THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. 18 OF 2013

JOHN MAYOMBO :: PLAINTIFF

(SUING THROUGH ASOBORA DANSON HIS LAWFUL ATTORNEY)

VERSUS

1. **PRINSLOO THOMAS KIMINTA**
2. **STEVEN LEONARD WILLIAMS**
   ADMINS OF THE ESTATE OF THE LATE
   J.C PALGRAVE SIMPSON)
3. **KIJURA TEA COMPANY LIMITED ::::::::::::::: DEFENDANTS**
4. **UGANDA REGISTRATION SERVICES BUREAU**

BEFORE: HON. JUSTICE VINCENT WAGONA

RULING ON A POINT OF LAW

This ruling follows a preliminary objection based on a point of law raised by learned counsel for the 3rd defendant. It was contended by counsel for the 3rd defendant that the plaintiff has no locus standi to bring this suit against the defendants and that the suit is an abuse of court process.

Locus Standi:

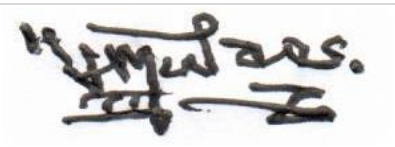
Learned counsel contended under paragraph 6 (a) of the amended plaint, the plaintiff described himself as the sole beneficiary of the estate of the late Charles John Lockhard Smith. That he went ahead and attached a copy of the grant made

by court over the estate of the said John Lockhard Smith to John Musana and Maria Goretti Kagwera.

That in the amended plaint, the plaintiff did not plead any disability on the part of the said executors neither did he attach any written authority from the said executors to bring the suit at hand. That as such, the suit is barred under section 264 of the Succession Act.

Learned counsel asserted that under Section 264 considered together with section 180 of the Succession Act, an estate of a deceased devolves to the administrator in case of intestate succession and to an executor where there is a will. That where there is an executor, the power to sue or prosecute any suit or otherwise act as a representative of the deceased is vested in the executor or administrator unless its revoked. That this position was considered in ***HCCS No. 27 of 2019, Bakanansa Kezia Hadija v James Nsubuga & 2*** others where court observed that: ***"Therefore after a grant of letters of administration, no person other than the person to whom the power has been granted has the authority to sue or prosecute any suit or otherwise act as a representative of the deceased, until the probate or letters of administration has or have been recalled or revoked by court as provided for under the provisions of section 264 of the Succession Act."***

In reply Mr. Rwabwogo, learned counsel for the plaintiff contended that the issues regarding locus standi of the plaintiff raised by learned counsel for the 3rd defendant is res-judicata. That the issue was considered by court in Misc. Application No. 09 of 2016 arising from the current suit where court observed that the plaintiff as a beneficiary under the estate had locus in the current suit. That as such the point of law should be overruled.



Learned counsel further submitted that there are exceptions to section 264 of the Succession Act cited by learned counsel for the 3rd defendant. That these were considered by court in ***Lugwisa v Shiek Ssegongo, Civil Appeal No. 4 of 2021*** where it was observed among other that a beneficiary under a deceased estate is eligible to sue in their own name to wit; to sue as long as the beneficiary has sufficient interest in the subject matter.

That it was further observed in ***Lugwisa (supra)*** that unless a transfer to a beneficiary has been made or the executor has assented to a specific bequest, a legate's title to his or her property is not yet complete. Such assent by the executor shall be sufficient to divest his or her interest as executor in it and to transfer the subject of the bequest to the legatee. That court further observed thus; ***"..That the assent of the executor may be verbal, it may be either express or implied from the conduct of the executor.."***

That the executor herein assented to the bequest when he filed a plaint in Civil Suit No. 44 of 2017 where he admitted that the plaintiff is the sole beneficiary of the estate of the late John Lockhart Smith ,that this by implication meant that the estate and suit property divested to the plaintiff as such he has locus to file the suit at hand.

