



Hassan & 79 others v Director General, National Environment Management Authority & another (Tribunal Appeal 144 of 2015) [2023] KENET 200 (KLR) (Civ) (18 April 2023) (Ruling)

Neutral citation: [2023] KENET 200 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
CIVIL**

TRIBUNAL APPEAL 144 OF 2015

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

APRIL 18, 2023

BETWEEN

HASSAN NOOR HASSAN & 79 OTHERS APPELLANT

AND

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

WASTE AFRICA LIMITED 2ND RESPONDENT

RULING

1. The matter before the Tribunal for Ruling is the Appellants' Party and Party Bill of Costs dated 21st December 2022 and filed on 26th January 2023 in which the total amount claimed by the Appellants is KShs. 15,201,460.00. The Bill arises from a judgment delivered by the Tribunal in favour of the Appellants on 5th December 2019 in which the Appellants were awarded costs to be borne by the 2nd Respondent.
2. The Tribunal ordered that the Bill of Costs be disposed of by way of written submissions which were filed by the Appellants and the 2nd Respondent.

The Appellants' Case

3. The Appellants' claim for instruction fees of KShs. 15,000,000.00 on the basis that they filed an Appeal at the Tribunal on 19th November 2012 in which they sought for cancellation of EIA Licence number 0014188 issued to the 2nd Respondent on 19th November 2012 and renewed on 10th January 2014.



4. The Appellants had also sought that orders do issue to restrain the 2nd Respondent from dumping asbestos on L.R No Laikipia/Nanyuki South, Timau Block 2/185, the decommissioning of the asbestos land fill medical investigations be conducted on the Appellants living in the vicinity of the disputed project site to investigate whether they are suffering from any illness associated with asbestos among other orders.
5. In their submissions, the Appellants submit that the taxation of the Bill of Costs in this matter should proceed under Schedule 11 paragraphs 3 and 9 of the Advocates Remuneration Order (the Remuneration Order) as the value of the subject matter in the Appeal is not known.
6. The Appellants rely on the case of 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.”

7. The Appellants stated that the Appeal was filed by 80 Appellants on behalf of 312 residents of Ethi Sub County in Laikipia County and relate to disposal of asbestos which are classified as hazardous materials which can cause cancer and asbestosis. They argue that the Appeal was based on the right to Clean and Healthy Environment as set out under Article 42 of the Constitution of Kenya and Section 3 of the Environmental Management and Conservation Act (EMCA), the failure to conduct public participation as provided under Articles 10 and 69 of the Constitution of Kenya.
8. According to the Appellants, the Appeal was unique as there are very few cases involving asbestos, was complex since it involved 312 Appellants who were represented by 80 Appellants, it involved novel principles of law on the application of the precautionary principle, effects of asbestos on ground water, it was important as it set the precedent on how asbestos ought to be disposed, took a long time to hear and determine the same as it had bulky documents and was filed on 2nd March 2015, a site visit was conducted by the Tribunal on 28th October 2015, the evidence of 8 witnesses was called over a period of 6 full days and finally judgment was delivered on 5th December 2019.
9. Finally on the instructions fees, the Appellants relied on the case of Del Monte Kenya Limited v Kenya National Chambers of Commerce and Industry (KNCCI) Murang’a Chapter & 2 Others [2021] eKLR in which the court stated that,

“Where the value of the subject matter is unknown or cannot be ascertained then the Taxing Officer is expressly permitted in exercising his or her discretion to take into account any such matters as he or she may consider to assess instructions fees”

10. As for item number 2 to 112 of the Bill of Costs, being costs of perusal, drawing, correspondence, court attendances, disbursements and expenses, the Appellants state that they are all based on Schedule 11 of the Advocates Remuneration Order and ought to be allowed as prayed.



