



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 40 OF 2011**

**IN THE MATTER OF THE ESTATE OF HONOURABLE GERISHON KAMAU KIRIMA  
(DECEASED)**

**R U L I N G**

The deceased Gerishon Kamau Kirima died on 21<sup>st</sup> December 2010 in South Africa where he had been taken for treatment, and was buried on 11<sup>th</sup> January 2011. An application has been brought by some members of his family seeking that Kahari Joseph Waithaka Advocate brings into court the written will of the deceased to be read to the beneficiaries. It is alleged in the supporting affidavit of Alice Njeri Kirima, a daughter of the deceased, that the deceased left a will which is the one she wants brought to court for reading. The Advocate swore a replying affidavit to say the deceased was his client who instructed him to prepare a will and two codicils. Upon his death the Advocate contacted the executors Samuel Ndei Kirima, Catherine Njeri, Ann Wangari, Stephen Kamau Kirima and James Njuguna Kirima to arrange for a date and convenient venue for him to read the will and codicils to the beneficiaries. On the scheduled date, 13<sup>th</sup> April 2011, the beneficiaries came but disagreed thereby making the reading of the will and codicils impossible. He supports the application and requests that he be ordered to read and/or deposit the will and codicils into court or he be otherwise directed as to how he will make public the contents of the will and codicils.

James Njuguna Kirima is challenging the will and the codicils. He says he had witnessed a will by the deceased which differs materially from the one the Advocate has. He said he found the documents the Advocate has to be suspicious. He further deponed that there is the deceased latest will which is in the custody of the firm of Rachier & Amollo Advocates.

The evidence before court shows there is serious dispute and acrimony among the members of the family of the deceased over his last wishes in regard to his property and how it will be shared.

This application was stated to be brought under section 70 of the Law of Succession Act (Cap. 160) and Rules 24 and 59 (5) of the Probate and Administration Rules. I agree with Mr. Arwa for the Respondents that section 70 relates to a situation where there is an application for a grant. No such application has been made before any court. Rule 59 relates to form of proceedings. Rule 59 (5) provides for summons. Rule 24 refers to order to bring in a will or to attend for examination and provides that on application by summons by any person claiming to be beneficially interested in the deceased's estate, or on its own motion, the court may order any other person to bring into court any testamentary document. Under Rule 24 (3) if the person ordered has in his possession the document by virtue of his having been an advocate for the deceased by whom or by whose direction the document was executed, for or in relation to his estate or his having been appointed an executor or trustee of the deceased person, he shall, in complying with the order, so inform the court in writing. Mr. Kahari has sworn that the deceased was his client and in that capacity prepared the will and codicils. He cannot be compelled to produce the will and codicils or to read them in court. My view is that the application contemplated by Rule 24 has to be brought within a petition for a grant.

The family of the late Gerishon Kamau Kirima, or any person claiming to be beneficially interested in the deceased's estate, should do the legal thing: go to a succession court and seek to be granted probate or letters of administration. It is before such court that any wills and codicils can be produced and proved. It is before such court that any challenge to the wills and codicils allegedly made by the deceased

can be done. It is such court that will ultimately determine the identities and shares of all persons beneficially entitled to the estate of the deceased.

Further the family members of deceased must be told that whatever they think about the wills in the custody of either Rachier & Amollo Advocates or Kahari Joseph Waithaka Advocate, whether it is thought that such wills were not made by the deceased or that they don't represent his last wishes, the journey towards the resolution of this embarrassing dispute will only begin if the wills are read. From thereon, each party can consider his/her position from a point of knowledge.

The parties shall, lastly, remember that for any of them to sue regarding the property left by the deceased he/she must first seek and obtain a grant of probate or letters of administration.

In conclusion, I dismiss the application with costs.

**DATED AND DELIVERED AT NAIROBI**

**THIS 25<sup>TH</sup> DAY OF MAY 2011**

**A.O. MUCHELULE**

**J U D G E**