REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCC MISC. APPLICATION NO. E076 OF 2025

THE ESTATE OF GERISHON KAMAU KIRIMA THROUGH THE ADMINISTRATRIX, ANNE W. KIRIMA.....CLIENT/APPLICANT

=VERSUS=

S. MUSALIA MWENESI ADVOCATES
NYAMU & NYAMU CO. ADVOCATES
P.C ONDUSO & CO. ADVOCATES.....ADVOCATES/RESPONDENTS

IN THE MATTER ARISING FROM

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI ELC MISC. APPLICATION NO. E037 OF 2024

S. MUSALIA MWENESI ADVOCATES
NYAMU & NYAMU CO. ADVOCATES
P.C. ONDUSO & CO.....ADVOCATES

=VERSUS=

THE ESTATE OF GERISHON KAMAU KIRIMA THROUGH

THE ADMINISTRATRIX.....CLIENT

RULING

1. By a Chamber Summons dated 2nd April 2025 brought under Article 159(2) (d) of the Constitution of Kenya, 2010, Section 3A of the Civil Procedure Act, and Paragraph 11(1) of the Advocates (Remuneration) Order, Cap 16, the Applicant seeks the following orders**:-**

a) Spent.

b) THAT, pending the hearing and determination of the application herein, there be a stay of taxation of the Advocate-Client Bill of Costs dated 26th February 2024.

c) THAT the decision by the Deputy Registrar Hon. Judith Omollo on the taxation of the Bill of Costs ('the Bill") filed in ELCL Miscellaneous Application No. E037 of 2024 by the Respondents against the Applicant herein, dated 19th March 2025, be hereby set aside, and the Advocate-Client, Bill of Costs dated 26th February 2024, be struck out in its entirety.

d) THAT the Advocates bear the costs of this cause.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Ann Wangari Kirima, sworn on even date.

THE APPLICANT'S CASE

3. The Applicant averred that the Respondent/Advocates filed a Bill of Costs dated 26th February 2024, in which they sought

to recover costs amounting to Kshs. 3,337,625,584/= against the estate of the late Gerishon Kamau Kirima.

4. The deponent asserts that no advocate-client relationship exists between the Advocates and the Estate of the late Gerishon Kamau, as the estate administrators did not agree to appoint the said Advocates to act on their behalf.
5. She asserted that the three sets of advocates were engaged by Teresia Wangari Kirima, who, at the time the Bill was filed, was one of the appointed Administratrix of the Estate of the Late Gerishon Kamau. She also stated that Teresia Wangari Kirima had been removed from her role due to intermeddling with the assets of the Estate of the late Gerishon Kirima.
6. According to the deponent, the advocates were appointed without consulting her as the Co-administrator or any other beneficiaries of the Estate.
7. She further asserted that Teresia Wangari Kirima, having appointed the advocates to act on her behalf, is liable for all legal costs incurred and payable to the advocates.
8. The Applicant is aggrieved with the ruling delivered on 19th March 2025, on the following grounds that:-
   a. *The Taxing Master erred in finding that the advocates acted for the benefit of the Estate and that the Estate was liable for the legal costs despite acknowledging the absence of a retainer agreement or written instructions from the administratrices of the Estate.*

b. The Taxing Master erred in shifting the burden of proving the existence of an advocate-client relationship from the Advocates to the Estate, despite acknowledging the absence of a retainer agreement or written instructions from the administratrices of the Estate.

c. The Taxing Master, having established that no written instructions were binding the Estate through its designated administrators, and considering compelling evidence showing that the instructions to the Advocates came from Teresia Wangari Kirima in her personal capacity, erred in concluding that, in the absence of opposition by the Co-administrator of the Estate regarding the instructions to the Advocates, the Bill was properly presented before the Taxing Master for assessing advocate-client costs.

d. The Taxing Master erred in holding that the Bill of Costs could be taxed against the estate of Gerishon Kamau Kirima and not against Teresia Wangari Kirima, who issued the instructions in her personal capacity to the advocates.

h) There being no retainer agreement or an advocate-client relationship between the Advocates and the Estate of the Late Gerishon Kamau, who was the sole listed Client, the Bill of Costs dated 26th February 2024 is rendered incompetent and fatally defective. The Taxing Master's decision to proceed with taxing the Bill against the Estate is mistaken and highly prejudicial to the beneficiaries of the Estate.

23. Based on the foregoing, the Applicant urged the court to set aside the ruling dated 19th March 2025 and to strike out the Bill of Costs dated 26th February 2024 with costs to the Applicant.

