



**Katisya & another v Director General, National Environment
Management Authority & another (Tribunal Appeal 100 of 2012)
[2023] KENET 207 (KLR) (Environment and Land) (18 April 2023) (Ruling)**

Neutral citation: [2023] KENET 207 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
ENVIRONMENT AND LAND
TRIBUNAL APPEAL 100 OF 2012**

**MOHAMED S BALALA, CHAIR, BAHATI MWAMUYE, WAITHAKA
NGARUIYA, KARIUKI MUIGUA & WINNIE Tsuma, MEMBERS**

APRIL 18, 2023

BETWEEN

ELIZABETH KATISYA 1ST APPELLANT

CAROLINE KATISYA 2ND APPELLANT

AND

**DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST RESPONDENT**

CARNEVAL VILLAGE APARTMENTS 2ND RESPONDENT

RULING

1. The law firm of Kithi & Company Advocates (the Advocates) filed an Advocate-Client Bill of Costs (the Bill of Costs/ the Bill) dated 28th June 2022 against the 2nd Respondent (the Client) who they acted for in the above cited Appeal. The Tribunal heard the Appeal filed by the Appellants in 2012 and finally a judgment in the matter was rendered on 8th June 2018.
2. The Appellants filed the Appeal on 25th September 2012 in which they were challenging the issuance of an Environmental Impact Assessment (EIA) Licence dated 2nd August 2012 for the construction of a 5 storey residential block for Carnival Village on LR No MN/1/7664 along Tudor Creek in Mombasa. The Tribunal heard the matter, conducted a site visit to the disputed project site and finally delivered its judgment on 8th June 2019.
3. In their Bill of Costs in consideration herein, the Advocates claim that the value of the subject matter is Kshs 60,000,000.00 thus their instruction fees is Kshs 10,000,000.00 based on the [Advocates](#)



Remuneration (Amended) Order, 2014 (the ARO). The Bill itemizes the costs to a total of Kshs 10,215,510.00 increased by half at Kshs 5,107,755.00, VAT at 16% being Kshs 2,451,722.40, further disbursements being emails, filing, telephone and sundries at Kshs 150,000.00 all summed up to a total of Kshs 17, 924,987.40.

4. The Client opposes the said Bill wholesomely and argues that the applicable ARO for the assessment of the costs payable to the advocates should be the ARO of 2006 as the suit was filed in 2012, therefore the instructions were given before the enactment of the ARO 2014.
5. In further opposition to the Bill of Costs, the Client argues that the Appeal does not disclose the purported value of the subject matter, there is no evidence of the value of the subject matter and the Appeal was purely for orders of cancellation of the EIA licence. The Client submits that the ARO 2014 should only be used for analogy and proceeds to state that the applicable provisions of the ARO are paragraphs 3 and 9 of Schedule 11 of the ARO, 2014 which provide for instructions fees of not less than Kshs 35,280.00 subject to the taxing master's discretion and taking into account relevant factors where the value is ascertainable.
6. Further to the above, the Client submits that the Appeal was not complex at all and no novel issue or difficulty was raised, the prosecution of the matter was expedient thus the Bill is excessive, unreasonable and unconscionable thus the substance of the Appeal warrants the award of the minimum fees as per the ARO.
7. The Client sought refuge in the judgment of the court in Joreth Limited v Kigano & Associates [2002] eKLR where the court held that

“We would at this stage point out that the value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement(if such be the case) but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, among other matters, the nature and importance of the cause or matter the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all relevant circumstances.”

8. The Client also relied on Republic v Minister of Agriculture & 2 others ex parte Samuel Muchiri W'Njuguna & 6 others [2006] eKLR that, “the taxation of Advocates instructions fees is to seek no more and no less than reasonable compensation for professional work done and to avoid an aspect of unjust enrichment upon a party.”
9. On drawing of documents and perusal of documents, the Client submits that the same should be taxed off and considered to be part of the instructions fees under Schedule 11 paragraph 5.
10. On making copies as well as disbursements, the Client submits that the same should be accompanied by receipts, failing which the items should be taxed off accordingly.
11. As for the necessary attendances at the registry, Schedule 11 paragraph 10(b) should be taxed at Kshs 500.00 and not Kshs 1,000.00 while service of documents is not provided for under Schedule 11 thus it should be disregarded in its entirety.
12. Lastly, the attendance for Mentions and Rulings should be taxed at Kshs 500.00 and not Kshs 4,000.00 as prayed by the Advocate while hearing of Applications and main Appeal should be taxed at Kshs 2,100.00 and Kshs 4,000.00 respectively.



