



Shah & another v Ngunyangi and Munene (Sued as the Legal Representatives of Ben Ngunyangi Iragu (Deceased)) & another (Environment & Land Case 115 of 2019) [2024] KEELC 7080 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7080 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 115 OF 2019
MAO ODENY, J
OCTOBER 29, 2024
(FORMERLY HCC NO 122 OF 2002)**

BETWEEN

GIRISH VAGHJI SHAH 1ST PLAINTIFF

VIPUL PATEL 2ND PLAINTIFF

AND

LUCY NJERI NGUNYANGI AND MAXWELL MUNENE (SUED AS THE LEGAL REPRESENTATIVES OF BEN NGUNYANGI IRAGU (DECEASED)) 1ST DEFENDANT

LAND REGISTRAR NAKURU 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 12th June, 2023 filed by the Plaintiffs/Applicants seeking the following orders:
 - a. That this Honourable Court be pleased to approve and recognize Joseph Chege Muthama and Albert Gatimuh Nderitu as recognized agents for Girish Vaghji Shah and Vipul Patel, respectively the Plaintiffs in ELC No 115 of 2019 for purposes of making applications, entering appearance and testifying on behalf of the said Plaintiffs in this matter.
 - b. That costs of this application be provided for.
2. The application was supported by the annexed affidavit of Joseph Chege Muthama dated 12th June, 2023 who deponed that he holds a power of attorney in respect of the interest held by Vipul Thakarshi Patel on all that parcel of land known as Nakuru Municipality Block 18/48 and he has authority to



swear the affidavit on behalf of Albert Gatimu Nderitu who is holding a power of attorney in respect of the interest held by Girish Vaghji Shah in the suit land.

3. He deponed that the Plaintiffs Girish Vaghji Shah and Vipul Thakarshi Patel filed HCC No 12 of 2002 as against the Defendant which suit was later transferred to this honourable court and became ELC No 115 of 2019, the matter was consolidated with HCCC No 317 of 2019 and Nakuru CMCC No 1074 of 2013. That it is within his knowledge that the Plaintiffs Girish Vaghji Shah and Vipul Thakarshi Patel later relocated to Australia where they currently reside.
4. Joseph Chege Muthama further deponed that it is within his knowledge that the said powers of attorney are general in relation to the donor's interest of Girish Vaghji Shah and Vipul Patel in over all that parcel of land known as Nakuru Municipality Block XVIII/48 to do anything and everything that they could do, and for them and in the name of the Plaintiffs to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers given.
5. The deponent further stated that since the matters herein involve the proprietary interests held by the Plaintiffs in the suit property, by dint of the said power of attorney they are authorized to appear before this court on behalf of the Plaintiffs who are desirous that this suit proceed to hearing and that the deponent appears in court to testify and produce documents on their behalf.
6. The 1st Defendant in ELC No 115 of 2019 filed grounds of opposition dated 15th June, 2023 where he stated that the powers of attorney relied on are not general powers of attorney but are restricted and that they were donated on 19th June, 2013 while the case in question HCCC 122 of 2002 was filed in the year 2002 and not 2021 which is 11 years before the donation of the powers of attorney.
7. They stated that if the donors wanted to have the donees prosecute the said case, then they should have specifically stated so. Further that the said powers of attorney are shown to be given under the Land Registration Act (sic) No 6 of 2012, the Registration Act (sic) No 5 of 2012 and the Registered Land Act Cap 300 (Repealed). That Act No 5 of 2012 is the National Land Commission and Act No 6 is the Land Act, and that none of these two acts have a provision for issuance of a power of attorney.
8. It was their case that the Registered Land Act which was repealed by the Land Registration Act (No 3 of 2012), had provision (Section 116) for issuance of a power of attorney which was to be in form R. L17 but the powers donated by the Plaintiffs are shown as given on R.L 17 which form was repealed with the Act.

The defendants stated that authorizing the Applicants to come into this suit to prosecute the same would further delay the conclusion of this matter being an old case which has been consolidated with others. They urged the court to dismiss the application with costs.
9. The Plaintiff in Nakuru ELC Civil Case No 519 of 2013 filed grounds of opposition dated 16th June, 2023 and stated that the 2nd Plaintiff's power of attorney to Joseph Chege Muthama was in relation to an interest in Nakuru Municipality/block 18/48 was given on 19th June, 2013.
10. It was the Plaintiff's case in ELC No 519 of 2013 that the 1st Plaintiff's power of attorney to Albert Gatimuh Nderitu was in relation to an interest in Nakuru Municipality/block 18/48 was given on 19th June 2013 thus not applicable in this case.
11. Further that the registration of the powers of Attorney by the Plaintiffs to Joseph Chege Muthama and Albert Gatimuh Nderitu on property registration number Nakuru Municipality Block 18/48, whose ownership as at 19th June, 2013 was in dispute, was improper, unlawful and illegal and should thus not earn the recognition of this Honourable Court.



