



**Round Square Properties Limited v National Environment Management Authority & another (Appeal 21 of 2022) [2023] KENET 1255 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KENET 1255 (KLR)

**REPUBLIC OF KENYA**  
**IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI**  
**APPEAL 21 OF 2022**  
**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI**  
**MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**  
**NOVEMBER 9, 2023**

**BETWEEN**

**ROUND SQUARE PROPERTIES LIMITED ..... APPELLANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>**  
**RESPONDENT**

**WINCHESTER VENTURES KENYA CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Tribunal on 20<sup>th</sup> July 2022 dismissed the Intended Appellant/Applicant's Notice of Motion application dated 23<sup>rd</sup> June 2022 with costs to the Intended 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent.
2. Pursuant to the Tribunal's order, the 2<sup>nd</sup> Respondent filed their Bill of Costs dated 3<sup>rd</sup> March 2023, wherein they seek costs in the sum of Kshs. 62,425,905.038. The intended Appellant/Applicant opposed the Bill of Costs by way of a Grounds of Opposition dated 5<sup>th</sup> April 2023 and a Replying Affidavit dated 18<sup>th</sup> April 2023.
3. Vide the directions of this Tribunal, parties canvassed the Bill of Costs by way of written submissions. Whereas the intended 2<sup>nd</sup> Respondent's submissions are dated 5<sup>th</sup> May 2023, the intended Appellant/Applicant's submissions are dated 29<sup>th</sup> May 2023.

**Determination**

4. The Tribunal makes the following determination having considered the intended 2<sup>nd</sup> Respondent's Bill of Costs dated 3<sup>rd</sup> March 2023, responses thereto and the submissions filed by the parties.



5. This Tribunal is vested with jurisdiction to make an order for costs pursuant to Section 129 (3) (c) of EMCA and Rule 39 of the National Environment Tribunal Procedure Rules, 2003. The legal framework for the assessment of costs before Tribunals, including the National Environment Tribunal, is provided for under Schedule 11 of the Advocates (Remuneration) (Amendment) Order, 2014.

### **Instruction Fees**

6. Where the value of the subject matter can be ascertained from the pleadings filed, Party and Party costs are computed as provided under Schedule 11 (8). Where the value of the subject matter cannot be ascertained, the scale is provided for under Schedule 11(9).
7. In *Joreth Limited v Kigano & Associates* [2002] eKLR, the court held that the value of the subject matter of a suit for the 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, amongst 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 other relevant circumstances.
8. The intended 2<sup>nd</sup> Respondent seeks to be awarded a sum of Kshs. 62,232,720.038/= as instruction fees. They contend that the value of the subject matter of the appeal is Kshs. 1,599,837,318/= based on a valuation of the construction as per the Quantity Surveyor, William Otieno Amolo. The said valuation, however, does not form part of the record placed before this Tribunal.
9. We have poured over the pleadings filed by parties herein and sighted a Certificate of Compliance filed as an Annexure to the 2<sup>nd</sup> Respondent's Replying Affidavit sworn by Miao Min on 27<sup>th</sup> June 2022. In the said document, whose contents are not controverted by the Appellant, the cost of the project is indicated as Kshs. 1,599,837,318/=. We, therefore, find that the value of the subject matter can be ascertained in the present case.
10. The High Court in *Satnam Singh Bahra vs Joseph Mungai Gikonyo T/A Garam Investments & Another* [2012] eKLR warned that the decision of a taxing officer risked being set aside if it wasn't based on principle. The principle that commends itself to this Tribunal is to be found in Schedule 11(4) which provides that the Lower Scale shall be applied in cases where an appeal is determined preliminarily on a question of law. The instant appeal was dismissed preliminarily on a question of law vide the Ruling delivered on 20<sup>th</sup> July 2022.
11. Applying the lower scale to the computation made by the 2<sup>nd</sup> Respondent, the instruction fees are taxed at Kshs. 31,116,360.019. The sum of Kshs. 31,116,360.019 is taxed off.
12. Can the award be deemed manifestly excessive in the present circumstances? Can it fit within the admonition of the High Court in *First American Bank of Kenya versus Shah & Others Nairobi (Milimani)* HCCC No. 2255 of 2000 [2002] 1 EA 64 that 'it is important that advocates should be well motivated, but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.' The parties before the Tribunal are property developers pursuing interests that we find do not fall within the meaning of public interest. Strictly speaking, the litigants before us cannot fall within the meaning of 'poor litigants.'
13. Importantly, can we exercise discretion and disturb the award of Kshs. 31,116,360.019 as instruction fees? Doing so runs the risk of creating an inconsistent body of precedent that lacks in principle contrary to the counsel offered by the High Court in *First American Bank of Kenya versus Shah & Others Nairobi (Milimani)* HCCC No. 2255 of 2000 [2002] 1 EA 64.



14. Discretion can be an unruly horse, in this matter, as a Tribunal, we are careful not to astride it, as we never know where it will carry us. In our considered view, where the pecuniary value of the subject matter of a dispute has been established, all we can do as a Tribunal is enforce the Schedule 11(8) of the Advocates (Remuneration) (Amendment) Order, 2014.
15. As we pen down on this limb of the 2<sup>nd</sup> Respondent's Bill of Costs, we are mindful to add that an award of costs will lose its meaning in the event this Tribunal were to proceed and award nominal costs at the stage of taxation. The principle behind taxation, which must not be lost on us, remains "a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case; the general level of remuneration of Advocates must be such as to attract recruits to the profession."<sup>1</sup>

### **Drawings, Perusals And Photocopies**

16. Schedule 11, Paragraph 5 of the Advocates Remuneration Order provides that instruction fees shall include taking instructions, drawing, perusals, engrossing documents and filing the same. Items 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 21 are disallowed in their entirety since they are covered under the instruction fees.

### **Attendances**

17. Items 18 and 19 seek costs for attendances before the Tribunal for a mention and the filing of a Preliminary Objection, Submissions and Replying Affidavit. Schedule 11 paragraph 10 (a) of the Remuneration Order sets out a sum of Kshs.500 for any necessary attendance to the Tribunal other than at the hearing. Therefore, items 18 and 19 of the Bill of Costs are taxed at Kshs.500 each to a total sum of Kshs. 1,000.
18. Item 20 seeks costs for attendance before the Tribunal for a hearing. Schedule 11, paragraph 10 (c) of the Remuneration Order sets out a sum of Kshs. 4000 for attendance at the hearing. Therefore, item 20 of the Bill of Costs is taxed at Kshs. 4,000.

### **Order**

19. The Tribunal makes the following orders:  
The Bill of Costs dated 3<sup>rd</sup> March 2023 is taxed as follows:
  - i. Instruction Fees- Kshs. 31,116,360.019/=.
  - ii. Costs for attendance before the Tribunal- Kshs. 5,000/=.
 Total Sum Kshs. 31,116,360,019/=.

DATED AND DELIVERED AT NAIROBI, THIS 9<sup>TH</sup> DAY OF NOVEMBER 2023

**EMMANUEL MUMIA.....CHAIRMAN**

**WINNIE Tsuma.....VICE-CHAIR**

**KARIUKI MUIGUA.....MEMBER**

**DUNCAN KURIA.....MEMBER**

**RONALD ALLAMANO.....MEMBER**

<sup>1</sup> *First American Bank of Kenya vs. Shah & Others Nairobi (Milimant) HCCC No. 2255 of 2000 [2002] 1 EA 64*

