

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 21 OF 2021

(Arising from High Court, Misc. Civil Application No. 70 of 2020)

MEET SIGH BACHU (By his Constituted

Attorney, Rabinder Singh Bhachu) APPLICANT

VERSUS

THE ADMINISTRATOR GENERAL1ST RESPONDENT

GURMIT SIGH BHACHU2ND RESPONDENT

RULING

13/7/2021 & 11/10/2021

ROBERT, J:-

This is a ruling on a preliminary objection raised against an application for leave to appeal to the Court of Appeal of Tanzania. The Applicant seek to be granted leave to file an appeal against the Ruling and Order of this Court (Hon. Gwae, J) in Misc. Civil Application No. 70 of 2020. The application is brought under section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 read together with Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended.

The application is supported by an affidavit affirmed by **Mr. Rabinder Singh Bhachu**, Legal Representative, acting in authority conferred on him through the power of attorney. The application is resisted by a counter affidavit sworn by **Mr. Reginald Simon Makoko**, Principal Officer of the first respondent and an affidavit in reply affirmed by **Mr. Gurmit Singh**, the second Respondent.

Prior to the hearing of this application, counsel for the second Respondent raised three points of preliminary objection to the effect that:

- 1. The General power of Attorney- Annex MSB1 is incurably defective and bad in law as the attestation is not done in conformity with the mandatory provisions of Rule 1 (2) of the Registration of Documents Rules, GN 80 of 1956, under which the attesting officer must indicate the document was delivered and executed in his presence, which omission renders it as null and void. (Photocopies of the relevant pages law is annexed).*
- 2. The said Rabinder Singh Bhachu has no locus standi to institute the current application as the purported General Power of Attorney does not indicate anywhere that Rabinder Singh Bhachu is given power to institute the present application as averred by*

him in paragraph 2 of his supporting affidavit sworn by him on 10th March 2021 at Arusha.

3. In the present application, Meet Singh Bhachu – the Donor is shown in the said purported General Power of Attorney -Annex MSB1 as resident in Tanzania and therefore, Rabinder Singh Bhachu cannot purport to represent him in the Court of appeal of Tanzania under the purported General Power of Attorney being contrary to the provisions of Rule 30 (2) of the Tanzania Court of Appeal Rules- R.E 2019 [Copy of the relevant page of the said Rule is annexed].

At the hearing of this application the Applicant was represented by Mr. Alute Mughwai, learned counsel whereas the Respondents were represented by Mr. Julius Msengezi and Bharat B. Chadha, learned counsel for the First and second Respondents respectively.

Submitting in support of the first point of preliminary objection, Mr. Chadha argued that, the General Power of Attorney in the present application (annexure MSB1) is incurably defective for contravening Rule 2 (1) of G.N No. 89 of 1956 which requires attestation to be done “in the presence of” an attesting officer while the in the present General Power of Attorney the words used by the attesting officer are “before me” which

are not the same as "in the presence of". Thus, he maintained that the Power of Attorney is incurably defective.

Coming to the 2nd and 3rd grounds of preliminary objection, Mr. Chadha submitted first that, the holder of the General Power of Attorney has no locus to institute the present application since the attached General Power of Attorney (MSB1) does not give the donee of the power of attorney specific power to file the current application. (See page 3 paragraph 1.5 of MSB1).

Second to that, he submitted that, according to the General Power of Attorney and the affidavit in support of this application, the donor of the power of attorney seems to be a resident of Tanzania who is currently living in Birmingham, England. He argued that, under Rule 30 (2) of the Tanzania Court of Appeal Rules, only a person who is not a resident of the United Republic of Tanzania may lawfully authorize power of attorney whereas in the present application the donor of the power of attorney may have gone out of the country temporarily but that does not make him a non-resident of Tanzania as he may have gone out of the country temporarily. To support his argument, he made reference to the case of **Rayah Salum Mohamed (by virtue of special power of Attorney from Sherdel Ghulam Perd) vs The Registered Trustees of Masjid**

Sheikh Albani, Civil Application No. 340/18 of 2019, CAT (unreported) where the applicant, a resident of Tanzania, sought representation from a donee of the power of attorney which is prohibited by the law, the Court held that failure to comply with the requirement of the law renders the application incompetent.

On the basis of the points raised, the learned counsel prayed for the application to be struck out with costs.

On his part, Mr. Julius Msengi, counsel for the 1st respondent conceded to the points of objection raised by the learned counsel for the for the 2nd respondent.