Applicants Submissions

12. Mr. Konosi, counsel for the applicants filed submissions dated 18th July, 2024 and identified the following issues for determination:
 - a. Whether this honourable court should approve and recognize Joseph Chege Muthama and Albert Gatimuh Nderitu as recognized agents for Girish Vaghji Shah and Vipul Patel, respectively the Plaintiffs in ELC No 115 of 2019 for purposes of making applications, entering appearance, appearing and testifying on behalf of the said Plaintiffs in this matter?
 - b. Who should bear the costs of the application?
13. On the first issue, counsel submitted that the respondents herein only filed grounds of opposition and the failure to file a replying affidavit as required by law means that they are not rebutting the averments made by the applicant. Counsel relied on the case of Kennedy Otieno Odiyo & 12 others vs Kenya Electricity Generating Company Limited [2010] eKLR.
14. Mr. Konosi relied on Order 9 rule 2 of the Civil Procedure rules and the cases of Jack J. Khanjira & Another vs Safaricom Limited (2012) eKLR, Edmund Mwangi Waweru vs Gabriel Wanjohi Waweru & Another (2017) eKLR and Mirko Blaettermann & another vs David Mwangi Muiruri & 2 others [2022] eKLR and submitted that the Plaintiffs in ELC 115 of 2019 are keen in having this suit heard to completion, their absence notwithstanding and the powers given to the donees are not specific as alleged and therefore prosecuting this suit on their behalf is permissible under the law.
15. Counsel submitted that the assertions by the Plaintiff in 519 of 2013 that the donees do not have locus standi on behalf of the Plaintiff are unfounded as the donees were properly appointed and powers donated to them, duly registered and therefore they are recognized agents under the provisions of law with the authority including appearing for the donors in this suit.
16. On the second issue, counsel submitted that the Applicant has presented a proper case and there is no reason the Plaintiff should not be granted costs of prosecuting this application. Counsel relied on the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2014] eKLR.

Plaintiff In Elc 519 Of 2013's Submissions

17. Counsel filed submissions dated 24th July, 2024 and submitted that agents shall only act upon approval by the court. Counsel relied on Order 9, Rule 2 of the Civil Procedure Rules and the case of Carolyne Mpenzwe Chipande vs Wanje Kazungu Baya [2014] eKLR and submitted that the Applicants lack locus standi to participate in the proceedings.
18. It was counsel's submission that the donees of the said powers of attorney lack capacity to prosecute this suit as the scope of the power of attorney was in relation to an interest on Nakuru Municipality/ block 18/48 to execute all such instruments and related powers only hence the powers of attorney were not for purposes of the suit as the document would have expressly stated so since the suit was still alive.
19. According to counsel, the applicants allegedly acquired the powers of Attorney back in 2013 and have only sprang into action ten years later attempting to seek recognition retrospectively after an objection was raised during the hearing against them testifying on behalf of the Plaintiff. Further that an agent cannot do the act and then retrospectively seek the court's approval and urged the court to dismiss the application dated 12th June 2023 with costs.



1st Defendant In Elc Case No 115 Of 2019's Submissions

20. Counsel filed submissions dated 23rd July, 2024 and adopted the contents of their grounds of opposition dated 15th June, 2023 and submitted that the donees of the power of attorney have no capacity to prosecute this case. Counsel further submitted that even if the court does allow them to do so, such orders would not act retroactively.
21. It was counsel's further submission that the case was filed 22 years ago and no reasons have been given why the same has not been prosecuted and the donated powers of attorney did not permit prosecution of the case. Further, that litigation had been ongoing for 11 years as at time of the donation of the powers of attorney hence this application should be dismissed with costs.

Analysis And Determination

22. The issue for determination is whether this honourable court should approve and recognize Joseph Chege Muthama and Albert Gatimuh Nderitu as recognized agents for Girish Vaghji Shah and Vipul Patel, respectively the Plaintiffs in ELC No 115 of 2019 for purposes of making applications, entering appearance, appearing and testifying on behalf of the said Plaintiffs in this matter.
23. The Applicants have brought the application under provisions of Order 9, Rule 2 of the Civil Procedure Rules which provides:

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 or an affidavit sworn by the party 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.
24. It is the Applicant's case that on 19th June, 2013, Girish Vaghji Shah and Vipul Patel appointed Joseph Chege Muthama and Albert Gatimuh Nderitu respectively as their Attorneys over all that parcel of land known as Nakuru Municipality Block XVIII/48 and the same were registered on 26th June, 2013.
25. The Applicant stated that the powers of attorney are powers to deal with the suit property, to do anything and everything that they could do, and in their name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given.
26. The court has looked at the Plaint dated 24th April, 2002 in HCC No 122 of 2002 and the orders sought therein are as follows:
 - a. A declaration that the plaintiffs are the lawful registered owners of LR Nakuru Municipality Block 18/48.