The 2nd Respondents Case

11. The 2nd Respondent opposed the Bill of Costs vide its submissions dated 6th March 2023 and filed on 9th March 2023. In its submissions, the 2nd Respondent states that the taxation ought to proceed under Schedule 11 of the Advocates Remuneration Order and proceeds to cite paragraph 9 thereof and laid further reliance on the holding in *Joreth Limited v Kigano & Associates* (2002) eKLR (supra). In further submission, the 2nd Respondent states that the value of the subject matter of the property cannot be ascertained from the pleadings or the judgment thus the award would only depend on the discretion of the taxing master.
12. On the nature and importance of the matter, the 2nd Respondent submitted that the matter was an Appeal based on a complaint that the 2nd Respondents were ‘dumping waste’ in violation of the law yet the 1st Respondent had refused to act on the complaint and had also failed to revoke the license of the 2nd Respondent. According to the 2nd Respondent, the costs ought to have been pursued against the 1st Respondent.
13. The 2nd Respondent relied on the case of *Jubilee Party v Alfred Ndemo Ongera & 4 others* [2018] eKLR,
 - “ 17. When taxing the Bill of Costs in the present applications, the Taxing Officer in the ruling dated 24th May 2018 did correctly apply Schedule 11A, and noted that the subject matter therein was not certain. The Taxing Officer also considered the principles as regards taxation of costs outlined in *Republic v Ministry of Agriculture & 2 Others Ex parte Muchiri W’Njuguna & 6 Others*, (supra) and *Joreth Ltd vs Kigano & Associates* (supra), as well as the provisions of paragraph 9 of Schedule 11A which provides for a minimum instruction fee of Kshs 35, 280/=.
 18. In addition, after perusing the relevant Court file, the Taxing Officer ruled that she had considered the importance of the matter to the parties, the documents prepared or perused, the period of time the matter was in Court and the amount of research done in the matter. She also noted that the matter was not classified as complex or novel in the judgment given by the PPDT, and in light of all these considerations taxed item 3 on instruction fees as Kshs 622, 646/=. I also note from the ruling that a considerable number of items were taxed off completely from the Bill of Costs, as being taken care of in the instruction fees.
 19. I therefore find that the taxing master did take into account relevant considerations and gave reasons why she exercised her discretion to tax off the item on professional fees from Kshs 5,000,000/= to Kshs 622,646/=. Further, the instruction fee awarded was not excessive in the circumstances.”
13. The 2nd Respondent further submitted that the filing voluminous documents as well as making submissions before the Tribunal does not translate into the complexity of a matter and in any event, the advocate should place before the court, evidence to show the hours that he took to peruse or prepare on the instructions from the 80 Appellants. In further opposition to the Bill of Costs, the 2nd Respondent submitted that there was no complexity in the matter as it only required perusal of the Environmental Management and Co-ordination (Waste Management) Regulations 2006 and the National Guidelines of Safe Management and Disposal of Asbestos which according to the 2nd Respondent spoke to the dangers of asbestos and their management in the country.



14. According to the 2nd Respondent, costs are awarded to the successful party in order to indemnify them for the expense of being taken through litigation. To achieve this, a balance must be struck to afford the innocent party adequate indemnification but within reasonable grounds for necessary work properly done. Further to this, the 2nd Respondent submitted that the costs should only be for indemnification for the party and not unjust enrichment or to punish an unsuccessful party in an environmental suit filed in public interest. In conclusion, the Bill of Costs ought to be taxed off and an award of KShs. 200,000.00 be paid to the Appellants.
15. The 2nd Respondent relied on the authority of *University of Nairobi & another v Moses* (Civil Appeal 119 of 2020) [2022] KECA 45 (KLR) (4 February 2022) (Judgment) in which the court held that,
- “Turning to the applicable guidelines that the Taxing Master who rendered the impugned ruling was obligated in law to take into to consideration, the Judge adopted fully the guidelines enunciated by Ojwang. J. (as he then was) in *Republic vs. Ministry of Agriculture & 20 Others Ex parte Muchiri W’Njuguna & 6 Others* [2006] eKLR as approved by Odunga, J. in the case of *Nyangito & Co. Advocates vs. Doinyo Lessos Creameries Limited* [supra]. In summary, these may be rephrased that in purely public law proceedings, the consideration to be borne in mind by the Taxing Master is that the exercise of that mandate should be entirely free from any private business arrangements or income generated by the substratum of the proceedings; the advocate with the bill should seek no more than reasonable compensation for professional work done, the Taxing Master has to avoid any prospect of any semblance of an unjust enrichment for any particular party or parties, comparability should be applied in the assessment of advocate’s instruction fees, objectivity should be sought when applying loose textures criteria in the taxation of costs, where complexity of the proceedings is a relevant factor, the specific elements of the same should be judged on the basis of the express or implied recognition and mode of treatment by the trial Judge where factors of the nature of the responsibility borne by an advocate and novelty of matters are taken into account, its nature is to be clarified; where account is taken of time spent, research done, skill deployed by counsel, the pertinent details are to be set out in summarized form and taken into account; and lastly, the Taxing Master must first recognize the basic instruction fee payable before venturing into consideration as to whether to reduce or increase the instruction fees.”
16. As for the other elements in the Bill of Costs, the 2nd Respondent submitted that the items on perusal and drawing of the Bill of Costs, the same should be taxed off and included in the instructions fees. The items on correspondence and site visit are not provided in the Remuneration Order and should be taxed off, the items on expenses and disbursements should be equally taxed off for failure to include the vouchers while the attendances should be assessed in accordance with the rates provided in Schedule 11 of the Remuneration Order.

Analysis

17. We have considered the submissions filed by the parties in the dispute as well as the authorities annexed thereof and the applicable law in taxation of Bill of Costs before this Tribunal.
18. It is common ground that the appeal filed before the Tribunal did not have a value for the subject matter. It is also admitted by both parties that taxation of the current Bill of Costs should be done in accordance with the provisions of Schedule 11 of the Remuneration Order.



