**REPUBLIC OF KENYA**

**COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 170 OF 2010**

**KIPKORIR, TITOO & KIARA ADVOCATES…...……...…...……APPELLANT**

**AND**

**JUNE NDUTA KINYUA……...……..1ST RESPONDENT**

**ESTATE OF JACKSON KAMAU CHEGE (DECEASED)…..2ND RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**Hon. Justice J. W. Mwera**) dated 6th May, 2010*

*in*

***H.C. MISC. APPL. NO. 585 OF 2008)***

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**JUDGMENT OF OKWENGU, JA.**

**1.** This appeal originates from the decision of the taxing officer made on the 24th March, 2009 in Nairobi **High Court Misc. application No. 585 of 2008**. Kipkorir, Titoo and Kiara advocates, who are the appellants herein, had filed an advocate/client bill of costs dated 6th October 2008. The bill of costs was objected to by the client, **Jane Nduta Kinyua**, who is now the 1st respondent to this appeal. In his decision, the taxing officer assessed the advocate/client's bill of costs at Kshs.34,610,855/- all inclusive. Out of the assessed amount, a sum of Kshs.20 million was in regard to instruction fees. The appellant had charged Kshs.70 million, but the taxing officer taxed off Kshs.50 million, and allowed Kshs. 20 million.

**2.** Being dissatisfied with the decision of the taxing officer, the 1st respondent filed a reference in the High Court under **Rule 11(2)** of the Advocates Remuneration Order, **Schedule 10** of the Advocates Remuneration Amendment Order, and the Advocates Act, Cap 16 Laws of Kenya. The 1st respondent sought orders that the taxing officer's decision on the issue of instruction fees be set aside, and that the advocate/client's bill of costs dated 6th October, 2008 be remitted to another taxing officer for review and reassessment, or in the alternative, the High Court be pleased to reassess and review the advocate/client's bill of costs dated 6th October, 2008.

**3.** The parties agreed to have the reference disposed of by way of written submissions. Accordingly, written submissions were duly filed on behalf of the 1st respondent and the appellant. In a ruling delivered on 6th May, 2010, Mwera J. allowed the reference with costs to the client (1st respondent), directing that

if the parties do not amicably settle the issue, taxation of the advocate/client's bill of costs should proceed before another taxing officer. This ruling triggered the memorandum of appeal dated 15th July, 2010, lodged in this court by the appellant in which twelve grounds are raised. In short, the appellant contends that the High Court Judge erred in allowing the reference without any legal or factual basis; that the taxing master did not err in principle, such as would justify allowing the reference; that the High Court Judge misunderstood and misapprehended the law relating to references from a taxing master; that the reference was fatally defective; and that the ruling of the High Court Judge was made "*in vacuo*" and was not "*justiciable*".

**4.** The appellant therefore asks this Court for orders as follows:

a) **That this court reappraises the evidence and complete record of the file in Nairobi High Court Succession Cause No. 2855 of 2005 (OS), to draw inference of fact.**

b) **That this court takes additional evidence on the true value of the Estate of the 2nd respondent and all payments made out to all parties including lawyers, to arrive at a just decision.**

c) **That this court orders for a full inventory of the Estate of the 2nd respondent to arrive at a just decision.**

d) **That the ruling delivered on 6th February, 2010 and all subsequent orders, be set aside.**

e) **That the reference dated 12th May, 2009 and filed on even date be dismissed.**

f) **That the ruling of the taxing master dated 24th March, 2009 be reinstated.**

g) **That cost of the appeal and the superior court, be awarded to the appellant.**

h) **That such further additional relief as may be necessary for the ends of justice or to prevent abuse of the court process be granted.**

i) **That this appeal be allowed as aforesaid.**

**5.** Mr. Kipkorir who argued the appeal on behalf of the appellant, submitted that the ruling of the High Court Judge was made without any legal or factual basis; that the record of proceedings in **Succession Cause No. 2855 of 2005 (OS)** shows that the proceedings began on 16th October, 2005 and went on until 20th February, 2008, during which period the appellant appeared 27 times in court to deal with different applications; that the proceedings began with a citation to propound a document as a Will under **sections 26, 27 and 28** of the **Law of Succession Act, Cap 160;** that subsequently, a petition for grant of probate of the estate of **Jackson Kamau Chege** (deceased) was filed.