In rejoinder learned counsel for the 3rd defendant contended that Res-judicata does not arise in the premises. That the 3rd defendant was not a party to the suit where court observed that the plaintiff has locus. That as such she is not precluded from raising the point of law at land.

He further maintained that the position in ***Insreal Kabwa*** case was distinguished in ***HCCS No. 771 of 2007, Kanyenya Wanjala & ors v Robinah Nabikolo & ors,***

where court observed that in the former case letters of administration had not been granted. That where letters exist, the powers vest in the executor or administrator as the case may be. That therefore the decision ***in HCMA No. 9 of 2016 John Mayombo v Prinsloo Kiminta & anor*** was decided per incurium and court should not rely on the same. That court ought to uphold the clear provisions of Section 264 of the Succession Act.

Failure to attach powers of attorney to the plaint and abuse of court process:

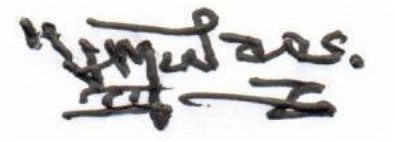
It was submitted by learned counsel for the 3rd defendant that Mr. Asobora Danson who purport to sue as a lawful attorney of the John Mayombo has no powers of attorney. That as such it is left to court to guess as to whether he is indeed was a lawful attorney of the plaintiff. It was contended that the omission to attach the powers of attorney renders the plaint incurably defective. Learned counsel relied on Order 7 rule 14 (1) of the civil Procedure Rules and the case of ***Fakhruddin Vallibhali Kapasi & Anor v Kampala District Land Board & anor, HCCS No. 570 of 2016*** where court held that the omission to file with the plaint the documents upon which the plaintiff relies renders the plaint fatally defective for disclosing no case of action.***(See also Fenekasi Kiwanuka v Malikit Singh Sondh, HCMA No. 163 of 2004).***

Learned counsel also contended that the manner in which the amended plaint was filed constituted an abuse of court process. That the plaintiff had brought the suit through a one Samuel Okwakol Atubet as his attorney and there is no proof of revocation of the same. It was pointed out that the amended plaint was filed through Asobora Danson who cannot be become a party to the suit or representative by amendment without leave of court. Learned counsel invited me

to the case of ***Executive Properties Limited v Akright Projects Limited, HCMA No. 643 of 2012*** where court observed that amendment of pleadings constitutes replacing pleadings or matters omitted in the earlier pleadings. That the current amended plaint introduces Asobora Danson as a holder of powers of attorney without leave of court.

In reply Mr. Rwabwogo submitted that this point of law is misconceived That it is not true that court was left on a wild guess as to whether Mr. Asobora is indeed a lawful attorney of the plaintiff. That the said powers of attorney are already on record since they were attached to Misc. Application No. 11 of 2023 which sought leave to amend the plaint that introduced the 3rd and 4th defendants. That the summary of evidence still refers to the power of attorney although it was not attached, it was capable of being produced. That the mistake to attach the same to the plaint is curable under article 126(2)(e) of the Constitution.

He further asserted that there is no abuse of court process. That Order 1 rule 1 is to the effect that all persons may be joined as defendants against whom any right to relief in respect of or arising of the same transaction or series of acts or transactions is alleged to exists, whether jointly, severally or in the alternative where if separate suits were brought against those persons, any common question of law or fact would arise. That the plaintiff requested his new lawyer to file a notice of change of advocates withdrawing instructions from the former law firm and the by implication, the power of attorney granted to aOkwakol was expressly withdrawn and revoked in writing in September 2022. The same date the plaintiff signed new powers of attorney appointing his new attorney Mr. Asobora Danson. That the change did not prejudice the 3rd defendant in any way and it is not an abuse of court process. That the said Asobora is not a stranger to the suit since he



was introduced by a power of attorney signed by the plaintiff. He asked court to overrule this point of law.