13. On their part, the Advocates filed their submissions and reiterated that they are entitled to their fees and cited Civil Appeal No 280 of 2015 [*Desai Sarvia & Pallan Advocates v Tausi Assurance Company Limited*](#) [2017] eKLR in which the court stated that, “It is trite that an advocate is entitled to his fees once he is instructed, retained or employed by his client.”
14. The Advocates further sought to justify their fees on the grounds that their fees are premised on the nature and importance of the matter, the general conduct of the matter, the substantial paperwork and resources expended on behalf of the client to protect his interests. He sought solace in [*Onyango, Kibet & Ohaga Advocates v Adopt a Light Limited*](#), Milimani HC Misc No 729 of 2006 (Unreported) cited in [*Orion East Africa Limited v Permanent Secretary Ministry of Agriculture & another*](#) [2013] eKLR in which the court stated,

“The law gives the taxing master some leeway but like all discretions it must be exercised judicially and in reliance to the material presented before court. The taxing master must consider the case and labour required in the matter, the nature or importance of the matter. More so the amount or value of the subject matter involved, the interest of the client in sustaining or losing the benefit and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject..”
15. The Advocates submit that the Appeal took 6 years to complete which was a long time in which energy and expenses were expended in handling the suit thus the Tribunal was urged to exercise discretion and award the costs as prayed.
16. As for the drawing of documents and court attendances, the Advocates state that the same are drawn in accordance with Schedule 11 Part B of the [*ARO*](#), 2014 and should not be disturbed.
17. On disbursements, the Advocates submit that the amounts claimed are verifiable from the duplicate copies of receipts in the Tribunal’s file while the others are ordinary expenses expected of an advocate in the course of executing a client’s instructions.

Analysis

18. The Tribunal has considered the Bill of Costs filed by the Advocates and the submissions by both parties in the matter and finds it absolutely necessary to first set out the ARO that ought to be considered for the assessment of the Bill before the Tribunal.
19. The Advocate has based the instruction fees on the [*ARO*](#), 2014 while the Client submits that it should be based on ARO 2006 but at the same time states that reference should also be made to [*ARO*](#), 2014 by way of analogy. The position taken by the Client is rather confusing.
20. The Appeal for which the Bill of Costs relates to was filed on 21st September 2012 and the suit proceeded for six years until a judgment was delivered on 8th June 2018. The [*ARO*](#) 2014 was published in the Kenya Gazette vide a Special Issue on 11th April 2014 but the ARO that preceded it was ARO 2006.
21. The Advocate filed a response to the Notice of Appeal on 15th March 2013 thus instructions must have been issued before the said response was filed. It follows that the instructions fees can only be assessed based on the Remuneration Order that was applicable at the time of issuing the instructions, which was the Advocates Remuneration Order, 2006. The other items that involved the matter after 2014 can be assessed in accordance with the [*ARO*](#) 2014.



22. The fees assessed for appearance in Tribunals is not expressly provided in ARO 2006 thus the parties fall back to Schedule V of the said remuneration order for assessment of such fees. Part of the considerations while assessing the fees payable as instructions to the advocates is described in the said schedule as:
- “Such fee for instructions as, having regard to the care and labour required the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances of the case, may be fair and reasonable, but so that due allowances shall be given in the instruction fee for other charges raised under this schedule.”
23. The position of the [ARO](#) has been upheld by the courts in assessment of instructions on numerous occasions. See [Joreth Limited v Kigano & Associates](#) [2002] eKLR
- In *Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (No 3) [1972] EA 162 the Court outlined these principles as follows;
- (a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,
 - (b) that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,
 - (c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession and
 - (d) so far as practicable there should be consistency in the award made and
 - (e) The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.
24. The Appeal before the Tribunal was filed in 2012 and proceeded until 2018 when judgment was rendered. The hearings took place over a long period of time and included a site visit of the disputed project.
25. The Tribunal has considered the issues raised in the Appeal, the interest in the matter, the expertise required in defending the matter, the complexity of the environmental issues raised including reclamation of land to increase the land area and destruction of marine life. We do find that the Appeal raised novel matters of law that required skill and research for proper representation of the Client by its advocates.
26. The Tribunal has also perused the judgment and established that the value of the subject matter was not disclosed in the arguments before court as the dispute was about the cancellation of the EIA Licence and not damages or compensation.
27. The above notwithstanding, the instructions fees of Kshs 10,000,000.00 appear to be excessive for the nature of the matter that was before the Tribunal but at the same time, we find the sum of Kshs 35,500.00 as proposed by the Client to be ridiculously low and not commensurate to the work done by the advocates in the suit. Award of such a low figure to the advocate would not only impoverish the advocate but would also act as a barrier from achieving quality appearance at the Tribunal and attracting new entrants into the legal profession. In the circumstances, the Tribunal does tax off the instructions fees in the Bill of costs to a sum of Kshs 3,000,000.00.