**6.** In regard to the value of the estate, **Mr. Kipkorir** pointed out anaffidavit sworn in support of the citation by **Kathleen Wanjiku Kihanya** (the mother to the 1st respondent), wherein several assets subject of the estate were identified; an affidavit sworn by the proposed executors of the deceased's estate, identifying the assets of the deceased, and estimating the total value of the estate at Kshs.251 million; and an affidavit sworn by one **Yvonne Nduta Chege** in support of the petition for letters of administration for the estate of the deceased, wherein she lists the assets of the deceased and estimates the value of the estate at Kshs.4 billion. **Mr. Kipkorir** argued that the assets of the deceased were immense and could not be only Kshs.10 million as held by the High Court Judge; that the Kshs.10 million referred to by the High Court Judge only related to an amount set aside by the deceased for a trust to which the 1st respondent, as one of the surviving grandchildren was entitled to; that the 1st respondent being a beneficiary of the estate of the deceased was entitled to an equal share in the estate, and not just a share in the Kshs.10 million set aside for the trust fund.

**7.** On the issue of justiciability, **Mr. Kipkorir** argued that the appellants initiated the proceedings on behalf of the 1st respondent who was a beneficiary of the estate of the deceased; that the estate having been valued at between Kshs.231 million and Kshs.4 billion, there should have been no discrimination between the advocates who were acting for the parties; that **Miller & Co. Advocates** having been paid over Kshs.27 million, the appellant who was acting for only one of the beneficiaries to the estate, should have had his fees pegged on the beneficiary's entitlement to the estate, which was a sixth of the value of the estate. **Mr. Kipkorir** maintained that in taxing the Bill, the taxing officer properly exercised his discretion which was unfettered. He blamed the High Court Judge for having fettered the discretion of the taxing officer by confining that discretion to only the sum of Kshs.10 million, and urged the court to allow the appeal.

**8.** **Mr. Githinji** who appeared for the 1st respondent referred the Court to his submissions made before the taxing officer, and submissions made before the High Court judge, in regard to the reference. **Mr. Githinji** noted that it was only the instruction fee of Kshs.20 million which was subject of the reference before the High Court. He distinguished the Bill for **Miller & Co. Advocates,** who were acting for the estate of the deceased as governed by **Schedule X Clause 1** of the Advocates (Remuneration) (Amendment) Order, 1997 on the party and party costs for instruction fees, while the Bill filed by the appellant is governed by **Schedule X clause f** of the Advocates (Remuneration) (Amendment) Order, 1997, which provides the starting figure for instruction fees as Kshs.4,500/-; that although the taxing officer had discretion to increase the figure, there was nothing much done by the appellant to warrant any increase as the appellant only used prescribed forms to file the matter in court.

**9.** As for the twenty seven court attendances, **Mr. Githinji** observed that costs in respect of this had been taken care of in the uncontested sum of Kshs.168,960/- which was allowed by the taxing officer. He argued that the appellant having already been paid a sum of Kshs.500,000/- as deposit, the sum of Kshs.20 million awarded by the taxing officer for instruction fees was not justified; and that the taxing officer erred in principle, in overemphasizing the complexities and difficulties of the suit, thereby awarding costs which were manifestly excessive. **Mr. Githinji** pointed out that if the value of the estate of the deceased was taken at Kshs.251 million, the total sum of Kshs.35 million assessed as costs payable to the appellant was 14% of the estate of the deceased, which is excessive and unjustifiable; that the Will of the deceased stated the figure to be set aside for the trust fund as Kshs.10 million, and therefore, the right figure to be used for purposes of litigation was Kshs.10 million. The court was thus urged to uphold the ruling of **Mwera, J.** and dismiss the appeal.

**10.** **Mr. Sijenyi** who appeared for the estate of **Jackson Kamau Chege** (deceased), who is the 2nd respondent, also opposed the appeal. He relied on submissions which were filed in the High Court by the 2nd respondent during the hearing of the reference.

