



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO.15 OF 2018

ERDEMANN PROPERTY LIMITED..... APPELLANT

-VERSUS-

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

LONDON DISTILLERS (K) LIMITED..... 2ND RESPONDENT

GALOT INDUSTRIES LIMITED.....3RD RESPONDENT

MACHAKOS COUNTY GOVERNMENT.....4TH RESPONDENT

MAVOKO WATER AND SEWERAGE COMPANY LTD.....5TH RESPONDENT

AND

SAFARICOM STAFF PENSION SCHEME.

REGISTERED TRUSTEES.....1ST INTERESTED PARTY

EVEREST LIMITED.....2ND INTERESTED PARTY

SUNSET HOUSING LIMITED.....3RD INTERESTED PARTY

FUJIAN INSTALLATION KENYA COMPANY LTD.....4TH INTERESTED PARTY

CHINA WU YI KENYA PRECAST COMPANY LTD.....5TH INTERESTED PARTY

RULING ON THE 2ND & 3RD RESPONDENT'S BILL OF COSTS DATED 18TH MAY 2020

1. The Tribunal on 5th December 2019 delivered its judgment wherein it dismissed the Appellant's appeal filed vide a Notice of Appeal dated 21st September 2018 with costs to the Respondents. The issue of award of costs and its quantum was reserved for submissions by the parties.

2. The 2nd and 3rd Respondents filed their Bill of Costs dated 18th May 2020 and seek costs of Kshs. 23,445,166/=.

SUBMISSION BY PARTIES

APPELLANT'S SUBMISSIONS

3. In response to the 2nd and 3rd Respondents' Bill of Costs, the Appellant filed written submissions dated 25th June 2020. On the instruction fees of Kshs. 20,000,000/= being sought by the 2nd and 3rd Respondents, the Appellant submits that the amount is manifestly excessive and prohibitive. The Appellant contends that under **Schedule 11 of the Advocates (Remuneration) Amendment Order, 2014**, the instructions fees for matters before the Tribunal is to be assessed against the value of the subject matter where it can be ascertained. The Appellant contends that the Notice of Appeal never had a pecuniary value, neither did the responses nor

the judgment thereto, against which the instructions fees could be computed.

4. On this basis, the Appellant submits that the Tribunal should be guided by provisions of Schedule 11 paragraphs 3 and 9 of the Advocates Remuneration (Amendment) Order which provides for instructions fees of not less than Kshs.35,280/= subject to the taxing master's discretion and taking into account relevant factors where the value of the subject is unascertainable. It cites the case of **Joreth Limited v Kigano & Associate (2002) eKLR** in support of this argument.

5. The Appellant further submits that the appeal was quite ordinary in nature devoid of any complexity and does not justify special allowance in costs far removed from the minimal provided in law. It contends that the substance of the appeal best warrants award of the minimum fees allowed by law.

6. The Appellant further submits that the appeal by its nature is grounded in the pursuit of a public good and that it should not be penalized for pursuing a claim that would not only benefit itself but the general public since this would have the effect of scaring away litigants approaching the Tribunal for purposes of environmental conservation.

7. On the other items listed in the 2nd and 3rd Respondents' Bill of Costs, the Appellant submits that under Schedule 11 paragraph 11 of the Remuneration Order, instructions fees include taking instructions, drawing, perusal, engrossing documents and filing them. The Appellant questions the criteria used to separate multiple items from the overall instruction fees and submits that the amounts claimed for drawings, perusals, engrossing of documents and attendant filing be taxed off.

8. On items no. 7, 9, 20, 51 and 55 of the Bill of Costs in relation to expenditure on copies, the Appellant submits that under schedule 11 paragraph 6 of the Remuneration Order and Rule 74 of the Advocate Practice Rules, the claim should be supported by receipts and vouchers and prays that the amount be taxed off from the Bill of Costs and substituted with the appropriate fee incurred by the Applicant, if at all.

9. On costs of attendance set out under items 13, 30,37,43 and 49 of the Bill of Costs, the Appellant submits that the Bill elicits inconsistencies on the various amounts claimed and this warrants dismissal of the claim since it offends provisions of paragraph 10 (c) of schedule 11 of the Remuneration Order.

10. On the Value of VAT payable, the Appellant submits that pursuant to the Value Added Tax (Amendment of the Rate of Tax) Order vide Legal Notice No. 35 issued on 26th March 2020, the applicable rate of VAT is 14% and urges the tribunal to tax the bill at this rate.