THE RESPONDENTS' CASE

24. The advocates filed grounds of opposition dated 23rd April 2025, raising the following grounds:-

a) The application is incurably defective as it offends the provisions of Section 7 of the Civil Procedure Act.

b) The application is vexatious, malicious, and scandalous as ELC No 1257, as consolidated with ELC No. 252 of 2011, ELC No. 309 of 2014, ELC No. 1315 of 2013, ELC No. 1496 of 2013 and ELC No. 50 of 2014 show that Teresia Kirima and the Applicant were sued in their capacities as Administratrices.

c) By way of a Chamber Summons dated 23rd November 2022, Teresia Kirima moved the succession court in the above files, where a consent was recorded that each firm, including the firm of M/s Kaplan and Stratton, should be paid Kshs 1,000,000/= from the estate's account.

d) The firm of Kaplan and Stratton, having acted together with the Advocates/Respondents in the

matter, is barred under Rule 9 of the Advocates (Practice) Rules from representing the Applicant, and therefore the Notice of Objection and Chamber Summons should be struck out in limine.

25. The Respondents also filed a replying affidavit sworn by Wilfred Nyamu Mati, Advocate, in opposition to the application. He averred that the application is misconceived, as paragraph 11(1) of the Advocates Remuneration Order assumes a decision based on taxation, while in this case, the bill has not been taxed. He maintained that the application is misconceived as it was filed simultaneously with the Notice of Objection before receiving the reasons from the taxing officer.

26. He also argued that it does not matter whether Teresia Kirima was removed as an administrator of the estate, since the judgment in the consolidated suits was delivered on 23rd October 2023, while the judgment removing her as an administrator was delivered on 21st February 2025.

27. He asserted that the application is made in bad faith to settle scores with Teresia Wangari Kirima and to defeat the advocate's efforts to recover their legal fees by delaying the taxation of the bill of costs.

THE RESPONSE

28. The Applicant filed a supplementary affidavit in response to the grounds of opposition and the replying affidavit.

29. She argued that Paragraph 11 of the Advocates' Remuneration Order is not limited to the items listed in the bill of costs, but also applies to any decision made by a taxing officer.

30. She maintained that the ruling provided sufficient reasons, and so she only had to file her notice of objection within the specified timeframe.

31. She reiterated the contents of her supporting affidavit and emphasized that no advocate-client relationship exists between the advocates and Kirima's estate.

32. The Reference was canvassed by way of written submissions.

THE CLIENT/APPLICANT'S SUBMISSIONS

33. The Applicant filed her submissions dated 20th May 2025.

34. On behalf of the Applicant, Counsel outlined the following issues for the court's determination:-

a) Whether the Reference violates paragraph 22 of the Advocates Remuneration Order and whether it is premature due to lack of reasons from the taxing master.

b) Whether the taxing master erred in fact and in law by determining that, despite the lack of a retainer agreement, an advocate-client relationship existed between the Estate of the late Gerishon Kamau Kirima and the Advocates.

c) Whether the Bill of Costs dated 26th February 2024 against the estate of the late Gerishon Kirima should be struck out in its entirety.

d) Who should bear the costs of the application?

35. Regarding the first issue, Counsel submitted that the claim that paragraph 11(1) of the ARO only allows the filing of a reference when a bill of costs has been taxed is incorrect. To support this argument, Counsel relied on the case of **Wilfred N. Konosi t/a Konosi & Co Advocates v. Flamco Limited, 2017 KECA 431 (KLR),** where the court held that a taxing officer has jurisdiction to address any issues related to a bill of costs.

36. Counsel argued that the main issue for determination in the bill of costs concerns the retainer, which is properly before the court.

37. Counsel argued that the taxing officer's decision contained its own findings, making it unnecessary for the Applicant to wait for additional reasons since they are clearly implied in the ruling. To buttress this point, reliance was placed on the case of **Mwaniki Gitau & Co Advocates v Njoroge,** where the court ruled that:-

> ***Although Rule 11(1) of the ARO stipulates that any party wishing to object to the decision of the Hon Taxing Officer should do so within 14 days after the said decision and then file his reference***

within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek further reasons simply because the unfortunate wording of sub-rule (2) of Rule 11 of the ARO demands so.

38. Regarding the second issue, Counsel submitted that the main issue for determination is whether the estate of the late Gerishon Kamau Kirima instructed the advocates to act on its behalf in the court cases.

39. Counsel submitted that no advocate-client relationship exists between the advocates and the estate of the late Gerishon Kamau Kirima. Counsel further submitted that the Applicant was never consulted on the appointment of the said advocates. It was submitted that there was no agreement between the estate's administrators or beneficiaries regarding the appointment of the advocates at the estate's expense. Counsel also contended that when an estate has several appointed administrators, they must act jointly since there is only one estate administration. To support this argument, reliance was placed on the case of **Re Estate of Makoha Idris (2019) EKLR,** where the court held that:

"***Joint administration such as the one in this case is a joint enterprise; it cannot be done by one***

administrator alone without involving the rest."