**11.** The proceedings in High Court Succession Cause No. 2855 of 2005, reveal that the 1st respondent **Jane Nduta Kinyua** was a beneficiary of the estate of the late **Jackson Kamau Chege** (deceased). Indeed, the succession cause was prompted by a citation to propound a document as a Will of **Jackson Kamau Chege**, (deceased). The citation was filed by the appellant on behalf of the 1st respondent, in an attempt by the 1st respondent to assert her rights under the Will. The professional services rendered by the appellant in the succession cause, is the subject of the advocate/client's bill of costs which led to the reference, subject of the appeal now before us.

**12.** The main bone of contention in the reference was only one item, i.e. the taxing of the instruction fees. In particular what the appellant's instruction fees should have been pegged on. In his ruling, the judge had this to say on this issue:

***"The applicant did not instruct Mr. Kipkorir to take on the whole estate of the deceased and act on its behalf. It was submitted and it was not disputed that M/s Miller & Co. Advocate was the one acting for the whole estate. The applicant's entitlement was limited to a fraction of Ksh.10m only as per the Will which she put at Ksh.2m. In that regard that was the subject matter for which instructions were given and a fee ought to have been limited to that. Instead the taxing officer took the value of the whole***

***estate as the basis of instruction fee. That was an error. It was further in error that he awarded a grand sum of Ksh.34,610,555/- to the advocate unjustifiably, and in excess of Ksh.18m allegedly paid to Mr. Miller who was acting for the entire estate."***

**13.** I concur with the judge to the extent that the appellant's instructions did not cover the entire estate but was limited to pursuing the 1st respondent's entitlement in the estate. In the first place, the appellant's instructions were to lodge a citation to propound a document as a Will. This, the appellant did by preparing and filing the citation on 17th October, 2005. That citation succeeded in its purpose to the extent that it led to the executors of the estate of **Jackson Kamau Chege** (deceased), filing a petition for probate of the written Will of the deceased, in which the 1st respondent was named as a dependant. The appellant continued to act for the 1st respondent and filed an answer to the petition, and even a petition by way of cross application for a grant. This means that apart from the instructions to propound a document as a Will, the appellant had instructions to contest the petition for grant of probate filed by the executors of the deceased's Will and also petition by way of cross application for a grant of probate of the deceased's Will.

**14.** It is noteworthy that in his ruling, the taxing officer only referred to **Schedule X part (A)** of **clause 1(f)** of the Advocates Remuneration Order, which provides as follows:

***"(f) To lodge an objection to a grant, or a citation or other application or proceeding under any provision of the Law of Succession Act not otherwise provided for in the Schedule: such sum as the taxing officer shall consider reasonable, but not less than 4,500/-."***

This provision confirms that unlike instructions fees for applying for grant of probate, the instruction fees for lodging an objection to a grant or a citation, is not calculated based on the gross capital value of the estate, or the interest of the beneficiary, but has been left to the discretion of the taxing officer with a minimum figure set at Kshs.4,500/-. Nonetheless, it should be noted that this scale was only relevant in determining the fees for instructions to the appellant for lodging a citation for propounding a document as a Will.

**15.** Indeed, in calculating the full instruction fees of the appellant, there were different aspects which ought to have all been taken into account. Apart from the instruction fees for lodging a citation for propounding a document as a Will, there were instruction fees for objection to making of a grant, and also instruction fees for petition by way of cross application for a grant, as well as instructions for the various applications. All these ought to have been taken into account in arriving at the final figure for instruction fees. Therefore, the taxing officer erred in confining himself only to **Schedule X part (A)** of **clause 1(f)** of the Advocates Remuneration Order. In determining the reference, the High Court Judge also fell into the same error.