- b. A declaration that the 2nd title issued to the 1st defendant was issued fraudulently and against the law and hence null and void.
 - c. The certificate of lease issued to the 1st defendant on 15/10/01 be cancelled.
 - d. Costs of this suit.
 - e. Any other relief that this honourable court may deem fit and just to grant
27. The powers of attorney stipulate as follows in respect of Nakuru Municipality Block XVIII/48:
- “I/We Vipul Thakarshi Patel hereby appoint Joseph Chege Muthama of P.O Box 18074-20100 Nakuru to be my attorney and generally in relation to my interest in the above-mentioned title to do anything and everything that I myself could do, and for me and in my name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given.”
- “I/We, Girish Vaghji Shah, hereby appoint Albert Gatimuh Nderitu of P.O Box 12552-20100 Nakuru to be my attorney and generally in relation to my interest in the above-mentioned title to do anything and everything that I myself could do, and for me and in my name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given.”
28. In the case of *Jack J. Khanjira & Another vs Safaricom Limited* (2012) eKLR, the court held as follows:
- “Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the Court. The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in Court, they must periodically obtain the approval of the Court to do such acts. It is for the Court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognized; it is the extent or scope of their agency that is recognized. That is to say, a recognised agent can perform only that which he is recognized or authorized to do in law.”
29. The Applicant wants to implement the duties as provided for in the power of Attorney. There is no evidence that they want to act as Advocates as provided for in the *Advocates Act*. The respondents have submitted that the Applicants have no locus standi and that they are unqualified persons as per the provisions of the *Advocates Act*. If they had indicated that they were representing the Donors as advocates, then the court would not shy away from calling them unqualified persons hence not fit to represent parties in a case.
30. In the case of *Aswa Developers and Contractors Ltd & 2 others v Synergy Industrial Credit Ltd & another (Civil Suit E808 of 2021)* [2024] KEHC 92 (KLR) (Commercial and Tax) (17 January 2024) (Ruling) the court held as follows:
- “From the Civil Procedure Rules, a person can institute a suit either through a recognized agent, an advocate or in person. When doing so as an advocate, the *Advocates Act* which regulates the conduct of the Advocates kicks in. Section 9 provides the qualifications of such persons while section 31 and 34 of the Act give the prohibitions of persons who are unqualified as well as the punishment to be meted out to the unqualified.



In the present case, the question is whether Mr. Jacob Meeme was acting in the capacity of a recognized agent or as an advocate. I have perused the record and nothing in the proceedings shows that he presented himself as an advocate. Section 34 of the *Advocates Act* cannot be construed to mean that anyone not qualified under section 9 cannot file court documents. This would then block people from acting in person or recognized agents on behalf of parties or corporations. To the extent that he did not present himself as an advocate, then this provision is not applicable to Mr. Jacob Meeme.”

31. Similarly, in the case of *Carolyne Mpenzwe Chipande Vs Wanja Kazungu Baya* [2014] eKLR the court held that:

“ the wording of Order 9 Rule 1 and 2 of the Civil Procedure Rules leaves no doubt that the court has wide discretion in determining whether or not to allow an agent to appear or do any act in a suit. That discretionary power must be invoked by way of an application and exercised judicially. No party should presume to act or appear before the court merely on the basis of the power of attorney without first obtaining the court’s approval, however sought ”

32. The court has discretion to approve or decline to approve an agent holding a power of attorney to act on behalf of a donor but the discretion must be exercised judiciously.

33. It is trite law that upon the death of a donor of a Power of Attorney, the power so donated becomes inoperative and invalid in law. The power of attorney is extinguished upon the demise of the donor as was held in the case of *Loice Wanjiru Meru & 3 others v John Migui Meru* [2017] eKLR

34. There has been mushrooming of land cases where people holding power of attorneys have transferred land or dealt with lands entrusted under the powers of attorney fraudulently. To safeguard aiding fraudulent activities, court have been vigilant when dealing with such applications. Some agents use powers of attorneys, which have been extinguished upon death of the donors.

35. To this end, I will allow the application conditionally upon the donors appearing virtually to prove that they exist or file documentation that is certified by a Notary Public in Australia to confirm that they are alive and still wish the applicants to proceed with the terms of the power of Attorney within 14 days. This is possible due to technology in the digital space and virtual hearing platforms.

36. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF OCTOBER 2024.

M. A. ODENY

JUDGE

