



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 17 OF 2019**

**HANNAH WAMBUI IRUNGU (Administrator of the estate of**

**NELSON IRUNGU KINGORI.....PLAINTIFF**

**VERSUS**

**RUFUS KINGORI IRUNGU.....1<sup>st</sup> DEFENDANT**

**MARY WANJIRU NJANE.....2<sup>nd</sup> DEFENDANT**

**DAVID NJANE.....3<sup>rd</sup> DEFENDANT**

**JOE KAMANDE.....4<sup>th</sup> DEFENDANT**

**RULING**

1. The matter was filed under certificate of urgency wherein the Applicant sought for orders restraining the Defendants from entering, remaining onto or interfering in any way with the ownership and occupation or quiet possession of land parcel No. Nyandarua/Olkalou South/1099.
2. The said application dated the 4<sup>th</sup> April 2019 was supported by the grounds on the face of it and the affidavit of Hannah Wambui the applicant and proprietor of the suit land.
3. On the 4<sup>th</sup> April 2019, the court gave interim orders in regard to prayers No.2 and 4 of the said application, pending inter-parties hearing.
4. The application was subsequently served upon the Defendants who filed their Replying Affidavit on the 31<sup>st</sup> May 2019. On the 10<sup>th</sup> June 2019 when the matter came up for the hearing of the said application inter-parties, Counsel for the Defendants raised a point of objection on a point of law wherein he sought that the Plaintiff's Counsel disqualifies himself from the proceedings.
5. This was based on the fact that the suit land was a subject matter in the Nakuru High Court Succession Cause No. 324/2014, which Succession Cause was petitioned by Mr. Gakinya Advocate who drew the consent of the grant which was later confirmed.
6. That annexure No. 11 in their replying affidavit was the Grant whereby the 1<sup>st</sup> Defendant had been named as a beneficiary of the suit land in the schedule of the confirmation.
7. That the succession cause was in respect of the Estate of Nelson Irungu (deceased) who was both a husband to the Plaintiff as well as a father to the 1<sup>st</sup> Defendant.
8. That pursuant to the provisions of Rule 9 of the Advocate Practice Rules, it was incumbent of an Advocate to disqualify himself or be disqualified by the court once it is shown that there is conflict of interest. The 1<sup>st</sup> Defendant and the Plaintiff are signatories of the P&A forms executed and filed by Counsel for the Plaintiff.
9. The defence Counsel's submission was that one of the issues that they would canvass during the trial in the case would be whether the Plaintiff consented in the schedules for confirmation for the 1<sup>st</sup> Defendant to get the suit land in which case they would be calling Mr. Gakinya Advocate as a witness because he had drafted the consent that was executed. That it was based on the said chain of events Counsel submitted, that a conflict would arise when Mr. Gakinya Advocate steps in the witness box wherein his witness would remain unrepresented.

10. In response and in opposition of the said application, Counsel for the Plaintiff submitted that the defence Counsel had taken the explanation of Rule 9 of the Advocate Practice Rules out of context. That there was no indication in his response that he was disputing or seeking to revoke that grant. That neither the Plaintiff nor the 1<sup>st</sup> Defendant had disputed the grant so as to be said that the parties would be seeking to prove that there was a disagreement to the distribution. That if indeed there was a dispute, it would be handled in the Succession Cause court and not in the present court.

11. That in essence, what counsel for the Defendant was implying was that in case the 1<sup>st</sup> Defendant was to be involved in another case emanating from this case, then it would mean that he would be excluded from this matter.

12. That he had been caught unaware by the present application otherwise he would have shed more light on the decided case in ELC Suit No. 87 of 2012 between **Kenya Commercial Bank Ltd v Mukeshkumar & Another** where the court ruled that for as long as the sale agreement was not disputed, an Advocate cannot be said to have a conflict of interest.

13. That the issue of presupposing that an Advocate will be called as a witness was a matter of fact and that if at all Counsel was to dispute the executed documents in the Succession Cause, then the Deputy Registrar would be the proper person to bring the document before court to confirm that it was actually executed.

14. That what was before court was the issue of occupation of land and not a succession matter and therefore parties should restrict themselves to the said issue at hand.