**16.** The advocate/client's costs for contested matters under the Law of Succession Act, is calculated under **Schedule X, clause 1(a**) of **Part (A) -Party & Party Costs** of the Advocates Remuneration Order, as read with **Schedule X clause (a)** of **Part (B) Advocates & Clients Costs,** of the Advocates Remuneration Order. For ease of reference I set out these provisions hereunder:

***"SCHEDULE X***
***PROBATE AND ADMINISTRATION***
***A-PARTY AND PARTY COSTS***

***1. INSTRUCTION FEES***

(a) ***To apply for grant of probate of written Will, or proof of oral Will, or letters of administration with or without Will annexed, the proceedings not being contested: where the gross capital value of property comprised in the grant –***

| *Exceeds* | *but does not exceed* |
|---|---|

| | | |
|---|---|---|
| ***Kshs*** | ***Kshs.*** | ***Kshs.*** |
| ***-*** | ***10,000*** | ***3,000*** |
| ***10,000*** | ***50,000*** | ***4,500*** |
| ***50,000*** | ***200,000*** | ***6,000*** |
| ***200,000*** | ***1,000,000*** | ***1.5 per cent of the value*** |
| ***1,000,000*** | ***-*** | ***1.5 per cent of the value on the first*** |

***Sh.1,000,000 thereof and three quarters per cent over Sh. 1,000,000"***

**……..**

***B- ADVOCATE AND CLIENT COSTS***

***In contested maters under the Law of Succession Act, the fees as between advocate and client shall be –***

(a) ***the fees prescribed in A above increased by one-half; or***

(b) ***the fees ordered by the court, increased by one-half; or***

(c) ***the fees agreed by the parties under paragraph 57 of this order increased by one-half as the case may be, such increase to include all proper attendances on the client and all necessary correspondence."***

The above scale underscores the fact that unlike the position in UK where the advocate's costs in probate matters are in the discretion of the Court, (**Halsbury's Laws of England, 4th edition Vol. 17 paragraph 785 and 916),** the costs herein are dependent on the gross capital value of property comprised in the grant calculated in accordance with the above scale. In my considered view the appellant's bill ought to have been taxed in accordance with the aforementioned scales, yet neither the taxing officer nor the judge in the reference referred to these scales.

**17.** The Judge properly directed his mind to the fact that the appellant's instructions did not concern the whole estate but was only limited to the 1st respondent's interest in the estate. In his ruling the learned judge found that the 1st respondent's interest was limited to only her share in the Kshs.10 million set aside for the trust fund. With respect, this was a misdirection. Clause 8 of the deceased's Will provided that a sum of **not less than** Ksh.10 million had been set aside for the trust fund. Therefore, the amount could be more. Secondly, in Clause 14 of the Will, the deceased categorically identifies the beneficiaries entitled under the Will as follows:

***"For the avoidance of doubt as which of my beneficiaries are entitled under this my will, I refer or mean the issue(s) of my late son Fredrick Chege Kamau, the issue of my late daughter Margaret Wambui Kamau and my son Ernest Kinyua Kamau for himself and their issues that will be alive on the day I die and those who may be born thereafter. Outside this line of issue, nobody shall be entitled to benefit from my property"***

**18.** This means that other than the trust fund, the 1st respondent who is an issue of the deceased's son **Ernest Kinyua Kamau**, is also a beneficiary to the residue of the deceased's estate. The gross capital value of the property comprised in the grant therefore becomes important as the 1st respondent had an interest in the entire estate. The application of **Schedule X, clause 1(a**) of **Part (A) -Party & Party Costs** of the Advocates Remuneration Order, as read with **Schedule X clause (a)** of **Part (B) Advocates & Clients Costs,** of the Advocates Remuneration Order, must be limited to the value of the 1st respondent's interest in the estate. However, that value can only be deduced from the gross value of the estate, and not just the trust fund.

**19.** Worthy of note is the fact that the appellant's bill of costs was apparently filed after the 1st

respondent's objection to the application for the grant, and the 1st respondent's petition by way of cross-petition for grant, and all pending applications in the succession cause, were withdrawn by consent, and it was further agreed by consent that the legal costs of the appellant be agreed upon or taxed. In my view, since the succession cause was settled by the consent order, the appellant was entitled to be paid on the full scale provided in the Advocates Remuneration Order for instruction fees using the figure determined as the 1st respondent's interest in the estate.

**20.** In arriving at the figure of Kshs. 70 million which the appellant claimed in the advocate/client's bill of costs, as instruction fees, the appellant based the instruction fees on the total value of the estate of the deceased which he estimated at Kshs.3 billion. This figure was based on an estimate of Kshs.4 billion given by the 1st respondent as her estimated value of the estate of the deceased. On the other extreme is the figure of Kshs.251 million given by the executors of the deceased's Will, in their affidavit sworn in support of the petition for grant of probate, as the estimated value of the estate. This was the figure which both the taxing officer and the judge accepted as the value of the estate.