11. On item 57 of the Bill of Costs for attending court for taxation, the Appellant submits that pursuant to Rule 69(3) of the Advocate Practice Rules, a party should not in its Bill of Costs include the fees used in preparation of the Bill of Costs which should be filed in by the taxing master. The Appellant submits that this figure should be taxed off for failing to comply with the rule.

12. In summary, the Appellant urges the Tribunal to uphold the principles of taxation and tax the 2nd and 3rd Respondents' Bill of Costs as per the submissions and authorities cited.

RESPONDENT'S SUBMISSIONS

13. The 2nd and 3rd Respondents filed written submissions dated 10th July 2020 in support of their Bill of Costs. On instructions fees, the 2nd and 3rd Respondents contend that the amount is fair taking into consideration the amount of work that went into defending the suit. They further contend that the Appellant's interpretation of schedule 11 paragraph 9 to the effect that where the value of the subject matter is unascertained, the amount shall be Kshs.35,280/= is erroneous and submit that the sum is only an irreducible minimum amount set to guide the taxing officer where the appeal is undefended. They cite the case of **Masore Nyang'au & Co. Advocates –vs- Kensalt Limited (2019) eKLR** and urge the Tribunal to take into consideration other ways of determining the value of the subject matter in order to render a fair determination on the instruction fees.

14. On the other items sought in the Bill of Costs, the 2nd and 3rd Respondents cite the cases of **Joreth Limited –vs- Kigano & Associates (2002) 1 EA 92** and **Phemchand Raichand Ltd & Another –vs- Quarry Services of East Africa Ltd & Another (1972) EA 162** and submit that instruction fees should not include the amount utilised in disbursements and thus the itemization of all services rendered and the fees due was necessary.

15. In summary, the 2nd and 3rd Respondents submit that the Tribunal in taxing the Bill of Costs should not translate to unfair and unjustifiable interference with the said Bill of Costs. They pray that their Bill of Costs dated 18th May 2020 be allowed as drawn.

APPELLANT'S SUPPLEMENTARY SUBMISSIONS

16. The Appellant filed its supplementary submissions dated 10th August 2020 in response to the 2nd and 3rd Respondents' written submissions. The Appellant submits that the appeal was not in any way frivolous, vexatious or unreasonable and neither was such a finding made by the Tribunal.

17. On instructions fees, the Appellant reiterates its position that the appeal fell under the class of public law matter and the value of the subject matter is not a determinant factor in assessment of costs. It cites the case of **Republic –vs-Kenya Medical Supplies Authority & Another (2019) eKLR** in support of this argument.

18. The Appellant further cites the case of **Makula International –vs- Cardinal Nsubuga & Another (1982) HCB 11** and submits that in taxing the Bill of Costs, the Tribunal is required to first find the appropriate scale, which in the case is schedule 11(9) of the Advocates Remuneration Order, 2014 and tax the costs in accordance with such scale and in the event the Tribunal considers that the fees should be increased, the discretion should be exercised reasonably and judiciously and reasons given.

19. The Appellant also argues that the mere fact that Counsel conducted research before responding to the pleadings should not be considered complexity to warrant exercise of judicial discretion and that the volume of the work done and the materials were not so great as to justify the excessive and prohibitive amount.

20. In summary, the Appellant urges the Tribunal to apply appropriate scale of fees and further uphold the principles of taxation and exercise of judicial discretion in assessing the costs.

COMPUTATION OF COSTS

21. The National Environment Tribunal has 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 assessment of costs before tribunals including the National Environment Tribunal is provided for under Schedule 11 of the Advocates (Remuneration) (Amendment) Order, 2014. Where the value of the subject matter can be ascertained from the pleadings filed, then 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).

22. The Tribunal having considered the 2nd and 3rd Respondents' Party and Party Bill of Costs dated 18th May 2020, submissions by the Appellant and the 2nd and 3rd

Respondents' makes the following determination.

INSTRUCTION FEES

23. The 2nd and 3rd Respondents seek to be awarded the sum of Kshs.20,000,000/= as instruction fees. The Appellant contends that this sum is manifestly excessive and prohibitive since the value of the subject matter cannot be ascertained. The 2nd and 3rd Respondents however justify this amount on what they term as the large volumes of documents perused, extensive research and time spent and the urgency of the matter. They urge the Tribunal to take into consideration other ways of determining the value of the subject matter in order to render a fair determination but in all circumstances uphold the instruction fees of Kshs.20,000,000/= as drawn.