15. That far from that, Counsel had neither entered appearance nor filed his pleadings. That the provisions of the Constitution were to the effect that matters be heard without reference to technical issues especially those geared at wasting the courts time. He prayed that the objection be disregarded as it bore no basis at all, and the application dated the 4<sup>th</sup> April 2019 be heard instead.

16. In rejoinder Counsel for the Defendants submitted that the Court of Justice was governed by rules of procedure. One of the issues of this case was the ownership of the suit land. For that to be proved, it was imperative that the Succession Cause comes into play. That the Plaintiff lay claim to its ownership and therefore his claim in the present suit could not be divorced from the Succession Cause.

17. That as deponed in paragraph 24 of their replying affidavit, they would move the court to revoke the grant issued. That their objection was merited.

18. Pursuant to the said submission, the court stayed the hearing of the application dated 4<sup>th</sup> April 2019 pending delivery of the ruling on the objection, and extended the interim orders.

### **Analyses and Determination.**

19. I have considered the objection, the submissions by the parties as well as the provisions of the law. The Objection boils down to whether or not counsel representing the Plaintiff, M/s Hari Gakinya Advocate, offended the provisions of Rule 9 of the Advocate Practice Rules having had drawn the consent of the grant which was later confirmed in the Nakuru High Court Succession Cause No. 324/2014.

20. Counsel for the Plaintiff did not deny the fact that the subject matter of the preset suit was a subject of Nakuru High Court Succession Cause No. 324/2014, which Succession Cause he petitioned and even drew the consent of the grant which was confirmed.

21. It will be observed that the reasons given for the disqualification of M/s Hari Gakinya Advocate are inter alia that he prepared several documents which are in issue in this case and that he is expected to appear before this court as witnesses. I have gained sight of the Defendants' replying affidavit and annexures to the Application dated the 4<sup>th</sup> April 2019 where I have seen that indeed M/s Hari Gakinya Advocate prepared the summons for Confirmation of Grant as well as the consent to Confirmation of Grant.

22. The Defendants are of opinion that because counsel prepared these two documents, then he needs to be disqualified, for the reason that he is expected to appear as witnesses to shed light on these documents. The question that arises is whether an advocate who has prepared a document which may be in issue in the proceedings must disqualify himself/herself.

23. Rule 9 of the Advocate Practice Rules reads as follows:

*'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 in formal or non-contentious matter of fact in any matter in which he acts or appears.*

***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'.***

24. It will be seen from the above provisions of the law that an advocate may be prevented from appearing in a matter if he may be required as a witness. But this is not absolute, for an advocate can still appear for a party and still be a witness, so long as his evidence is confined to a formal or non-contentious matter of fact.

25. In the case of **Delphis Bank vs Channan Singh Chatthe & 6 others (2005) eKLR**. The Court of Appeal held that:

*The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties. In sum, there is no evidence before us, as there should be, for consideration before the drastic decision of interfering with a party's constitutional right to counsel of his choice is interfered with.*

26. I have considered the submission by counsel for the Defendant that M/s Hari Gakinya Advocate is expected to be witnesses in this matter. But I do not know the nature of confidential or privileged information, if any, that may have been imparted on him that would be prejudicial to the either party and even if he is expected to be a witnesses, according to the document he drew, his role would probably only be confined to producing the consent to confirmation of Grant executed by the Plaintiff.

27. There having been no Memorandum of Appearance or Defence filed, I cannot say at this stage whether the said Grant would be an issue in the present suit meaning that this would at most be evidence of a formal or non-contentious matter of fact.

28. M/S Hari Gakinya Advocate himself does not believe he would be a useful witness, but that is not the point because the indication is that he would be summoned. The nature of the evidence that he is required to tender before court is still unclear. If it is merely formal and non-contentious, then of course the proviso to the rule would bail him out. On that consideration I find it unnecessary to issue orders barring him from participating as an Advocate in the application before me

29. The upshot is that the objection raised is overruled and the main application shall be set down for inter parte hearing. Interim orders are extended in the meantime.

**Dated and delivered at Nyahururu this 19<sup>th</sup> day of June 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**