



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Succession Cause 1064 of 2003**

**IN THE MATTER OF THE ESTATE OF FRANCIS GIKUNU WANJOHI (DECEASED)**

**AND**

**IN THE MATTER OF THE ADVOCATES ACT, CAP.16 LAWS OF KENYA**

**RULING**

On 22.05.07 the form of Ndung'u Mwaura & Co. Advocates filed summons of the same date stated to be brought on behalf of objectors applying for orders that the firm of C.N. Kihara & Co. Advocates do cease representing the petitioners and that costs be in the cause.

The grounds upon which the application is based are:-

1. That the firm of C.N. KIHARA & CO. ADVOCATES prepared the WILL dated 09.01.01 on behalf of the deceased herein.
2. That the said WILL is being contested by the objectors herein.
3. That the said firm of C.N. KIHARA & CO. ADCOCATES especially Mr C.N. KIHARA ADVOCATE will undoubtedly be a witness in this case.

The application is supported by the affidavit of JAMES MWAURA NDUNG'U who described himself as Advocate representing the objectors.

At the hearing of the application before me, learned counsel, Mr J.M. Ndung'u said he represented the objectors/applicants while learned counsel, Mr L.W. Kamau said he represented the petitioners/respondents.

The objectors/applicants were not named in the present application. However, there is in the court file an affidavit of protest by BERNARD CHEGE GIKUNU, ANTHONY W. GIKUNU and ERASTUS MAINA GIKUNU sworn on 23.11.04. The affidavit is stated to be a protest against confirmation of grant of probate dated 09.05.04. The only grant of probate in the file is dated 18.09.03 annexing a WILL which purports to have been executed on 09.01.01. The grant states that it was to GODFREY GICHUKI GIKUNU AND NATHAN MUI GIKUNU.

Objectors'/applicants' counsel told the court in his submissions that he relied on rule 9 of the Advocates (Practice) Rules. The rule provides:

**'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 as a witness to give evidence, whether verbally or by declaration or affidavit; and 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 matter of fact in any matter in which he acts or appears.'**

Objectors'/applicants' counsel pointed out that Mr C.N. Kihara admitted in his relying affidavit sworn on 22.06.07 that he drew up the deceased's last WILL. It was objectors'/applicants' counsel's case that his clients maintained that the deceased had no mental capacity to prepare his last WILL. Objectors'/applicants' counsel urged that the present application be granted

On the other hand, petitioners'/respondents' counsel opposed the application, relying on the replying affidavit of Charles Kihara sworn on 22.06.07. Petitioners'/respondents' counsel pointed out that the succession cause was filed in 2003; that directions were given on 16.05.05 on how to proceed with the petition; and that it is only when the matter was to proceed to hearing that the objector brought the present application. Petitioners' counsel said the matter was to proceed to hearing on 09.05.07 but could not be reached. He described the summons as an afterthought and pointed out that no legal basis had been cited in the summons for the said summons. Petitioners' counsel pointed out that Mr Kihara had acknowledged vide paragraph 4 of his replying affidavit that he drew up the deceased's disputed WILL. Petitioners' counsel concluded from the objectors' counsel's submissions that the objectors acknowledged being served with Mr Kihara's replying affidavit, yet they filed no supplementary affidavit to rebut Mr Kihara's averments.

Petitioners'/respondents' counsel drew attention to paragraph 5 of Mr Kihara's affidavit to the effect that all beneficiaries were present when the WILL was opened and read; that all beneficiaries including the objectors, who represented the only two houses, instructed the law firm to file for probate; and that there was no objection then. Petitioners'/respondents' counsel said that the objectors have not given evidence that they asked Mr C.N. Kihara to make a statement or bonded him to appear in court to testify regarding the WILL; that one of the objectors, Barnard Chege Gikunu has since died but that no administrator has been appointed for his estate and that his objection has lapsed. Petitioners' counsel pointed out that none of the objectors has informed Mr Mwaura by affidavit of any prejudice if Mr Mwaura acts in this matter.

With regard to rule 9 of the Advocates (Practice) Rules, petitioners' counsel submitted that it expressly refers to an advocate but not a firm of advocates and that it is irrelevant in the present case. Petitioners' counsel viewed the present application as being intended to vex other beneficiaries by delaying the proceedings. He said that the firm of C.N. Kihara & Co. Advocates has more than one advocates who can act if Mr Kihara is required as a witness.

Petitioners'/respondents' counsel pointed out that Charles Kihara deponed vide paragraph 14 of his replying affidavit that the petitioners have strongly expressed their desire to be represented by the firm of C.N. Kihara & Co. Advocates in these proceedings. Petitioners'/respondents' counsel urged the court to dismiss the present application with costs and that the matter be fixed for hearing.

In reply, objectors'/applicants' counsel essentially reiterated the grounds for his clients' objection to Mr Kihara acting in this matter and said that the objection was on a pure

point of law arising from rule 9 of the Advocates (Practice) Rules. He submitted that the petitioners' desire to have the firm of K.N. Kihara & Co. Advocates cannot override the pure point of law. Objectors' counsel contended that Charles Kihara and C.N. Kihara & Co. Advocates are one and the same person, adding that 'C.N. Kihara' stands for Charles Njuru Kihara. I interpose here to record that Mr. Kamau for petitioners confirmed that 'C.N. Kihara' indeed stands for Charles Njuru Kihara. Objectors' counsel said that the legal basis for the objection is rule 9 of the Advocates (Practice) Rules and reiterated that the application be allowed.

I have given due consideration to the application and the objection thereto.

The parties are on common ground that Mr. Charles Kihara of C.N. Kihara & Co. Advocates drew up the deceased's WILL. The said WILL is being contested on the principal ground, as I understand it, that the deceased did not at the material time have the mental capacity to make a valid WILL. Mr. Charles Kihara appears clearly to be a material witness in the matter. The fact that the objectors/applicants have not formally summoned him or asked him to record a statement does not change his potential as a material witness. Under rule 9 of the Advocates (Practice) Rules, his role in this matter must be reserved for the witness stand. The firm of C.N. Kihara & Co. Advocates is said to have more than one advocates. There is no evidence before this court that all the advocates in the firm drew up the WILL in question. The court has not been told how the objectors' case will be prejudiced if another advocate in the firm represents the petitioners in this case and I am unable to put my finger on any such prejudice. I hold that only advocate Charles Kihara is precluded from representing the petitioners in this case by virtue of rule 9 of the Advocates (Practice) Rules. Another advocate in the firm may represent the petitioners.

Petitioners' counsel made a valid point in criticizing the summons now under consideration for not citing in or under its title the legal provision under which it was being brought. That is not how to litigate. I note, however, that objectors'/applicants' counsel eventually made reference during his submissions to rule 9 of the Advocates (Practice) Rules. Non-citation of the rule is in the circumstances of this case a curable irregularity and I shall ignore it.

Having regard to the entire circumstances of this case, I find the summons dated 22.05.08 and filed on the same date to have no merit and the same is hereby dismissed.

Costs shall be in the cause.

Orders accordingly.

**Delivered at Nairobi this 1<sup>st</sup> day of September, 2008**

**B.P. KUBO**

**JUDGE**