**21.** The appellant recognized the paucity of evidence regarding the value of the estate of the deceased, hence the prayer that this court should re-appraise the evidence and complete record of **HC. Succ. Cause No. 2855 of 2005 'OS',** and call for additional evidence, so as to arrive at the true value of the estate, in order to arrive at a just decision. The power to re-appraise evidence and to take additional evidence is given to this Court under **Rule 29** of the Court of Appeal Rules. Under **Rule 29(1)** the power is limited to appeals from a decision of superior court acting in the exercise of its original jurisdiction.

**22.** In his ruling, the learned Judge correctly recognized the need for the taxing officer to go beyond determining the gross value of the deceased's estate and assess the value of the 1st respondent's interest in the estate. With due respect, however, I find that the Judge misdirected himself by limiting the interest of the 1st respondent to the trust fund. From the Will of the deceased which was exhibited, it is evident that the interest of the 1st respondent in the estate was in actual fact the trust fund plus a 1/6th of the net residue of the estate. Given the inconclusive evidence regarding the value of the estate, and the fact that the 1st respondent's interest can only be deduced from the value of the estate, neither the taxing officer, nor the High Court Judge can be faulted for adopting the lower estimate of Kshs. 251 million as the value of the deceased's estate.

**23.** Taking the gross value of the deceased's estate at Kshs. 251 million as accepted by the Judge and the taxing officer, the appellant's instruction fees for preparing and lodging the objection to the grant and filing the cross-appeal ought to have been based on the 1st respondent's interest in the estate, i.e. 1/6th of Kshs. 251 million, which is 41.8 million. This is the gross value of the 1st respondent's interest in the estate and for the purposes of the instruction fees, the subject matter. In light of that value of the subject matter, the sum of Kshs. 20 million allowed by the taxing officer as the appellant's instruction fees being about 50% of the 1st respondent's interest in the estate was totally excessive, unconscionable and unjustified. Moreover, the figure of Kshs. 20 million was arrived at by the taxing officer by erroneously basing the instruction fees on the gross value of the estate instead of gross value of the respondent's interest in the deceased's estate. This was an error of principle as the taxing officer failed to take into account a material consideration which was the value of the 1st respondent's interest in the deceased's estate. I find that although the High Court Judge was correct in finding that the taxing officer erred in his decision regarding the instruction fees, the Judge erred in failing to give proper guidance with regard to the principle to be applied in determining the value of the subject matter for the purposes of determining the instruction fees.

**24.** For the reasons that I have given, I come to the conclusion that the taxing officer erred in his decision regarding the instruction fees and the order allowing the reference was proper and to that extent, I would uphold the appeal. Having given the appropriate guidance in regard to this taxation and in an effort to bring this matter to a speedy conclusion, I would set aside the order made by the High Court, for the taxation of the appellant's advocate/client's bill to proceed before another taxing officer. I would order that this matter be remitted back to the High Court for the taxation of the bill to be brought to

finality by the High Court by re-hearing of the reference regarding the instruction fees only.

**Dated and delivered at Nairobi this 9th day November, 2012.**

***H. M. OKWENGU***

**……**

***JUDGE OF APPEAL***

**JUDGMENT OF GITHINJI, JA.**

I have had the advantage of reading the Judgment of Okwengu, JA in draft. I agree with the Judgment fully and with the proposed order. I have nothing useful to add.

Accordingly the appeal is allowed, the Orders of the High Court dated 6th May, 2010 allowing the Reference with costs and remitting the Advocate/Client bill of costs to another Taxing Officer is set aside and in lieu thereof we substitute an Order remitting the matter to the High Court for rehearing of the Reference regarding the instructions fees only before another Judge. The costs of this appeal shall be costs in the Reference.

This Judgment has been delivered pursuant to ***Rule 32(3)*** of the Court of Appeal Rules, as Nyamu, JA. Is not currently performing judicial functions.

**Dated and delivered at Nairobi this 9th day of November, 2012.**

**E. M. GITHINJI**

**…….....**
**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**