

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC APPLICATION NO. 81 OF 2018
ARISING FROM
SUCCESSION CAUSE NO. 1298 of 2011
IN THE MATTER OF THE ESTATE OF GERISHON
KAMAU KIRIMA (DECEASED)

**RACHIER & AMOLLO LLP.....APPLICANT/
ADVOCATES**

VERSUS

**THE ESTATE OF GERISHON KAMAU KIRIMA
THROUGH
THE ADMINISTRATIXRESPONDENT/
CLIENTS**

RULING

1. The Applicants present summons dated 20th May 2025 in which they seek the following orders-
 1. **THAT** the decision of the Taxing master delivered on 6th May 2025 on item number 1, 2, 596, 598, 599, 600 and 650 in the Advocate client Bill of cost dated 22nd June 2018 be set aside and / or vacated.
 2. **THAT** this Honourable Court be pleased to tax afresh item number 1, 2, 596, 598, 599, 600 and 650 in the Bill of cost dated 22nd June 2018 or in the alternative, the Bill of cost be referred to the Taxing Master for fresh taxation on the subject matter.

3. **THAT** the Advocate be awarded interest at court rates from the 6th May 2025 when the taxing master taxed the costs until payment in full.
 4. **THAT** the cost of the application be provided for.
2. The application is supported by the affidavit of Dr. Otiende Amollo sworn on 20th May 2025. In essence the applicant avers that the taxing master erred in law and in principle in her determination of what comprised the subject matter of the estate for purposes of assessing the instruction fee.
 3. It is urged that the taxing officer erred in her finding that only the distributable assets comprised the estate, further that the taxing officer erred in ascribing a lower value to the assets of the estate by-
 1. Electing to reference a single valuation report (she only relied on report by Crystal valuers, disregarded the report by Legend Valuers yet both were commissioned by the Court);
 2. Ignoring the valuation report prepared by Legend Valuation
 3. It is also averred that in her assessment of the value of the estate she did not include the assets in paragraph 237 and 238 of the judgment delivered on 21st day of February 2025 in Succession Cause no. 1298 of 2011.

4. Applying discretionary values to LR NO. 6825/2, LR No. 5908/8 Njiru area, LR NO. 209/232/4 Tukika House and LR NO. 209/4401/19 with regard to specific assets; The applicant has attached a valuation report by circuit valuers in relation to the property in Njiru area (LR NO. 6825/2, LR No. 5908/8)
5. Ignoring previous valuation rendered by the administrator as regards certain assets (shares owned by the deceased valued at Kshs 72,396,843 pursuant to partial confirmation on 11th December 2015; the deceased's shareholding in Tumaini Estate).
4. The Administrators oppose the application and there is on record affidavit sworn by Stephen Kirima on 5th December 2025. He concedes that the advocate acted for the estate prior to the finalization of the cause. It is averred that the Court was right in its determination of the properties that comprise the estate and its assessment of the value of the estate.
5. Anne Wangari Kirima, Chairperson of the Registered Trustees of Kirima Trust has also sworn an affidavit in opposition dated 20th August 2025. It is submitted that the Taxing officer correctly applied the law and exercised her discretion judiciously in computing the value of the estate

and the instruction fee. It is submitted that the court cannot be faulted for solely relying on the report of Crystal Valuers solely.

6. Further she affirms that the taxing officer was right in not including assets found not to comprise the estate of the deceased, specifically, properties that belong to the Kirima trust Kirima & Sons Limited. She asserts that the application does not meet the legal threshold where this court should interfere with the discretion of the taxing officer.
7. Further it is stated that the assets attributed to Kirima & Sons Limited and the Kirima Estate do not comprise the estate of the deceased and therefore the taxing officer was right in excluding them. The reliance on the report by crystal valuers is defended and challenges the introduction of a valuation report by circuit valuers.
8. The application was canvassed via written submissions.
9. The Submissions of the **applicant** are dated 27th November 2025 and raise a preliminary issue, touching on the admissibility of response filed out of time by the respondents alongside the corresponding submissions. The

Applicant urges that the same ought to be struck out as admitting them would violate the applicant's right to a fair hearing as the applicant will not have had an opportunity to respond to the affidavits.

10. I have considered the application to strike out the pleadings filed by the.

11. I note that indeed that the parties failed to comply with the timelines and as stated by the applicant this would have the likely impact of disadvantaging the applicant in terms of his right to reply.