24. The Tribunal finds that the value of the value of the subject matter cannot be ascertained in the present case. The Notice of Appeal did not have a pecuniary value, neither did the pleadings and affidavits filed by the parties. Thus, there is no legal basis employed by the 2nd and 3rd Respondents in computation of the instruction fees as Kshs.20,000,000/=.

25. 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 (emphasis added).*

26. The Appellant submits that the appeal was quite ordinary in nature devoid of any complexity and does not justify special allowance in costs far removed from the minimal provided in law. It contends that the substance of the appeal best warrants an award of the minimum fees allowed by law. It urges the Tribunal to be guided by provisions of Schedule 11, paragraphs 3 and 9 of the Advocates Remuneration (Amendment) Order which provides for instructions fees of not less than Kshs.35,280/= subject to the taxing master's discretion and taking into account relevant factors where the value of the subject is unascertainable.

27. Having perused, the pleadings and submissions on record, the Tribunal finds that the appeal before it was not complex since the appeal challenged the National Environment Management Authority's (NEMA) failure to exercise its powers under the Environment Management and Co-ordination Act (EMCA) to compel the 2nd and 3rd Respondents to cease and desist from disposing, depositing and/or dumping waste, refuse, debris and/or soil on their own properties L.R No. 12867/3, 12867/6, 12867/7 and 12867/8 (the suit properties) which are adjacent to the Appellant's properties known as L.R No. 12581/14, L.R No. 27317/2 and L.R No. 128671.

DRAWINGS, PERUSALS AND PHOTOCOPIES

28. Schedule 11, Paragraph 5 of the Advocates Remuneration Order provides that the instruction fees shall include taking instructions, drawing, perusals, engrossing documents and filing the same. Items 2,3,4,5,6,8,10,11,12,14,15,16,17,18,19,21,22,23,24,25,26,27,28,29,31,33,34,35,36,38,39, 40,41,42,44,45,46,47,48,50,52,53,54,56 are disallowed in their entirety since they are properly covered under the instruction fees.

29. Under items 7, 9, 20, 51 and 55 of the Bill of Costs, the 2nd and 3rd Respondents claim costs of photocopying. Schedule 11 paragraph 6

of the Advocates Remuneration Order provides that for Binding and Photostat copies; actual costs incurred supported by vouchers of all necessary photocopying will be allowed to the successful party. In this case, the claim was not supported by any evidence and is thus disallowed in its entirety.

ATTENDANCES

30. Items 13, 30, 37, 43 and 49 of the Bill of Costs seek costs for attendances before the Tribunal. Under Schedule 11 paragraph 10 (c) of the Advocates Remuneration Order, the costs of court attendance for hearing are stipulated to be Kshs.4,000/= for each day after the first day and Kshs.2,100/= for each part of the day after the first day. Thus items 30 and 37 of the Bill of Costs which seek a total sum of Kshs. 10,000/= being costs of court attendance for hearing are taxed off to Kshs. 8,000/= as per schedule 11 paragraph 10 (c) of the Advocates Remuneration

Order. Further, 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. Thus items 13, 43 and 49 of the Bill of Costs are taxed at Kshs.500 each to a total sum Kshs.1, 500/= since the court attendances were not in relation to hearing of the matter.

31. Item 57 of the Bill of Costs which seeks the sum of Kshs. 3,000/= as costs of attending court for taxation is taxed off in its entirety since it has no legal basis.

ORDER

32. The Tribunal makes the following orders:

a. The Bill of Costs dated 18th May 2020 is taxed as follows:

i. Instruction Fees- Kshs.300,000/=

ii. Costs for attendances before the Tribunal- Kshs. 9,500/=

Total Sum Kshs.309,500/=.

b. A Certificate of Costs to issue forthwith.

DATED AT NAIROBI THIS 7TH DAY OF DECEMBER 2020

MOHAMMED S. BALALA.....CHAIRPERSON

CHRISTINE MWIKALI KIPSANG.....MEMBER

BAHATI MWAMUYE..... MEMBER

WAITHAKA NGARUIYA..... MEMBER

KARIUKI MUIGUA..... MEMBER