

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
(LAND DIVISION)
LAND DIVISION CIVIL SUIT NO. 1050 OF 2021)
WASWA COLLINS WELLPLAINTIFF
VERSUS
NAKAYIMA MARY.....DEFENDANT

BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

R U L I N G:

This case was fixed for hearing on 24th October 2023. Counsel Kiyingi Emmanuel appeared for the plaintiff while Counsel Bwire Geoffrey represented the respondent. The respondent's Counsel raised a preliminary objection and made oral submissions. The respondent's Counsel replied in written submissions.

Submissions on preliminary objection.

The gist of the objection is that the plaintiff has no capacity to institute the suit in his own name while he is a donee of Power of Attorney from Semuwemba Stephen as per annexure C2 to the plaint. The law is that the suit unit be instituted in the name of the Principal (Donor) through the Donee. See case of **Ayihuguhugu & Co. Advocates vs Munyakindi Muteri 1990-1992 K.L.R 180.**

While it was held that since the plaintiff was a donee he did not have a cause of action in his own name since he is an agent only permitted to sue in the name of the Principle. He further referred to the case of **Botique Sazim Ltd Vs Noratam Bahtia & another C/A No. 36/1997**, where court confirmed the principle that an attorney had no capacity to sue in his own name.

He further argued that in these pleadings it is Wasswa Collin Wells an agent who is a party instead of Semuwemba Stephen as the law provides.

In conclusion he invited court to dismiss the case for lack of locus standi with costs.

In reply, the plaintiff's counsel in his written submission cited decided cases arguing that a power of attorney is an instrument which confers authority of the principle to an agent that as long as the donor of powers of attorney is still alive, an agent can act on his behalf. That in this case the power of attorney granted to the plaintiff conferred authority upon him to institute the suit against the defendant. And in the plaint it was clear that he was instituting a case on behalf of Semuwemba Stephen the donor of power of attorney hence with capacity to sue.

Counsel further referred to the **Halsbery's laws of England 4th Edition Volume 1 Paragraph 46** arguing that a power of attorney should be construed strictly by the courts according to well recognized rules of construction. According to counsel, in this case special powers were conferred to the plaintiff to sue the defendant. He invited court to overrule the preliminary objection.

In alternative he prayed for substitution of the donor of power of attorney under O.1 r 10 CPR.

In rejoinder, the defendant's counsel argued that the plaintiff does not contest but a challenge is the donee suing in his own name which is irregular and procedurally improper according to decided cases.

As regards the alternative prayer to substitute the parties under O.1 r 10 of CPR, counsel argued that it is also irregular and improper as such substitution ought to be brought by Notice of Motion in an application and no such application has been brought by the plaintiff.

Determination.

From the application, there appears to be one main issue for determination as follow;

1. Whether the plaintiff legally instituted this case in his name as a donee of power of attorney of Semuwemba Stephen?

I have carefully examined the record and pleadings of both parties.

It is clear to me that the defendant is not challenging the power of attorney but the pleadings. Both parties were alive to the fact that a power of attorney grants the agent the authority to act on behalf of the principal. However, it is the means to do so which is being challenged in this preliminary objection.

In this case, the plaintiff after obtaining the authority to sue decided to commence proceedings against the defendant in his own name. I find this to be procedurally wrong as it has long established that a Principal sues through an agent and not the contrary. This means that the donor has to appear in the pleadings as person suing through the donee. This is so because it is the donor suing or defending his or her rights in a case. By instituting a case in his own name in this case, the plaintiff assumed a

capacity he does not have and therefore the proceedings are incurably irregular. This irregularity cannot be cured without a formal application by notice of motion as the law require under order 1 rule 10 of the CPR.

As a whole, the preliminary objection is upheld. Civil suit number 1050 of 2021 between the parties is hereby dismissed for lack of locus to sue.

Defendant is awarded costs against the plaintiff.

*his own
Name:*

TADEO ASIIMWE

JUDGE

25/10/2023.