19. Section 3 of Schedule 11 of the Remuneration Order provides that,
- “ 3. When taxing the costs consideration shall be given by the taxing officer to either the value of the subject-matter or, where the value of the subject matter cannot be determined, to the following criteria.
- (a) the nature and importance of the proceedings;
 - (b) the complexity of the matter and the difficulty or novelty of the question raised;
 - (c) the amount or value of the subject matter,
 - (d) the time expended by the advocate(s),
 - (e) The number and importance of the documents prepared or perused, without regard to length.”
20. The Appeal before the Tribunal was in relation to an EIA Licence granted to the 2nd Respondent for the disposal of asbestos products and did not have any value on the subject matter. In an event where the value of the subject matter cannot be determined from the pleadings or the judgment thereof, the Tribunal shall be guided by section 3 of Schedule 11 of the Remuneration Order based on the criteria provided in the said section while observing the discretion provided in section 9 of the same schedule.
21. Section 9 of Schedule 11 provides as follows:
- “Where the value of the subject matter cannot be ascertained such costs as the court in its discretion but not less than Kshs. 35,280 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) such figure being left to the discretion of the court.”
22. This position has been amplified by the courts in many decisions including the now classic case of *Joreth Limited v Kigano & Associates* [2002] eKLR (supra).
23. The Appellant has taken a position that the dispute before the Tribunal was complex, constituted novel points of law, it was important, involved many Appellants and numerous documents and took a considerable long time to conclude. On the other hand, the 2nd Respondent has sought to persuade the Tribunal that the Appeal raised ordinary matters which could be easily deciphered from statute and a plain reading of *the Constitution* and application of the law.
24. We have perused the pleadings and judgment in the matter and it is clear to the Tribunal that the issues raised in the Appeal were not the ordinary dispute about ‘dumping waste’ as the 2nd Respondent has described the dispute. The waste in contention is not the ordinary solid waste but rather, it is hazardous waste whose disposal is specially set out under the National Guidelines of Safe Management and Disposal of Asbestos. At paragraph 17 of the judgment of the Appeal, asbestos is defined as “a hazardous material with extremely fine fibres and can remain suspended in air for hours. If handled without caution, it may cause serious chronic health problems such as asbestosis, lung cancer and mesothelioma. The diseases cause long term serious social, economic and emotional problems.”
25. The Appellants were required to prove that the disposal of the asbestos by the 2nd Respondent was not being done in accordance with the applicable regulations and guidelines thus exposing the human population in the neighbourhood to health dangers and the related social economic problems.



26. A wholesome perusal of the task that was required to prove the allegations in the Appeal leads us to the conclusion that the Appeal was complex in nature, raised novel points of law which needed to be proved cogently for the Appellants to succeed in their claim. We have also noted that the matter was important as it touched on the health of the human population in the neighbourhood for which the parties called the evidence of 8 witnesses including expert witnesses for the disposal of the Appeal which took 4 years to conclude.
27. In *Republic vs The Minister for Agriculture ex parte Samuel Muchiri W/Njuguna* (2006) eKLR the court held that,
- “The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.”
28. Having come to the inescapable conclusion that the Appeal was complex in nature and raised novel points of law which required considerable research and industry by the advocates prosecuting the same, the Tribunal finds that it is only fair to indemnify the Appellants from the costs that they may have incurred to prosecute the Appeal. In so doing, the Tribunal is guided by the principles set out by the court in *In Premchand Raichand Ltd v Quarry Services of East Africa Ltd* (No. 3) [1972] EA 162 where it espoused the following guidelines:
- “(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.”
29. The upshot of the above is that Tribunal finds that although the Appeal required considerable industry from the advocate for the successful prosecution of the same, the instructions fees of KShs. 15,000,000.00 as claimed in the Bill of Costs is excessive in the circumstances but at the same time, the figure of KShs. 200,000.00 as proposed by the 2nd Respondent is inordinately low and not commensurate to the work done in prosecution of the Appeal. In conclusion, the instructions fees shall be taxed off to KShs. 5,000,000.00.
30. As for the other items contained in the Bill of Costs including drawing, perusal and correspondence, section 5 of Schedule 11 provides that, “The instruction fee shall include taking instructions, drawing,



perusals, engrossing documents and filing the same.” Noting the clear provisions of the law on the issue, items 2-38 of the Bill of Costs are taxed off.

31. On court attendance, the same are taxed in accordance with section 10 (c) of Schedule 11 and they shall not be disturbed. Item 43 of the Bill of Costs is on costs for the site visit at Nanyuki and is proposed to be taxed at KShs. 15,000.00. Considering the distance and the time that it would take for an advocate practising in Nairobi to attend a site visit in Nanyuki, the costs of the site visit are taxed off to KShs. 10,000.00. The total amount allowed for court attendances in items 39 to 50 of the Bill of Costs is KShs. 45,700.00
32. On Disbursements and expenses, section 6 of Schedule 11 provides that, “6. Binding and Photostat copies; actual costs incurred supported by vouchers of all necessary photocopying will be allowed to the successful party.” The Appellants have not furnished the Tribunal with any vouchers for any disbursements or expenses claimed in the Bill of Costs thus the same are taxed off.
33. Considering the above, the Appellant’s Bill of Costs dated 21st December 2022 is taxed off and assessed as follows:
 - a. Instruction fees – KShs. 5,000,000.00
 - b. Attendances – KShs. 45,700.00Total KShs. 5,045,700.00

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

Mohammed BalalaChairperson

Bahati Mwamuye.....Member

Waithaka Ngaruiya.....Member

Kariuki Muigua.....Member

Winnie Tsuma.....Member