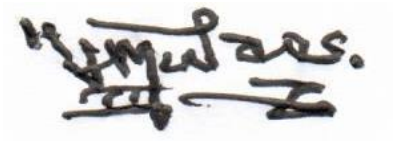
In rejoinder, it was asserted for the 3rd defendant that the plaintiff merely attached a scanned copy which was an unregistered copy of the revocation. That this falls below the requirements under Order 7 rule 14 of the Civil Procedure Rules which requires that the plaintiff attaches documents to the plaint at the time of filing the plaint. That the omission is not a mere technicality that can be disregarded while having recourse to article 126(2)(e) of the Constitution.

Learned counsel invited me to the decision of ***Mulindwa v Kasubika, Civil Appeal No. 12 of 2014*** where the Supreme Court held that: "*such a contention is erroneous and unsupported by pronouncements of the supreme court in several cases involving application of article 126 of the constitution by the courts. That according to these authorities, the settled position is that article 126(2)(e) has not done away with the requirement that litigants must comply with the rules of procedure in litigation. The article merely gives constitutional force to the well settled common law principle that rules of procedure act as the hand maidens of justice. The framers of the constitution were alive to this fact. That is why they provided that the principles of article 126 including administering substantive justice without undue regard to technicalities must be applied subject to the law. Such laws include the rules of procedure."*

Learned counsel maintained that the instant suit is an abuse of court process and ought to be struck out on the basis of the points of law raised.

Consideration by Court:

I will resolve the points of law under two issues that is:



1. **Whether the plaintiff has locus standi to bring the action at hand.**
2. **Whether the current suit is an abuse of court process.**

Issue No.1: Whether the plaintiff has locus standi to bring the action at hand.

In ***Law society of Kenya Vs. Commissioner of Lands and others, Civil case no. 464 of 2000***, locus standi was define thus:

> ***"Locus standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in court"***

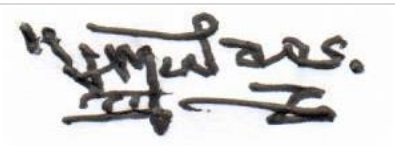
In ***Dima Enterprises Poro Vs. Inyani Godfrey, Civil Appeal No. 17 of 2016, the Hon. Justice Mubiru*** (HCJ) described locus thus:

> ***'The terms locus standi literally means a place of standing. It means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding"***

Therefore, locus implies the legal capacity of a claimant or a party to a suit to originate or file a claim. Locus standi goes beyond a claimant's legal status. The claimant must have sufficient interest in the subject matter which in my view could be legal or equitable. For one to sustain a claim in law, he or she must demonstrate sufficiency of interest in the subject matter.

In ***quick Enterprises Ltd Vs. Railways Corporations, Kisumu High Court Civil Case No. 22 of 1999*** it was held that a suit by a person without locus standi, such a suit is none existent law.

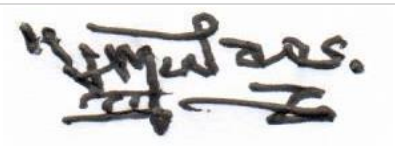
Learned counsel for the 3rd defendant vehemently contended that since there is an executor of the estate of the late John Lockhart Smith granted under Probate Cause



No. 18 of 2011, the plaintiff lacks locus to bring an action on behalf of the estate. It was contended that the proper plaintiffs should have been Johnson Musana and Maria Goretti Kagwera and not the plaintiff. The defendant's counsel on the other hand claimed that the issue of locus is res-judicata as it was considered by the same court in Misc. Application No. 009 of 2016 where the plaintiff was found to have locus. Further, that the property in issue passed to the plaintiff by assent of the executor.

