



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 111 OF 2011

HANNAH WANJIRU KAMAU.....PLAINTIFF

VERSUS

TERESIAH NJERI.....DEFENDANT

RULING

Argued before me on 9th June 2011 was a Notice of Motion dated 8th June 2011 and filed on 9th June 2011, under a Certificate of Urgency. It sought two orders -

(1) that the court be pleased to issue an order disqualifying JAMES NDEGWA WAHOME from acting for the Defendant herein.

(2) that costs of the application be provided for.

The application was supported by the Affidavit of HANNAH WANJIRU KAMAU sworn on 8th June 2011 and the grounds on the face of the application.

The application was opposed under a Replying Affidavit of the said James Ndegwa Wahome sworn and filed on 9th June 2011.

The Motion was premised upon the provisions of Rule 9 of the Advocates (*Practice*) Rules (*LN. 19/1967 and L.N. 223/1984*), Section 1A & 1B & 3A of the Civil Procedure Act, (*Cap. 21, Laws of Kenya*).

Rule 9 of the Advocates (Practice) Rules says -

"9. No Advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required to give evidence, whether verbally or by declaration or affidavit, or if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear PROVIDED that this rule does not prevent an Advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matters of fact in any matter in which he acts or appears."

It was common ground among both Mr. Konosi, counsel for the applicant, and Mr. Ndegwa, counsel for the Respondent that Mr. Ndegwa Wahome whose disqualification from acting for the

Respondent is sought, has been counsel both for the deceased and for the Respondent (*in a complaint brought by the Respondent*) against the deceased in Nyahururu P. M.C.Cr. Case No. 3146 of 2010. It was also common ground that Mr. Wahome has been acting for the Respondent since the untimely demise of the deceased Samuel Kamau Wanjiru.

Rule 9 prohibits any Advocate from acting in any matter in which he may be called to give evidence, by declaration orally or by affidavit. What is the matter in this application? It is about the burial of the deceased? Is it a matter about which the Advocate would be required to give evidence at some stage? I doubt it.

If it is about the death of the deceased, it is a matter within the purview of the Police. There was no material before me upon which I could reach the conclusion that it is a matter upon which he may be required at some stage to give evidence. The counsel may be one among many who are arranging the burial of the deceased. If he were later to be required to give evidence on that aspect, he will be in good company because he will not be the sole witness to the burial.

As former counsel for the deceased, his brief certainly ended with the death of the deceased. The respondent herein was free to engage him as her counsel of choice. It is her constitutional right.

Counsel must however be awake to the fact that as counsel for the deceased, he will no doubt be called upon to give material information as to the deceased's assets in a formal succession cause. At that stage he will have to re-consider his brief with the Respondent. At this stage however there is no cause to do so. He was not Advocate for the Applicant the mother of the deceased, and there would be no information confidential or otherwise he could be conveying to the Respondent herein. The authorities cited to me - **John Alexander Kamu & 5 Others** (*Nakuru HCCC No. 17 of 1999*), **Francis Mugo & 22 Others vs. James Bress Muthee** (*Nakuru HCCC No. 122 of 2005*) would be of no application here.

At this point in time, I find no conflict of interest or issue of ethics in a matter of a burial.

The application here is premature, a question of shadow-boxing, and I dismiss it with a direction that to avoid exacerbating body temperatures between the parties, each of them will bear its own costs.

Dated, signed and delivered at Nakuru this 10th day of June 2011

M. J. ANYARA EMUKULE
JUDGE