Opposing the first point of preliminary objection, Mr. Mughwai submitted that, the General Power of Attorney is not mandatorily registrable as it does not fall under Section 8 (1) (a) (b) of the Registration of Document Act, Cap 117 R.E 2002. He maintained that, the General Power of Attorney in the present application was registered at the option of the donee by the Registrar of Documents.

He maintained that, the General Power of Attorney was dully executed by the donor of the power of attorney and properly authenticated by Notary public on 15/12/2020. He referred the court to section 94 of the Evidence Act which allows the court to presume that the

power of attorney is duly executed and authenticated and section 5 of the Act which requires the Court to regard the facts required by law to be presumed as proved unless and until it is disproved. He argued that, the burden of proving lack of authentication is upon the respondent and the respondent has failed to discharge that burden.

With regards to the words "before me" used by the the attesting officer instead of the words "in my presence", he regarded the difference as a matter of semantics as both of them have the same meaning. He made reference to the Chambers Concise Dictionary, published by Chambers and Cambridge University Press, 1988 which defines the word "before" to mean in the presence, in the sight of and the Black's law Dictionary, 8th Edition which defines the word "presence" the state or act of being in a particular place and time. He maintained that, the use of words "before me" means it was done "in the presence of". However, he implored the Court to consider applying the provisions of section 64 of the Interpretation of Laws Act, Cap. 1 (R.E. 2019) if the court finds the words to be different and the document defective.

Coming to the second point of preliminary objection, Mr Mughwai regarded this objection to have no substance. He submitted that, since the title to the instrument is the General Power of Attorney not a Special

Power of Attorney, the recital of the power of attorney refers to "anything". Submitting further, he made reference to specific clauses of the General Power of Attorney which confers powers to the donee to file this application. He noted that, clause 1.5 of the said General Power of Attorney authorizes the donee of power of attorney to sign "all pleadings" which includes any application or proceedings filed in the court. Clause 1.6 makes reference to "any case", thus, the instrument having been signed on 15/12/2020 the donee had the required powers to file the present application in March, 2021 when he deemed it necessary. Further to that, clause 1.7 allows the donee to deal with any matter incidental thereto while clause 4 requires that the powers conferred to the donee to be given the widest interpretation and to be considered as an express authority to do and perform all such acts and things as donor shall deem necessary.

On the third point of preliminary objection, counsel for the applicant submitted that, paragraph 3 of the affidavit supporting the application, revealed that currently the donor is living at Birmingham, England (See MSB2- stamped passport). He maintained that the donor's stamped passport indicates that he left Tanzania on 18/12/2020 which means he is not resident in Tanzania. He stated that this supported by the second

respondent's counter affidavit at paragraph 6 where he stated that the applicant has gone abroad.

He argued that to be a resident in Tanzania means to be physically present in Tanzania. Thus, the case of Rayah Salum Mohamed cited by the counsel for the first respondent is distinguishable from this case as both the donor and donee in that case were present in Tanzania. He stated that Rule 30 (2) of the Court of Appeal Rules do not apply to this court as this court is guided in this matter by Order III Rule 1 and 2 of the Civil procedure Code, Cap. 33 R.E 2019 and the Power of Attorney falls under Order III Rule 6 (2) and the donee has complied with all the requirements provided thereto.

In his brief rejoinder, Mr. Chadha reiterated the arguments in his submissions in chief and maintained his prayer that the application be struck out with costs.

On his side, Mr. Julius argued that, the Law of Evidence Act is not applicable on affidavits. He made reference to section 2 of the Evidence Act, Cap. 6 (R.E. 2019).

On registration of the general power of attorney, he submitted that while it is not specifically indicated under section 8(1)(a) and (b) of Cap. 117 that the general power of attorney is compulsorily registrable, section

24 of the Act provides that registration of a document cannot cure any defect in any document registered or confer any validity which it would not otherwise have. He proceeded to pray that this application be struck out.

Having carefully considered the rival arguments advanced by the counsel for the parties and examined the records of this matter, I will now proceed to determine the merit of the points of objection raised.

Starting with the first point of objection, the Court is moved to decide that attestation of the General Power of Attorney used by the applicant is not done in conformity with the mandatory provisions of Rule 1 (2) of the Registration of Documents Rules, G.N. No. 89 of 1956 because the attestation clause used the words "before me" instead of the words "in my presence" which the learned counsel considers to be an incurable defect.

Rule 2(1) of G.N. No. 89 of 1956 provides that:

"Every person attesting the execution of a document which registration is compulsory under the provisions of the Registration of Documents Ordinance shall sign an attestation clause in one of the forms contained in the first schedule whichever may be appropriate."