I have critically examined the ruling in Misc. Application No. 009 of 2016 arising from the current suit between the plaintiff and the 1st and 2nd defendants. In the said ruling, the first issues framed for resolution by court was ***whether the applicant (currently the plaintiff) had the locus to bring the suit at hand***. In resolution of the said issue, Oyuko J observed that;

> *"The sections and the authorities as cited by counsel are to the effect that only the executor with letters of Administration can institute a suit or pursue an interest in an estate. I however disagree and associate myself with the observation in the case of Alanyo & anor, Civil Appeal No. 0025 of 2009 which state that; 'A beneficiary does not need to have letters of Administration to sue for his interest in the estate'. I do concur with the submissions of counsel for the plaintiff that one does not need to have letters of administration or probate to institute a suit to protect their interests in an estate.* ***The Applicant in the instant case was bequeathed property through a will and this property became his personal property and there is no need for him to apply for probate or letters of administration****." (Emphasis is mine)*



It is my firm view that the said ruling finally settled the question regarding the plaintiff's locus to file the case at hand. The learned trial judge clearly noted that the property passed to the plaintiff and it became his personal property and thus he needed no letters of administration or probate tofile the case at hand. This resolution renders the current point of law which seeks to challenge the locus standi of the plaintiff to file the suit at hand res-judicata. The issue was substantially heard and determined by a competent court and a retrial of the same would be irregular as it would amount to me sitting as an appellate court to question the decision of this very court. Additionally it is noted that the plaintiff did not bring this suit on behalf of the estate. The suit was brought in his name as the owner of the property which was bequeathed to him by will. In a nutshell, the point of lawraised by learned counsel for the 3rd defendant is res-judicata. Further, without prejudice to afore-mentioned, the point of law has no merit. Therefore, the plaintiff has locus to file the case at hand. This issue is accordingly resolved in the negative and I accordingly overrule this point of law.

Issue No. 2: Whether the current suit is an abuse of court process.

What constitutes abuse of court process was defined in ***Attorney General vs. James Mark Kamoga & Anor, SCCA No. 8 of 2004,*** where Mulenga JSC (RlP) in the lead judgment concurred with the definition of ***"abuse of court process"*** as proffered by authors of Black's Law Dictionary 6thEdn) and held that:

> ***"Abuse of court process involves the use of the process for an improper purpose or a purpose for which the process was not established."***

He further went on to observe that;

"A malicious abuse of legal process occurs when the party employs it for some unlawful object" not the purpose which it is intended by law to effect; in other words, a perversion of it."

Learned counsel for the 3rd defendant contended that the suit was an abuse of court process because the plaintiff changed an attorney without leave of court. He also contended that the failure to attach the powers of attorney granted to Asobora Danson renders the plaint incurable defective under Order 7 rule 14(1) of the Civil Procedure Rules. Mr. Rwabwogo on the other hand submitted that there were powers of attorney already submitted to court in Misc. Application No. 11 of 2023. That the omission to attach the same to the plaint is a mere technicality which is curable under article 126(2)(e).

Order 7 rule 14 provides as follows;

Production of document on which plaintiff sues and listing of other documents on which plaintiff relies.

(1) Where a plaintiff sues upon a document in his or her possession or power, he or she shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy of it to be filed with the plaint.

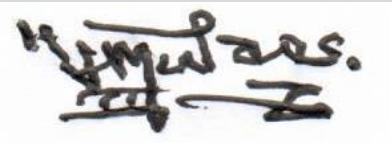
(2) Where a plaintiff relies on any other documents (whether in his or her possession or power or not) as evidence in support of his or her claim, he or she shall enter the documents in a list to be added or annexed to the plaint.

It is deducible from the said order that where a plaintiff sues on a document in his possession or power, such document should be attached to the plaint. In cases where a party sues through a donee of powers of attorney, the same must be

attached to the plaint. This is because, the authority is derived from such powers to present the claim at hand.

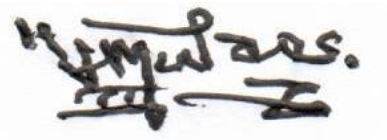
In the case before me, the plaint in issue is an amended plaint which was filed with leave of court. In this case, the plaintiff through one Asobora Danso as his done of powers of attorney filed Misc. Application No. 11 of 2023 seeking leave to amend the plaint and add Kijura Tea Company Limited (3rd defendant) and Uganda Registration Services Bureau, (4th defendant) as parties to the suit. The donor attached powers of attorney dated 9th September 2022 signed by the plaintiff as the donor and one Asobora Danson as his donee. The powers were registered by Uganda Registration Services Bureau on 11th October 2022 and premised on the said powers, the donee presented the application for leave.

Court after due consideration of the application granted leave to the plaintiff to amend the plaint and include the 3rd and 4th defendants. The amended plaint was to be filed within 15 days from the date of the ruling. Therefore, whereas I agree with the dictates of order 7 rule 14(1) of the Civil Procedure Rules, in the current suit, the plaintiff filed an amended plaint and had previously submitted to court the duly registered powers of attorney in Misc. Application No. 11 of 2023. Therefore, the omission to attach the same on the amended plaint in a mere technicality which is curable under Article 126(2)(e) of the Constitution. This is because, the plaintiff in this case and the donee were already known to court. In this case, the plaintiff had already introduced Asobora Danson as his donee in Misc. Application No. 11 of 2023 who was to take on and continue the proceedings in Civil Suit No. 18 of 2013.Therefore, the omission is a mere technicality which is curable under Article 126(2)(e) of the Constitution.



I agree with the submissions of learned counsel for the 3rd defendant that if a party is to change a donee of powers of attorney in a pending suit, leave of court should be sought. This is intended to ensure that the pleadings capture the true holder of powers of attorney and to avoid future controversies where the plaintiff may deny a subsequent donee. Further, the donor should revoke the earlier powers granted to the former donee. However, this being the case, what should be the primary consideration by court is that the donee is not the plaintiff but the donor. The donee only exercises delegated powers from the donor. These being delegated powers; the delegate has the discretion to revoke the same or where the donee subsequently denounces the same, the suit does not collapse since it is not a case for the donee but for the donor.

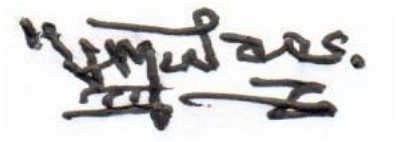
In this case, the plaintiff being the donor of powers of attorney formerly granted to a one Samuel Okwakol, he had the absolute discretion to revoke the same and appoint another person. As to who should be a holder of powers of attorney to represent a party is not a concern by court. Court is concerned with ensuring that the person before it was duly authorized by a party to a suit. In this case the plaintiff revoked the powers of attorney granted to the former attorney and the same are attached to the submissions. He also went ahead and appointed another attorney through a duly registered power of attorney dated 9th September 2022.Therefore, the previous powers of attorney ceased to have any force of law. Further, I find that by implication, the subsequent powers of attorney granted to Asobora Danson revoked the earlier ones granted since the plaintiff appointed him as his attorney to prosecute the suit land.



It is also find that since the said Asobora was introduced as an attorney in Misc. Application No. 11 of 2023 and leave was granted to the plaintiff to file an amended plaint and include the 3rd and 4th defendants as parties to this suit through the current attorney, the issue of leave is overtaken by events. I find that Asobora Danson was substantively replaced as an attorney for the plaintiff. I take the position that the failure to seek leave of court was a mere technicality which is cured under article 126(2)(e) of the Constitution, and in the same spirit, leave is herein granted to allow the current holder of powers of attorney to proceed with the suit. The plaintiff remains the same and it would not serve any justice striking off Asobora as an attorney and then admit him later after leave is sought. It serves not greater justice. No prejudice has been suffered by the 3rd defendant by such omission. I believe proper justice shall be attained by hearing the dispute before court on merit.

I therefore resolve this issue in the negative and overrule the point of law at hand. The points of law are overruled. The costs shall abide the outcomes of the suit.

I so order.



Vincent Wagona

High Court Judge / Fort-portal

Date: 22/03/2024