



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1792 OF 2016

IN THE MATTER OF THE ESTATE OF MUKESH BILLING alias MANJIT

BILLING alias M. BILLING alias MUKESH (MANJIT) BILLING - (DECEASED)

PATRICIA HANAMAN BILLING.....PETITIONER

VERSUS

RAJINDER BILLING.....1ST PROTESTOR

BINA BILLING.....2ND PROTESTOR

CHATTAR BILLING.....3RD PROTESTOR

KALEET BILLING.....4TH PROTESTOR

RULING

1. The deceased Mukesh Billing alias Manjit Billing alias M. Billing alias Mukesh Manjit Billing was an advocate of the High Court of Kenya who was the proprietor of Guram & Company Advocates. He died intestate on 29th March 2015. He had nominated his brother Rajinder Billing (1st respondent) who practices in the name and style of R. Billing & Co. Advocates to manage and conclude all pending cases in the law firm in the event of his incapacitation or death.

2. The petitioner Patricia Hanaman Billing petitioned this court for the grant of letters of administration intestate. Her case was that she was the deceased's widow with whom she had had sons. Her petition has been opposed by Rajinder Billing, his sister Bina Billing (2nd respondent), mother Chattar Billing (caveator) and sister Kaleet Billing (caveator). Rajinder Billing through his firm was acting for himself and his family during these proceedings until 8th February 2018 when the firm of Kihanga and Company Advocates took over the matter on their behalf. Mr. Kihanga appeared for them on behalf of the new firm.

3. Mr. Bowry acts for the petitioner.

4. There is another caveator Farzana T. Yakub who is represented by Mr. Khan.

5. It is not in dispute that since the matter begun Mr. Rajinder Billing has always introduced himself as acting for the respondents. After the firm of Kihanga and Company Advocates came on record, he has continued to appear alongside Mr. Kihanga for the respondents.

6. The court asked that the first issue to be determined is who is entitled to administer the estate of the deceased. Yesterday, oral hearing begun. The petitioner testified stating that she was the widow of the deceased, having married him in 1989. When she closed her case, Mr. Kihanga brought the mother of respondents. She was, however, stood down because of the need for a Punjabi interpreter. He then called his second witness, Rajinder Billing.

Mr. Bowry took objection to his being called to testify on the basis that he cannot be an advocate for the respondents and seek to testify on their behalf at the same time. Mr. Kihanga did not see anything wrong with him testifying.

7. Advocates are governed by the **Advocates Act (Cap. 16)**. **Rule 9 of the Advocates Practice Rules** made under the Act provides that:-

“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 no-contentious matter of fact in any matter in which he acts or appears.”

8. Every person has a constitutional right to be represented by counsel of his choice. The court will therefore be reluctant to come to the conclusion that an advocate ought to be disqualified from acting for a party (**Willian Audi Odode & Another –v- John Yier & Another, C.A. Civil Application No. Nai 360 of 2004**). However, this right can be put to test where a conflict of interest arises that could endanger the principle of confidentiality in the advocate/client relationship and also where an advocate could appear as a witness (**Delphis Bank Ltd – v- Chatthe & 6 others [2005]IKLR 760**). The court has to guard against prejudicing any party or embarrassing the trial.

9. In this case, Rajinder Billing was acting for all the members of his family, including himself, in opposing the petition. Even after they instructed another firm to act for them, he still indicated he was acting for them. He is, however, no longer on record for them. One cannot act for a client without instructions. But now that he insists to act for them, he has to elect either to continue to act for them or be witness in the matter. I consider that in the matter, the family is opposed to the petitioner being granted letters of administration. They do not agree with her claim that she is the deceased’s widow. This is a hotly-contested matter.

10. Mr. Bowry is right when he states that Mr. Rajinder Billing cannot have it both ways. He is a competent witness to testify, for himself and for the family in the matter which involves the estate of his late brother. However, he is disqualified from acting either for himself or for his family in the matter. It is basic that an advocate should not accept a brief or appear in case in which he himself is a witness. If he has any reason to believe that in the course of events he will be a witness then he should not continue to appear for the client. The continued participation of Rajinder Billing as an advocate will prejudice the case and embarrass the trial. From now he will not act, either for himself or for his family, in the proceedings.

11. Counsel can, however, testify.

DATED and DELIVERED at NAIROBI this 2ND day of JULY, 2019.

A.O. MUCHELULE

JUDGE