12. For the orderly conduct of Court proceedings, parties should comply with timelines issued by the Court and when they fail to do so they are exposed to the risk of not having audience. This procedural imperative is balanced against the Constitutional imperative to deliver substantive justice which opens a very narrow window to litigants to seek leave of the Court to file their papers out of time. I note that the administrators have in the affidavit sworn by Stephen Kirima sought this leave on the ground that the Counsel was indisposed. I note also that the affidavit is limited to issues raised by the applicant. I also take note that this matter is

long drawn out and it is in the interests of the parties that the Court move to decide the reference on merit to enable the parties finalise on the settlement of the estate. For this reason, I will allow the affidavit sworn by the administrator and submissions filed by the Trust.

13. In addition to the preliminary objection the applicant frames the following as the issues for determination

1. Whether the High Court has jurisdiction to tax afresh the fees due to the Advocate and set aside the taxing master's decision
2. Whether the taxing master erred in principle in taxing the Advocate's Bill of Cost at Kshs 84, 049,129.52/-
 - a. Whether the taxing master erred in limiting the values of the Estate to the distributable assets only, contrary to the Court's direction that the fees be borne by the Estate as a whole.
 - b. Whether the Taxing Master erred by considering only part of the distributable assets thereby undervaluing the estate
 - c. Whether the taxing master improperly preferred one valuation report- the lower one- while disregarding, without justification the second report used throughout the proceedings.
 - d. Whether the taxing master erred in assigning arbitrary and undervalued discretionary figures to properties contained in the ignored valuation report.
3. Who should bear the cost of the reference application.

14. On the 1st issue **Whether the High Court has**

jurisdiction to tax afresh the fees due to the Advocate and set aside the taxing master's decision. It is submitted that the decision of the taxing master falls squarely within the parameters warranting the Court's interference as enunciated in the decision of **Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another [1972] EA 162.**

15. On the 2nd issue, **Whether the taxing Master erred in limiting the value of the Estate to the distributable assets only contrary to the Court's direction that fees be borne by the Estate as a whole.** The applicant urges that the Court erred in basing the fees on the distributable estate as opposed to 'an aggregate of all assets and interests forming part of the Estate, collectively referred to as 'properties of the estate.' It is submitted that the latter are not confined to assets registered in the deceased's own name but extends to all property and interests from which the beneficiaries stand to derive benefit by virtue of the deceased's ownership, control or settled intention. It is the submission of the applicant that in determining the value of the Estate the Court should have considered both the

distributable and non-distributable assets of the deceased (What the applicant refers to as the gross estate of the deceased- which includes the Kirima trust).

16. With regards to the Kirima Trust it is submitted during the pendency of the proceedings the land rates for trust properties were paid by the estate and that the Administrator herein had filed an application seeking that rental income collected from the Trust be deposited in the estate accounts. It is submitted that the properties enumerated at paragraph 219 of the judgment in the succession cause should be included. For the submission that the Court should consider both the distributable and non-distributable estate of the deceased reference is made to the decision in **Misc Civil Suit No. 61 of 2017 Swaleh Mwangi & Co. Advocates vs John Kaguma Maina and 2 Others.**

17. On the 3rd issue, **Whether the taxing master further erred by considering only part of the distributable assets, thereby undervaluing the estate.** It is submitted that the taxing master erred by omitting the assets in paragraphs 237 and 238 of the judgment undervalued the

estate. The taxing master therefore erred in not adopting the value of shares held by the deceased in various companies (Kshs 72, 396, 843 adopted for purposes of partial confirmation). This it is submitted amounts to a misdirection in principle and reference made to the decision in **ELC Misc. No. 47 of 2018 Ambwere T.S. & Associates vs Frank Nyambu Wafukwa & Others**

18. It is submitted further that where assets were not valued the taxing officer ought to have exercised her discretion by assigning a reasonable value to them and reference made to the decision in **Joreth Limited v Kigano & Associate Advocate [2002] EA 92**. It is submitted therefore that the taxing officer erred in failing to assign a value to shares under paragraph 237(1), 237(2) and 237(5). It is submitted that the taxing master undervalued the estate by failing to consider the assets owned by Kirima & Sons Limited, in which the deceased holds a 40% share. It is submitted that the value of the shares can be extrapolated from the value of the assets. The taxing officer is also faulted for not including the bank accounts in her assessment.