40. Counsel asserts that, in the absence of a retainer agreement binding the estate to the legal costs claimed by the advocates, it can be inferred that the advocates acted on the instructions of Teresia Wangari Kirima in her personal capacity, and she is therefore liable for the accumulated legal expenses.

41. Counsel further submitted that the Taxing Officer did not consider the Applicant's claim that costs incurred by Advocates not instructed by both administrators should be charged to Teresia Wangari Kirima instead of the estate. Counsel argued that if the amounts claimed in the bill of costs were properly incurred for the benefit of the estate under the instructions of Teresia Wangari Kirima, who is a beneficiary of the estate, then the validity of such a claim can only be determined in a succession court.

42. Counsel contends that a retainer agreement, like other contracts, does not necessarily have to be in writing and can be implied from the parties' conduct. However, in case of a dispute, the court will consider an advocate to be acting without instructions if there is no retainer. To support this argument, reliance was placed on the case of **Kamuti Waweru & Co Advocates v Shiven Dev Limited (2022) eKLR,** where the court held that the mere provision of legal services to an alleged client does not constitute a retainer. The party giving instructions must be clearly demonstrated

by the evidence presented.

43. Counsel argued that the Taxing Officer erred in shifting the burden of proof to the Applicant, requiring her to prove that she opposed the advocate's actions on behalf of the estate. It was argued that the burden of proof lies with the advocates to establish the existence of a retainer agreement between them and the estate of the late Gerishon Kamau Kirima.

44. Regarding the fourth issue, Counsel argued that the taxed costs were incorrect because there was no retainer.

45. In conclusion, Counsel urged the court to allow the application with costs to the Applicant.

THE ADVOCATES/RESPONDENTS SUBMISSIONS

46. The Respondents filed their submissions dated 24th June 2025

47. On behalf of the Respondents, Counsel outlined the following issues for the court's determination:-

a) *Whether the Chamber Summons application is res judicata and/or offends the provisions of Section 7 of the Civil Procedure Act.*

b) Whether the law firm of Kaplan & Stratton should recuse itself from this case due to a potential conflict of interest.

c) Who meets the costs of this application

48. Regarding the first issue, Counsel submitted that the application is res judicata because the issues herein were determined in E037 of 2024. Based on this, Counsel asserts that the instant application is an appeal through the back door.

49. Regarding the second issue, Counsel submitted that Dr. Fred Ojiambo is not qualified to file this suit for the Applicant due to a significant conflict of interest. Counsel argues that a consent order issued on 29th November 2019 by Hon. Justice Muchelule shows that the firm of Kaplan and Stratton, along with the Respondents, handled ELC Case No. 1257 of 2014, with each firm set to receive Kshs 1 million from the estate of the late Gerishon Kirima.

50. It was submitted that the advocate, along with the Applicant, was a party to the consent order and did not oppose the Respondents' firms receiving payment from the estate of the late Gerishon Kirima, even though they now claim they had no instructions.

51. It was submitted that, in Succession Cause No. 1298 of 2011, Dr. Fred Odjiambo, along with the three law firms, represented the estate to preserve 150 acres within L.R. No. 5908/8 and L.R. No. 6208, pending taxation during the estate's distribution.

52. Counsel further argued that when filing the summons, Dr. Fred Odjiambo expressed his preference for the

Respondents to be included in the application to safeguard his legal fees and ultimately participate in the taxation process.

53. It was argued that a conflict of interest existed involving Senior Counsel and, therefore, his law firm should recuse itself from this matter.

54. On the third issue, Counsel argued that the application is a nullity.

55. It was argued that the Applicant has no authority from her co-administrators to swear affidavits or file this suit on behalf of the estate of the late Gerishon Kamau Kirima.

56. Counsel further argued that paragraph 11(1) of the ARO allows a reference to be filed after a bill of costs has been taxed. It was also argued that a reference can only be filed within the same ongoing suit, not in a separate case, as in this instance.

57. In conclusion, Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

58. Having considered the application, the affidavits, the grounds of opposition, and the rival submissions, the following issues fall for determination:-

a*) Whether the instant application is res judicata?*

b) Whether the ruling delivered on 19th March 2025 should be set aside?

b) Whether the firm of Kaplan, particularly Senior Counsel Dr Ojiambo, is conflicted.

59. **WHETHER THE INSTANT APPLICATION IS RES JUDICATA**.

The doctrine of *res judicata* is anchored in Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya, which provides that:-

> ***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”"***

60. The **Black’s Law Dictionary, 10th Edition,** defines *res judicata* as follows:

> ***“a thing adjudicated" 1. An issue that has been definitively settled by judicial decision.***
>
> ***2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from***

the same transaction or series of transactions, and that could have been but was not raised in the first suit."

61. The elements which must be present to succeed on a defence of res judicata were enunciated in **Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR,** where the Court of Appeal held that: -

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

b. That the former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. ***The issue was heard and finally determined in the former suit.***

e. ***The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

62. The Respondents contend that the instant application is res judicata as the issues raised herein were addressed and determined in E037 OF 2025.

63. The record shows that the Applicant herein filed an application dated 26th March 2024 seeking the following orders:-

a). That pending the hearing and determination of the application herein there be a stay of taxation of the Advocate's Client Bill of Costs dated 26th February 2024.

b) That the Advocate client's bill of Costs dated 26th February 2024 be struck out in its entirety.

c) That the costs of this cause be borne by the Advocates

64. Prayer No. a and b of the above application are similar to prayer a and b of the present application, and therefore res judicata as they were determined in the ruling of 19th March 2025.

65. **WHETHER THE RULING DELIVERED ON 19TH MARCH SHOULD BE SET ASIDE**

The Applicant is seeking to set aside the ruling on the grounds that the taxing officer erred in holding that an advocate-client relationship existed between the Respondents and the estate of the late Gerishon Kirima.

66. The Applicant faulted the taxing officer for holding that an advocate-client relationship existed between the parties despite acknowledging that there was no written retainer or

written instructions from the administrators of the estate of the late Gerishon Kamau Kirima.

67. The Applicant maintained that there was no advocate-client relationship between the Advocates and the estate of the deceased because the administrators did not agree to engage the said advocates.

68. The **Blacks Law Dictionary** explains the word retainer as follows:

> ***"In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. The act of employment is called the retainer. The agreement between the client and the attorney sets forth the nature of services to be performed, costs, and related matters…"***
>
> ***The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client;* Consequently, the giving of a retainer is equivalent to the making *of a contract for the solicitor's employment***."

69. It is trite law that a retainer need not be in writing, but it can be implied from the conduct of the parties.

70. In the case of **Mereka & Co. Advocates v Zakhem Construction (Kenya) Limited (2014) eKLR,** the court held that:-

> ***"It is trite law that a retainer need not only be in writing but can be implied from the parties' conduct. On this am guided by the case of Ohaga v Akiba Bank***

Limited (2008) 1 EA where it was held that "a retainer may be implied where (i) the client acquiesces in and adopts the proceeding; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to consolidation order."

71. Based on the foregoing, it is clear that instructions to an advocate can be oral or in writing. The Applicant asserted that Teresia Wangari Kirima engaged the three law firms in her personal capacity and is therefore liable for the accumulated legal costs. The Applicant argued that the advocates were appointed without her being consulted as a co-administrator or other beneficiaries.

72. The Respondents argued that they rendered services to the estate in several suits where Teresia Wangari Kirima and the Applicant were sued as Administrators.

73. The Taxing Officer in her ruling found that the Advocates acted in the ELC cases for the benefit of the estate. She also found that there was no evidence that the co-administrator opposed the Advocates acting in the manner. The record shows that the Respondents acted for the estate in several suits.

74. Having scrutinized the entire record, this court finds that there was a retainer between the Applicant and the Respondent.

75. **WHETHER THE FIRM OF KAPLAN AND STRATTON AVOCATES IS CONFLICTED**

Conflict of interest has been defined in the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016, as follows:

> ***"A conflicting interest is an interest which gives rise to substantial risk that the Advocate's representation of the client will be materially and adversely affected by the Advocate's own interest or by the Advocate's duties to another current client, former client, or third person."***

The Respondents argued that the firm of Kaplan and Stratton Advocates, particularly Senior Counsel Dr. Fred Ojiambo, is conflicted due to his involvement in Succession Cause No 1298 of 2011. In view of the foregoing, the Respondents contend that there exists a conflict of interest; hence, the firm of Kaplan and Stratton should not be allowed to represent the Applicant in these proceedings.

76. In the case of **Charles Kariuki v Akusi Farmers Co. Ltd (2007) eKLR,** the court held that:-

> ***"The fact that an advocate acted for a litigant does not per se lead to a situation of conflict of interest. The Applicant was required to establish and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a***

possibility that a conflict of interest would arise where the advocate is allowed to act for the opposing party against such a litigant."

77. In the matter at hand, the court finds that the allegations of a significant conflict of interest, particularly involving Senior Counsel Dr. Ojiambio, have not been proven.

78. In the end, I find that the application dated 2nd April 2025 is devoid of merit and the same is hereby dismissed with costs.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS THIS 21ST DAY OF NOVEMBER, 2025.

.....
T. MURIGI
JUDGE

IN THE PRESENCE OF:-

Rao for the Applicant

Nyamu, appearing together with Ashiruma for the Respondents

Ahmed – Court Assistant.