28. Items 2-53 of the Bill of Costs are claimed under Schedule 11 of the [ARO](#), 2014 instead of ARO 2006 and they are taxed off and deemed to be part of the instruction fees to the Advocate. Items 54 onwards are for the period commencing 26th August 2014 at which time the [ARO](#) 2014 had come to effect.
29. Sections 5 and 6 of Schedule 11 provides that,
- “5. The instruction fee shall include taking instructions, drawing, perusals, engrossing documents and filing the same.
6. Binding and Photostat copies; actual costs incurred supported by vouchers of all necessary photocopying will be allowed to the successful party.”
30. Items 55, 56, 57, 58, 60, 62, 63, 64, 65, 66, 67, 68, 70, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 87, 88, 89, 91, 92, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 113, 115, 116, 117, 118, 120, 121, 122, 124, 127, 130, 131, 132, 134, 135, 136, 137, 138, 140, 141, 142, 144, 146, 147, 148 and 151 constitute drawing of documents, service, perusal, making copies et al. Sections 5 and 6 of Schedule 11 of the [ARO](#) 2014 provides that the actions covered in the above listed items are either provided under the instructions fees or must be supported by vouchers. There are no vouchers to support the disbursements hence all the items cited in this paragraph are taxed off.
31. Section 10 (a & b) of Schedule 11 of the [ARO](#), 2014 provides that attendance at the registry or the Tribunal for any other purpose apart from conducting a hearing, shall attract costs of Kshs 500.00 while subsection (c) thereof provides that fees for hearing for each day apart from the first day shall be Kshs 4,000.00 and each part of the day after the first day shall be charged Kshs 2,100.00.
32. Items 59, 69, 123, 125, 126, 128, 139 and 143 are attendances at the registry and the Tribunal for other purposes apart from hearing and they are accordingly taxed off to Kshs 500.00 per attendance thus a total of Kshs 4,000.00
33. Items 54, 61, 72, 83, 86, 90, 93, 96, 111, 114, 119, 129 and 133 are attendances for Mention for various reasons and the same are assessed at Kshs 2,100.00 for each attendance thus a total of Kshs 27,300.00
34. Items 71 and 149 are attendances for hearings and the same shall be taxed at Kshs 4,100.00 per attendance hence the sum of Kshs 8,200.00.
35. This being a Bill between Advocate and Client, the total amount payable requires to be increased by 50% and VAT is also chargeable at the applicable rate which is 16%.
36. The upshot of the above is that the party Advocate's Bill of Costs dated 28th June 2022 is taxed off and assessed as follows:
- a. Instruction fees – Kshs 3,000,000.00
- b. Attendances – Kshs 27,300.00 + Kshs 8,200.00
- Sub Total Kshs 3,035,500.00
- Raised by 50% - Kshs 1,517,750.00
- Total - Kshs 4,553,250.00
- Plus VAT @ 16% - Kshs 728, 520.00
- Grand Total = Kshs 5, 281, 770.00

DATED AND DELIVERED AT NAIROBI, THIS 18TH DAY OF APRIL 2023.



MOHAMMED BALALACHAIRPERSON
BAHATI MWAMUYE.....MEMBER
WATHAKA NGARUIYA.....MEMBER
KARIUKI MUIGUA.....MEMBER
WINNIE TSUMA.....MEMBER