19. On the 4th issue, **Whether the taxing master improperly preferred one valuation report- the lower one- while disregarding without justification, the second report used throughout the proceedings.** Under this head the taxing officer is faulted for not considering the report of M/S Legend Valuers Limited and not giving a reason for the sole reliance on the report by Crystal Valuers Limited.
20. On the final issue **Whether the taxing master erred in assigning arbitrary and undervalued discretionary figures to properties contained in the ignored valuation report.** The applicant faults the taxing officer for applying discretionary values when the report from Legend Valuers did provide the value for the properties enumerated in paragraph 239 of the judgment.
21. The Submissions of the **Kirima Trust** are dated 16th December 2025. The issue for determination is framed as **whether the Taxing Officer erred in principle to entitle the Court to interfere with the taxing master's decision?** It is submitted that the taxation is based on the taxing officer's assessment of the value of the estate's property. It is submitted that the taxing officer's arrival at the sum of Kshs 50 million as the instruction fee cannot be faulted (as it comprises properties with ascertainable values and non-ascertained values). Reference is made to the

decision in **Joreth Limited v Kigano Associates (Supra)** and the Supreme Court decision in **Kenya Airports Authority v Otieno Ragot and Company Advocates (Petition E011 OF 2023)[2024]KESC 44 (KLR)(2 August 2024)(Judgment)**. It is submitted that the Taxing officer's assessment of the instruction fee for assets not valued at Kshs 15,448, 250 should stand.

22. Further it is submitted that the taxing officer was right to exclude those not found to be part of the estate of the deceased and this includes property held by Kirima Trust, *inter vivos* gifts by the deceased to beneficiaries and properties belonging to Kirima Limited.

23. It is submitted that the Taxing Officer cannot be faulted for excluding Item 2 of the Bill of Costs as the Bill was taxed under Schedule X of the remuneration Order which does not provide for getting up fees and reference made to the decision in **Jonathan Njuguna Mwangi, Peter Kabatha Mwangi, Hannah Wangari Kinuthia, Samuel Gatitu & Hellen Wambui Vs Josephat Njoroge Mwangi, Josephat Njoroge Mwangi, Stephen Njuguna Mwangi & Christopher Mwaura Mwangi [2001] KEHC 728 (KLR)**.

24. It is submitted that in accordance with the decision in **Republic v Minister for Agriculture & 2 Others Ex Parte Samuel Muchiri & 6 Others [2006] eKLR** the advocate is only entitled to reasonable compensation for professional work done and reference made to the decision in **Alice Yano t/a Yano & CO Advocates v Rebecca**

Nadupoi Supeyo & Anor to dissuade this Court from interfering with the exercise of discretion by the taxing officer.

25. The Administrator did not file submissions. Having considered the pleadings on record, submissions and relevant law, I discern the issues for determination to be-

1. **whether the Taxing Officer erred in principle to entitle the Court to interfere with her decision**
2. **What if any are the consequential orders arising from (1) above**

26. On the 1st issue as summarised above the impugned ruling is challenged on the following grounds

1. Undervaluing of the estate (failing to reference an additional valuation report without justification, excluding certain assets, extrapolating value of assets when the value was either on Court record or in valuation report)

27. At paragraph 2 of the ruling the Court observed that the earlier ruling of 2nd June 2022 by Hon. Muchelule J (as he then was) directed that the costs be met by the Estate of the deceased. Quite rightly she referred to the judgment in arriving at a decision on what the estate comprised for purposes of taxation. In **Peter Muthoka & Another vs. Ochieng & 3 Others, Civil Appeal No. 328 of 2017; [2019] eKLR**, the Court stated as follows:

It seems to us quite plain that the basis for determining subject matter value for purposes of instruction fees is wholly dependent on the stage

at which the fees are being taxed. Where it happens before judgment, it is the pleadings that form the basis for determining subject value. Once judgment has been entered, and for what seems to us to be an obvious reason, recourse will not be had to the pleadings since the judgment does determine conclusively the value of the subject matter as a claim, no matter how pleaded, gets its true value as adjudged by the court.

Where, however, a suit is settled, then, from a literal and practical reading of the provision, the subject matter value must be sought by reference, in the first instance, to the terms of the settlement. Just as one would not start with the pleadings in the face of a judgment, it is indubitable that one cannot start with the pleadings where there is a settlement.

28. The taxing officer was therefore right when she excluded properties that are owned by persons other than the deceased, these include the properties owned by Kirima Trust and Kirima & Sons Limited. As relates to Kirima & Sons Ltd, the estate has a claim against the shares of the deceased (40% shareholding is undisputed). Having delineated the estate of the deceased, the taxing officer then proceeded to assess the instruction fee based on the value of the Estate as defined in Judgment of 28th February 2025. The Applicant faults the finding of the taxing officer.

29. The general principles on when an appellate court may interfere with a discretionary power of a trial are now well settled. In the case of **Mbogo & Another vs Shah, [1968] EA**, these principles were set out as follows: -

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

30. The circumstances when the High Court may interfere with the exercise of discretion by a taxing officer were well enunciated in the decisions of **Premchand Raichand Limited & Another v Quarry Services of East Africa Limited & Another [1972] EA 162** and **First American Bank OF Kenya v Shah & Others [2002] 1 EA 64**.

