S. Cause No. 187 of 2008)

RULING OF THE COURT

[1] By a notice of motion said to be brought under **Order 40 Rule 1** and **2** of the Civil Procedure Rules 2010 and **Rule 41, 42, 43 (1)** and **47** of the Court of Appeal Rules and **section 3A** of the Civil Procedure Act, **Cornel L. Shisanya** moved this court as “recognized agent” applying for and on behalf of **Mama Horoba Liyayi**, mother of the deceased **Ezekiel Luyali Liyayi**. The orders sought in the motion included: an order for injunction, an order for stay of the orders given in **Succession Cause No. 187 of 2009** on 9th

December 2013, an order for stay of all consents unlawfully entered by Deputy Registrar, High Court of Kenya at Mombasa on 9th June 2012, and 18th August 2009 and an order by **Justice J.B. Ojwang** on 7th October 2009 and finally an order for stay of the proceedings in Succession Cause No. 187 of 2008.

[2] The application was supported by an affidavit sworn by Cornel L. Shisanya in which he depones that he is the recognized agent of Mama Horoba Liyayi and further depones to matters concerning litigation in the succession cause involving alleged fraudulent proceedings and an application for revocation of a grant.

[3] The respondents in the application are eight. One of the respondent **Alex Shivachi Luyali**, has sworn an affidavit in which he objects to the application contending *inter alia* that the application has been overtaken by events and maintaining that the applicant is misusing the name of Horoba Liyayi to derail and confuse the issues before the court.

[4] **Beatrice Luvuno Karinga**, who is also a respondent, has also sworn a replying affidavit fully associating herself with the position taken by Alex Luyali. **Irene Juliet Otinga** another respondent has similarly sworn a replying affidavit in which she maintains that the application has been filed without the knowledge of Horoba Liyayi who is an old woman. She contends that Cornel Shisanya has abused the process of the court by filing another succession cause at Kakamega without disclosing the succession cause in Mombasa.

[5] At the hearing of the application, Cornel Shisanya appeared in person while **Mr. Munyithya** appeared for the 6th respondent and **Mr. Rajab** held brief for **Mr. Kadima** for the other respondents. Mr. Munyithya raised a preliminary objection objecting to the appearance of Cornel Shisanya as recognized agent. He pointed out that **Rule 25 (3)** of the Court of Appeal Rules provides for persons who are licenced advocates to have audience before the court while **Rule 22 (2)** of the Court of Appeal Rules provides that a person under a disability may be represented either by an advocate or a next friend or a guardian *ad litem*. Mr. Munyithya maintains that there is no provision in the Court of Appeal Rules for appointment of a recognized agent or for such an agent to have audience before the court. Mr. Munyithya argued that the applicant had no right of audience before the court nor did the court have any jurisdiction to hear his application as there is no intended appeal which has been lodged.

[6] Mr. Rajab supporting Mr. Munyithya's position, pointed out that there was an order made on 19th February 2013, in which the court had described Cornel Shisanya as a busy-body.

[7] In response to the objection, the applicant maintained that he was appointed a recognized agent under **Order 9 Rule 2** of the Civil Procedure Rules as Mama Horoba Liyayi is a sickly old lady and he is a family friend. He contended that under **Articles 22 and 159 (1) & (2)**, he had a right to come to court to complain against the High Court.

[8] We have given due consideration to the preliminary objection. The proceedings before this court are governed by the Appellate Jurisdiction Act and the Court of Appeal Rules. **Rule 22** of the Court of Appeal Rules provides as follows:

1. ***Subject to the provisions of rule 71, a party to any proceedings in the court may appear in person or by advocate.***
2. ...
3. ***A person under disability may appear by advocate or by his committee, next friend or guardian ad litem as the case may be and where any person acted as next friend or guardian ad litem in the court below for a person under disability and the person under disability becomes respondent in an appeal to the court, the next friend or guardian ad litem may, if he desires to act as such in the appeal, lodge a consent to act as such and shall thereupon be deemed to have been duly appointed and in any other case, the court may appoint a guardian ad litem for the purposes of an appeal and the court may at any time remove and replace any guardian ad litem, however appointed"***

[9] Thus a person other than a litigant can only appear before this court if he is an advocate or next friend or guardian *ad litem* of the litigant. There is no provision that has been made in the Court of Appeal Rules for representation by recognized agent. We take note of the fact that under **Article 22** and **258** of the Constitution, a person can initiate proceedings either acting on their own behalf or on behalf of another person where there has been contravention or threatened contravention of the Constitution. In this case, no violation or threatened violation of the Constitution has been alleged and therefore Articles 22 and 258 of the Constitution cannot apply.

[10] We come to the conclusion that the applicant does not fit within the provisions of Rule 22 of the Court of Appeal Rules and therefore has no right of audience before us. We also note that the applicant has been before this court in another application **Civil Application No. 22 of 2013** which was handled by a single judge and in which the applicant similarly appeared pursuant to a power of attorney. It is instructive to note the court's finding which was as follows:

“ As Cornel L. Shisanya has not been substituted for the plaintiff (Hezron Mjomba Mwachonga) in Suit No. 10 of 2005, Cornel L. Shisanya has no capacity or locus standi to make the application or to purport to be the plaintiff in the said suit.

Finally, the High Court (M.K. Mohammed,J. as he then was) in its order dated 14.2.2009 found Cornel Shisanya to be in contempt by filing applications while he was neither a party nor an advocate. He has not purged that contempt. He was clearly a busy-body in the case. It has not escaped my attention that Cornel L. Shisanya came to this Court on 6.9.2003 and the aforesaid orders were made in October and November of 2009...

It is my finding that the application is incompetent and amount to abuse of the process of the court and I accordingly strike it out and dismiss it with an order that Cornel L. Shisanya shall pay the costs to the respondents in the application.”

[11] Needless to state that the applicant is misleading parties by obtaining power of attorney in a bid to represent parties in court. This is not only a serious abuse of the court process but also contempt of court for which the applicant is liable to prosecution. Finally even if the applicant was properly before us, his application could not succeed as there is no notice of appeal that has been filed either in the High Court or before this Court.

[12] For the aforesaid reasons we dismiss this application and order the applicant to personally pay the costs to the respondents.

Dated and delivered at Malindi this 8th day of April, 2014

H. OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR