

THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA AT NAKAWA
CIVIL SUIT NO. 313 OF 2014

NANZIRI YAYERI.....
PLAINTIFF

**(Suing through her lawful Attorneys Semyano Peter,
Semyano David & Harriet Kalemeera)**

VS

NAMIREMBE KAGIMU AND 7 OTHERS.....
DEFENDANTS

BEFORE HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

RULING

The Plaintiff, through her Attorneys, Semyano Peter, Semyano David and Kalemeera Harriet brought this action against the Defendants, seeking recovery of Ug shs 109, 000, 000/=, a permanent injunction restraining the 1st Defendant, her agents, servants and employees from dealing with Plaintiff's house to the detriment of the Plaintiff, general damages, interest and costs of the suit.

The facts according to the Plaintiff, are that in 2003, the 1st Defendant was granted permission to collect rent from the Plaintiff's house. The Plaintiff claimed that since 2006 however, the 1st Defendant has failed to remit the sums collected from the tenants amounting to Ug shs 109,000,000/=. As a result, the Plaintiff granted Semyano Peter, Semyano David and Kalemeera Harriet authority to collect rent from the said house through a Power of Attorney. The Plaintiff's complaint was that the 1st Defendant continued collecting rent from the 3rd, 4th, 5th, 6th, 7th and 8th Defendants who are currently in occupation of the said premises.

The Plaintiff alleged fraud by the 1st Defendant including collecting rent and failing to remit it to the Plaintiff, refusal to attend meetings organized to resolve the impasse, and disregarding the Power of Attorney by continuing to collect rent. The Plaintiff also alleged that the 3rd-8th Defendants disregarded the Plaintiff's Power of Attorney and failed to pay rent directly to the lawful Attorneys and agents. The Plaintiff claims that this amounts to unjust enrichment by the 1st Defendant.

The 1st Defendant's Written Statement of Defence and counter claim, stated that she would raise a preliminary objection to show that the plaint is bad in law, frivolous, vexatious and does not disclose a cause of action. The 1st Defendant also stated that's she is a granddaughter to the Plaintiff who in 2001 allowed her to collect rent from the premises and use it for her welfare. The 1st Defendant also alleged that the Semyano David, Semyano Peter and Kalemeera Harriet falsely misrepresented to the tenants that they were the lawful owners of the rental flats. Further that in the year 2013, Semyano David, Semyano Peter and Kalemeera Harriet fraudulently presented a document which they claimed was a Power of Attorney enacted by Yayeri Nanziri and also forged her thumb print.

The 2nd Defendant in his Written Statement of Defence states that it was not existence in 2006, the time at which the alleged cause of action arose. Further that, the 2nd Defendant was only offering advice to his client in professional capacity and cannot be added as a Defendant. In their Written Statement of Defence, the 3rd and 4th Defendants stated that the 1st Defendant was responsible for collection of rent. Further that they had never been served with

any Power of Attorney by the Plaintiff or her agents. The 5th, 6th, 7th and 8th Defendants in their Written Statement of Defence denied the allegations of the Plaintiff and stated that they had never been served with any Power of Attorney.

When the case came up for hearing, Defence Counsel Mr. David Mukiibi raised the following preliminary;

- i) The capacity of the Plaintiff's Attorneys because the Plaintiff died about two and a half months ago.
- ii) The Plaintiff has no cause of action against the second Defendant.

Both parties filed written submissions. Counsel for the Defendants submitted that the two preliminary objections amount to points of law and have the effect of disposing off the main suit. He relied on Order 15 Rule 2 of the Civil Procedure Rule 2 of the Civil Procedure Rules S.I 71-1; ***Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696*** and ***Eng. Yahwant Sidpra & Hon. J.J Okello Okello vs Sam Ngude Odaka and 4 Others HCCS 365 OF 2007.***

1) Capacity of the Plaintiff's Attorney to Institute This Suit/ The Suit being Incompetent

a) Whether the Plaintiff's Attorneys acted outside their powers to institute the suit

Counsel for the Defendant posits that the Plaintiff's Power of Attorney did not give the agents any capacity to institute the suit on behalf of the Plaintiff. He argued that the Attorneys were acting outside the scope of the Power of Attorney granted to them. He submitted further that the Power of Attorney does not expressly or by necessary implication authorize the Attorneys to sue.

Learned Counsel cited **Gold Trust Bank (U) Ltd vs Josephine Zalwango Nsimbe, Executrix of the Estate of Sam Nsimbe (now deceased) High Court Civil Suit No. 226 of 1992**, and submitted further that a Power of Attorney is construed strictly as per well-established rules of construction. He also relied on **Friedman's Law of Agency; Fredrick J.K Zaabwe vs Orient Bank & Another SCCA No. 4 of 2006**.

Learned Counsel contended that the Power of Attorney given did not expressly provide for the institution of the suit. Therefore, instituting the suit could not be said to be incidental to the given powers. Further, the term 'care for and look after' had to be construed in a strict sense and could not be interpreted to include a suit in the Plaintiff's name.

For the Plaintiff, Counsel submitted that the Power of Attorney was duly witnessed and registered with the Registrar of Documents. Counsel submitted that incidental powers are usually implied. He referred to the case of ***Midland Bank Limited v Reckitt [1933] AC 1 at 16; Bryant, Powis, and Bryant Limited v La Banque du people [1893] A.C 170 at 177*** where it was held that in instances where there is need to determine whether an act was done in excess of authority conferred under a Power of Attorney, then construction of the whole instrument of authority is to be restricted to the four corners of the instrument.

Counsel contended that the Power of Attorney gave the Donees the authority to collect rent, and also allowed them to do other

acts which were necessary and incidental to collecting rent, and this included filing a suit to recover monies that should have been collected as rent from the Plaintiff's house.

b) Instituting the suit after death of the Plaintiff

Defence Counsel further submitted that the Plaintiff's Attorneys instituted the suit after her demise. He cited ***Babubhai Dhanji Pathak vs Zainab Mrekwe [1964] E.A 24***, where it was held that a suit instituted in the name of a dead person is a nullity.

On this point, Defence Counsel argued that a Power of Attorney lapses on the death of the Plaintiff. See ***Fredrick Zaabwe vs Orient Bank & 5 Others SCCA NO. 4 OF 2006; Black's Law Dictionary 9th Edition at page 1290***. He also referred to Order 24 of the Civil Procedure Rules which states that a suit abates with the death of the Plaintiff. He also cited ***Gold Trust Bank (U) Ltd (Now DFCU Bank Ltd) vs Josephine Zalwango Nsimbe, the Executrix of the Estate of Sam Nsimbe, (now deceased) High Court Civil Suit No. 2226 of 1992*** where it was held that Power of Attorney are construed strictly by Courts of law.

Counsel stated further the recital in the Power of Attorney did not authorize the Attorneys to act in that capacity after the Plaintiff's death. Further, that the Attorneys' authority lapsed upon the Plaintiff's death. Defence Counsel argued further that the acts of the Plaintiffs in instituting the suit and setting the hearing date after the Plaintiff's death were illegal and void. Further that the Attorney could not act retrospectively to recover sums of money dating back to 2006, and yet the Power of Attorney were executed in 2013.

Counsel for the Plaintiff submitted that by the time the suit was instituted, the Plaintiff was still alive. Further that the Attorneys, as beneficiaries to the Plaintiff's estate, were the recognized parties under the law to take over the suit upon the death of the Plaintiff. He submitted although Uganda's laws do not state whether a Power of Attorney is irrevocable on the death of the donor, common law provides that a Power of Attorney is irrevocable where it is expressly stated to be so and where it is given to secure a proprietary interest which interest has not been secured. (See section 4 of the **(English) Power of Attorney Act**.) He argued that as long as the Donee has an interest that

has not been discharged, then the Power of Attorney cannot be revoked by death, incapacity, insolvency or winding up of the donor, unless expressly provided for.

c) Capacity of the Plaintiff

It was argued for the Defendants that the Plaintiff, at age 107 years, did not have the capacity to execute the Power of Attorney. Counsel submitted that the general presumption was that a person of advanced age cannot understand a document unless it was clearly read and explained to her. He referred to Rule 7 of the Commissioner of Oaths Advocates Act Cap.5 which requires that a Commissioner must satisfy himself that the deponent is capable of understanding what she is doing.

Counsel submitted that the Power of Attorney only bore a thumb print of the Plaintiff but had no attestation clause, as proof that she understood the nature and effect of the document. He argued the Power of Attorney did not satisfy the requirements of the law and thus was of no legal effect.

He also argued that the Plaintiff who could be taken as an illiterate yet was not provided protection under the Illiterates

Protection Act. Counsel relied on the case of ***Violet Nakiwala & 2 Others vs Ezekiel Rwekibira and Another HCCS No. 280 of 2006 (unreported)*** for the principle that a document written at the request on behalf of an illiterate must bear certification that it fully represents his instructions and was read over and fully explained to him.

Counsel for the Plaintiff argued that allegations that the Plaintiff was an illiterate person and also a person of advanced age could only be ascertained by adducing evidence. He cited the case of ***Mukisa Biscuit Manufacturing Co vs West End [1969] EA 696***, at 701, where it was held that a preliminary objection cannot be raised in cases where a fact has to be ascertained. Counsel submitted further that the particular objection raised would require proof through experts or documents to prove the mental capacity of the Plaintiff, and as such had become a triable issue.

Counsel for the Plaintiff argued that the Plaintiff followed the right procedure in executing the Power of Attorney, as the same was duly witnessed and registered with the Registrar of Documents,

and remains valid until revoked or cancelled by Court. Counsel also argued that the Plaintiff was not illiterate but was rather a well-educated nurse, who was mentally stable and was capable of reading and writing.

2) The Plaintiffs and Her Attorneys Have no Cause of Action against the 2nd Defendant

Counsel for the Defendant argued that there was no breach of trust since the 2nd Defendant was only representing the 1st Defendant, his client. He argued that the Power of Attorney could also not be used retrospectively to recover sums of money that were collected in 2006. Learned Counsel also argued that the said firm was not in existence at the time. Counsel contended that advice given by an Advocate to his client is privileged information and confidential. Therefore, the Plaintiff cannot have a cause of action based on confidential information.

Further, that an Advocate cannot be compelled to divulge information by his client and enjoys immunity. That the Plaintiff and her Attorneys did not have a cause of action against the 2nd

Defendant as they had failed to prove that he had collected any sums of money from the suit premises.

Counsel for the Plaintiff submitted the issues raised by the 2nd Defendant including the fact that it was carrying out its professional duty, and that, it was not in existence at the time, required proof by adducing evidence during trial. Therefore, could not be determined as a point of law. Furthermore, that the 2nd Defendant gave wrong advice to the Plaintiff, and disregarded the Power of Attorney to the Plaintiff's detriment.

Counsel submitted that none of the Defendants had served a Written Statement of Defence upon the Plaintiff and that this amounts to an illegality which should not be sanctioned by Court. Counsel submitted that non-service of the Written Statement of Defence upon the Plaintiff is fatal and the result should be to strike off the Defence. He referred to ***Mark Graves v Bolton Uganda Ltd HCMA No. 0158 of 2008 and Nile Breweries Ltd vs Bruno Ozunga t/a Nebbi Boss Stores High Court Civil Suit No.0580/ 2006*** on this point.

RESOLUTION

Having set out the parties' submissions, I will proceed with the resolution of the issues raised. In my consideration, the issues raised above by both parties can be determined by whether the Power of Attorney is still effective after death of the Principal.

A Power of Attorney is a document that grants authority of the Principal to an agent to act on behalf of an agent. Such authority must be granted by deed. ***See Gold Trust Bank (U) Ltd vs Josephine Zalwango Nsimbe HCCS 226/1992***. The position of the law is that a Power of Attorney terminates upon the death of the Principal. In other words, an agent can only act for a living person. When an agent carries out an act, he carries it out as though it was the Principal carrying it out. Therefore if the Principal is dead, then they obviously cannot carry out the act.

A Power of Attorney can only be effective after the Principal's death where the Agent effects an act without actual knowledge of the principal's death. Instead, the Plaintiff's Attorneys, who stated in their submissions that they are beneficiaries of the deceased Plaintiff, can apply for letters of administration, if no Will exists.

When the application has been considered by a Judge, letters of administration will be issued to the Plaintiff's Attorneys to enable them take the necessary action on behalf of the deceased Principal. If the Plaintiff left a Will, then the Executor will be responsible to carry out the act on behalf of the Plaintiff. **See Paul Premack (2011) "How long does Power of Attorney continue?"**. Consequently, the Plaintiff's Attorneys had no powers to institute or continue with the suit after the demise of the Plaintiffs. As argued by the Defendants' Counsel, their powers abated upon the death of the Plaintiff.

In the circumstances, **I HEREBY HOLD THAT THE PRELIMINARY OBJECTION RAISED BY THE DEFENDANTS IS SUSTAINED. THE SUIT IS ACCORDINGLY DISMISSED WITH COSTS.**

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HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGE

27TH JANUARY 2015