The first schedule to the G.N. No. 89 of 1956 provides a prescribed form to be used in attestation clauses. As rightly stated by the learned counsel for the second respondent, the form uses the words "in my presence" and not the words "before me" which is indicative of the fact that attestation took place in the presence of the attesting officer. The question for determination is whether failure to use the prescribed words renders the General Power of Attorney incurably defective.

It should be noted that, while rule 2(1) of G.N. No. 89 of 1956 is couched in mandatory terms, it imposes requirements specifically for attestation of documents which require compulsory registration under the Registration of Documents Act, Cap. 117 (R.E. 2002). The documents of which registration is compulsory under Cap. 117 of the laws are provided for under section 8 (1) (a) and (b) of the Act. I have looked at that provision and noted that the General Power of Attorney is not one of such documents. This means rule 2(1) of the G.N. No. 89 of 1956 is not applicable in attestation of the General Power of Attorney.

However, considering that the words "in my presence" are used in the prescribed form of attestation clauses which can be used for attestation of both documents of which registration is compulsory as well as documents of which registration is not compulsory, this Court finds it

convenient to make a determination on the effect of the use of words "before me" instead of the prescribed words "in my presence".

While it is not disputed, according to the dictionary meaning given by the learned counsel for the applicant, that the two sets of words have the same meaning, it is obvious that the use of the words "before me" is a clear deviation from the words provided in the prescribed form. However, guided by the provisions of section 64 of the Interpretation of Laws Act, Cap. 1 (R.E.2019) this court finds and holds that the said deviation cannot vitiate the General Power of Attorney as it has not affected the substance of the document and it is not designed to misinform.

Coming to the second point of preliminary objection, counsel for the 2nd respondent maintained that, the donee of the general of power of Attorney has no locus standi to institute the current application as the General Power of Attorney does not indicate anywhere that he is given power to institute the present application.

The requirement of a Power of Attorney as an instrument by which a person may empower another person to represent him or act on his behalf in a civil suit is governed by the provisions of Order III rule 2 (a) of the Civil Procedure Code, Cap. 33 (R.E. 2019). It provides that:-

“The recognised agents of parties by whom such appearances, applications and acts may be made or done are-

(a) persons holding powers-of-attorney, authorising them to make appearances or applications and to do such acts on behalf of such parties;”

The central question here is whether the General Power of Attorney authorizes the donee of the power of attorney to institute and prosecute the present application. Counsel for the applicant maintained that having been titled “General Power of Attorney” the document confers to the donee power of attorney in respect of “anything”. Further to that he made reference to clauses 1.5, 1.6, 1.7 and 4 of the General Power of Attorney as specific clauses conferring power to file the present application. The cited clauses reads as follows:

1.5. *To sign all pleadings and any other deeds or documents for and on behalf of the Donor.*

1.6. *To engage an advocate on behalf of the Donor to take the conduct of any case that might arise if he sees it necessary.*

1.7. *To deal with any other matters incidental to the above.*

4. *Nature of this power of attorney*

4.1. *This power of attorney is a deed and has been executed by the Donor as a deed. The power hereby given shall be given the widest*

interpretation and shall be considered as an express authority to do and perform all such acts and things as the Donor shall deem necessary and expedient to be done for the purposes aforesaid.

From the clauses alluded to above, this Court is in agreement with the learned counsel for the applicant that the powers conferred to the donee of the General Power of Attorney in the cited clauses empowers the Donee to institute and prosecute this application.

Moving to the third point of objection, counsel for the second respondent maintains that, the Donor in the General Power of Attorney is indicated to be a resident of Tanzania and therefore the donee cannot purport to represent him in the Court of appeal of Tanzania under the said General Power of Attorney as this is contrary to the provisions of Rule 30 (2) of the Tanzania Court of Appeal Rules, 2019.

As noted in the second point of objection above, the provision governing the power of attorney as an instrument used by the donee of the said power to institute and/or prosecute a civil suit on behalf of another person is governed by Order III rule 2 (a) of the Civil Procedure Code, Cap. 33 (R.E. 2019). The cited provision does not require the donor of the power of attorney to be a non-resident of Tanzania.


However, in the instant case, the objection raised by the counsel for the second respondent challenges representation of the Donor of Power

dumb or deaf, or when the party to the proceedings is away in a foreign country and getting such party back would be tedious or expensive. His Lordship added that the donor of the power of attorney must be sure the donee of the power of attorney would step into donor's shoes and that the donor of the power of attorney must accept all the consequences that may arise in the course of the litigation".

In the light of the foregoing, I find no merit in the points of objection raised by the learned counsel for the second respondent and I hereby overrule the raised objections. The Court will proceed with the hearing of the main application on merit.

It is so ordered.




K.N. ROBERT
JUDGE
11/10/2021