



Civil Practice and Procedure: power of attorney-effect on locus standi, jurisdiction-failure to lodge notice of appeal-effect

Contempt of court: appearance by unauthorized party-consequences

IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 22 OF 2013

BETWEEN

CORNEL L. SHISANYA.....PLAINTIFF

AND

NGAMBENI NURSERY SCHOOL.....1ST DEFENDANT

ANGLICAN CHURCH OF KENYA.....2ND DEFENDANT

MUTINDA MUTISO3RD DEFENDANT

MUTHOKI SALU.....4TH DEFENDANT

PASCAL KIZAKA.....5TH DEFENDANT

KENNETH MWANJALA.....6TH DEFENDANT

(Being an application under Order 51 Rule 1, Order 22, Rule 25 and Order 42 Rule 6 (4) of the Civil Procedure Rules and Rule 41,42 and 43 (i) ,3a) and Rule 47 of the Court of Appeal Rules and Section 63 (E), 84,78 (A,B,C) and 3A of the Civil Procedure Act, the Laws of Kenya

in

H.C. C.C. No. 10 of 2005)

RULING OF THE COURT

[1] The applicant **Cornel L. Shisanya** moved this Court by way of a Notice of Motion dated 26th July, 2013. The substantive prayer sought by the applicant was extension of time for filing an intended appeal together with leave to file the appeal as well as orders for stay of execution pending the hearing of the appeal.

[2] The application was heard by a single Judge, (**Kariuki J.A**), under **Rule 53 (1)** of the Court of Appeal Rules. The application was opposed by **Mr. Sitonik** counsel for the respondent who submitted that the application was incompetent, as the applicant had projected himself as a party when he was only a donee of a power of attorney. In his ruling, the single Judge dismissed the application, first, on the grounds that the jurisdiction of the court had not been properly invoked as no notice of appeal was lodged pursuant to **Rule 75** of the Court of Appeal Rules and therefore the issue of filing the record of appeal could not arise nor could orders of stay of execution under **Rule 5(2)(b)** of the Court of Appeal Rules be issued. Further, that the applicant had no *locus standi* to make the application before the Court as he is not an advocate nor does the general power of attorney given to him qualify him to be substituted in place of the plaintiff. The single judge therefore struck out the application as being incompetent and an abuse of the Court process.

[3] The applicant not being satisfied with the decision of the single judge, has sought a reference to a full bench in compliance with **Rule 54 (1)(b)** and **56(1)** of the Court of Appeal Rules. The matter coming before the full bench today, the respondent though served is absent. The applicant has reiterated his application before us. He maintains that he appeared in the lower court on behalf of one **Hezron Mjomba Mwachonya** who had given him a general power of attorney. In his view, this makes him a recognized agent, entitling him to appear in court on behalf of the donee of the power of attorney.

[4] We note that this same applicant was before us in **Civil Application No. 1 of 2014** when he moved the court under **Rules 41, 42, 43 (1)** and **47** of the Court of Appeal Rules as a recognized agent of Horoba Liyai for orders of injunction and stay of execution of the orders given by the High Court in Succession Cause No. 187 of 2009. In dismissing his application, this court had this to say;

“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”.

[5] We have carefully perused the application now before us, and the ruling of the single judge. We are satisfied that the single judge properly exercised his discretion in considering the application and that the order striking out the application was justified. The applicant has been held to be in contempt of the court by the High Court (**Ibrahim J**) (as he then was). The applicant has not purged that contempt but has instead persisted in appearing before the court for parties, notwithstanding the caution given by this court and the High Court. This state of open defiance cannot be allowed to continue. We therefore now direct and order that the applicant be arrested and detained under **section 121(2)** of the Penal Code, and that the cases where the applicant has appeared for parties irregularly be investigated and the applicant be charged before an appropriate court for contempt of court and any other offence that may be established.

Orders accordingly.

Dated and delivered at Malindi this 1st day of July, 2014.

H. M. OKWENGU

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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