31. The applicant submits that the exercise of the discretion was arbitrary. At the core of a taxation of the Bill of Costs in a succession matter and Schedule X of the Advocates remuneration Order is the instruction fee which is derived from the "**gross capital value of the property comprised in the grant**". It is evident that the only property that can comprise the grant is the property that comprises the estate of the deceased. The challenge to the taxation is hinged on how the value of the estate was derived by the taxing officer. Did the Taxing officer exercise her discretion judicially?

32. **Madan JA (as he then was) in United India**

Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA, stated thus:

The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or that fifthly, that his decision, albeit a discretionary one, is plainly wrong.

32. Further in **Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021] eKLR**, The court there stated: -

[57]. In **Kenya Tourist Development Corporation v Sundowner Lodge Limited (supra)**, it was emphasized that an appellate court should pay some deference to decisions made in exercise of discretion but should not follow them slavishly. Where there is a basis for upsetting such decisions, the court should do so if the findings in question are based on no evidence, or a misapprehension of the evidence; consideration of irrelevant matters or failure to consider what ought to have been considered. The court will interfere if it is shown demonstrably that the court acted on wrong principles in reaching a particular finding of fact

33. In addition, Justice Odunga J, (as he then was) in **Teacher Service Commission v Ex-partePatrick M**

Njuguna [2013] eKLR had this to say: -

In John Onger Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163 it was held that: "...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent

34. In *Republic vs. Ministry of Agriculture & 2 Others Ex parte Muchiri W'njuguna & 6 Others*, HC Misc 621 of 2000; [2006] eKLR, Ojwang J (as he then was) framed the requirement for judicious exercise of discretion as follows-

Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for... The complex elements in the proceedings which guide the exercise of the Taxing Officer's discretion, must be specified cogently and with conviction....

It was necessary to specify clearly and candidly how she had exercised her discretion. Discretion, as an aspect of judicial decision-making, is to be guided by principles, the elements of which are clearly stated and which are logical and conscientiously conceived. It is not enough to set out by attributing to oneself discretion originating from legal provision, and thereafter merely cite wonted rubrics under which that discretion may be exercised, as if these by themselves could permit of assignment of mystical figures of taxed. (Emphasis Supplied)

35. For the exercise of discretion to be proper and

withstand legal challenge it must meet the following criteria- the court must act within the law, it cannot be a subjective whim, must not be capricious, the reasoning and rationale must be evident failing which the discretion will be said to have been exercised arbitrarily.

36. In the circumstances of this case, the taxing officer was at liberty not to refer to the other valuation report she was however required to give reasons to enable parties gauge the rationale and reasonableness of that decision. The applicant had invited her to consider the report, when she elected not to do so she was required to give reasons failing which the decision will be properly regarded as being arbitrary.

37. For this reason, I am inclined to set aside the decision of the taxing officer and remit it to a different officer to tax having regard to the following principles-

1. As summarised in **Premchand Raichand Ltd vs. Quarry Services of East Africa Ltd. (No. 3) [1972] EA 162** in assessing costs under the Advocates Remuneration Order:

a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy;

- b) That the general level of remuneration of advocates must be such as to attract recruits to the profession;
- c) The advocate should be reasonably remunerated for work done
2. The instruction fee will be pegged on the value of the Estate as per judgment delivered herein on 21st February 2025. For avoidance of doubt the Estate of the deceased is as defined in under Section 3 of the Law of Succession Act, - **“estate” means the free property of a deceased person.** See the decision in **Re Estate of SILAS KABURU M'MAGIRI (DECEASED) [2011] eKLR .**
3. The estate of the deceased therefore includes the assets/ properties enumerated under Paragraphs 236, 237,238 and 239 of the judgment of 21st February 2025. I find that the distinction that the applicant seeks to draw between the distributable and non-distributable assets not applicable as the distributable assets are those assets that comprise the estate.
38. On costs each party will bear their own costs.
39. Parties at liberty to appeal, party exercising their right of appeal to do so within 30 days.

It is so ordered.

SIGNED, DATED and DELIVERED VIRTUALLY at NAIROBI this 13TH day of February, 2026.

**P.M NYAUNDI
HIGH COURT JUDGE**

In the presence of:

Fardosa Court Assistant

Rao holding brief for Ojiambo Senior Counsel for Kirima Trust

Ms. Maina holding brief for Lugunya for the Applicant

Opade holding brief for Munge for Administrators

Jan Mohammed Senior Counsel for Estate of Agnes Waruguru

ORIGINAL