



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waste Africa Limited v Hassan & 79 others (Environment and Land Miscellaneous Application E126 of 2023) [2025] KEELC 1286 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1286 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E126 OF 2023**  
**AA OMOLLO, J**  
**MARCH 13, 2025**

**BETWEEN**

**WASTE AFRICA LIMITED ..... APPLICANT**

**AND**

**HASSAN NOOR HASSAN & 79 OTHERS & 79 OTHERS ..... RESPONDENT**

**RULING**

1. For determination is the reference brought by way of the Chamber Summons dated 15<sup>th</sup> May, 2023 filed by Waster Africa Ltd hereafter referred to as he Applicants. The reference is premised on the provisions of the law inter alia Section 27 of the *Civil Procedure Act* and Paragraph 11 of the ARO.
2. The orders sought by the Applicant are;
  - a. That the decision of the Natiional Environmental Tribunal issued in Net Tribunal No. 144 of 2015 Hassan Noor Hassan & 79 Others Vs. Waste Africa Ltd. delivered electronically on 4<sup>th</sup> May, 2023 on the Respondents' bill of costs dated 21<sup>st</sup> December, 2022 be set aside.
  - b. That this Court does apply its mind on the bill of Costs dated 21<sup>st</sup> December, 2022 and come up with its own decision on the same.
  - c. That the costs of this reference be awarded to the Applicant.
3. The Application is premised on the following grounds;
  - i. That the Learned members of the Tribunal erred and applied wrong principles of law on taxation in determining that the Respondents were entitled to Kshs.5,045,700/= being party and party costs vide their bill of costs dated 21<sup>st</sup> December, 2022 which costs were more than excessive.



- ii. That the Learned members of the Tribunal erred and applied wrong principles of law on taxation in determining Respondent's culpability to pay costs contrary to the provisions of rule 39 of the National Environment Procedure rules 2003 which provides that costs are not automatic and requires the Tribunal to make a factual finding on the conduct of parties during the proceedings before making any award of costs against a party to the proceedings.
  - iii. That the Learned members of the Tribunal completely ignored that the Net Tribunal No. 144 of 2015 Hassan Noor Hassan & 79 Others Vs. Waste Africa Ltd was filed on behalf of a community by 79 applicants thus within the ambits of a Public Interest Litigation and the Applicant in seeking to properly dispose Asbestos was also acting in the good of the community perhaps save for the location hence parties ought to have met their own costs.
  - iv. That the Learned members of the Tribunal completely ignored the Applicant's submissions on the correct principles law on taxation that the Respondents' bill of costs should have at most been taxed at Kshs.209,700/= which would have been more than adequate to refund the respondent for its minimal costs.
4. The Respondents filed a Replying Affidavit sworn by David Mareka, an advocate of the High Court in opposition to the reference. The Affidavit deposes to two main issues. First that the Tribunal's decision was right as they considered the magnitude/seriousness of the claim before them. Secondly, that the Tribunal proceeded in accordance with the judgment of the court and which has not been set aside and they were not called upon to determine the culpability of the Respondents or NEMA to pay costs. That this issue can only be dealt on appeal and not in this reference.
  5. The reference was prosecuted by way of written submissions. The Applicant discussed the principles to be considered while taxing costs. He submitted that Tribunal proceeded on the basis that the Appeal was complex in nature and raised novel points of law notwithstanding that there readily existed statutes. That the Tribunal did not clarify the nature of the novelty of the points of law raised by the advocates of the Appellants.
  6. The Applicant submit that the minimum fee prescribed by the ARO under Schedule 11 is not less than Kshs.35,280/= if under founded or unopposed. That in this case, the Tribunal increased what was awarded by 143 times. He quoted Rule 39 of the NET, Rules, 2003 which provides thus;
    1. The Tribunal shall not normally make an order awarding costs and expenses, but may, subject to paragraph (2), make such an order-
      - a. against a party, including a party which has withdrawn its appeal or reply, if it is of the opinion that that party has acted frivolously or vexatiously or that his conduct in making, pursuing or resisting an appeal was wholly unreasonable;
      - b. against the Authority, where it considers that the decision against which the appeal is brought was wholly unreasonable; or
      - c. as respects any costs or expenses incurred, or any allowances paid, as a result of a postponement or adjournment of a hearing at the request of a party.
    2. No order shall be made under paragraph (1) against a party without first giving that party an opportunity of making representations against the making of the order.
    3. Any costs required by an order under this rule to be taxed shall be assessed by the Tribunal.



7. By submissions dated 21<sup>st</sup> January, 2025, the Respondents submitted that it is not in dispute the taxing master applied the correct schedule during the taxation. That in awarding the sum of Kshs.5,000,000/=, the Tribunal under paragraph 23 – 29 of its ruling considered the rival submissions. Consequently, the finding of the Tribunal was not in error.
8. The Respondents cited the case of First American Bank of Kenya Vs Shah and Others (2002) I.E.A 64 at 69 where Ringera J. stated as follows;

“ First, I find that on the authorities, this case cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was so.”
9. In justifying that they were entitled to costs, the Respondents submitted that the suit before the tribunal was not a public interest litigation but a suit initiated by private citizens against a company acting in breach of its EIA licence. In The Indian Supreme Court in Ashok Kumar Pandey vs. State of West Bengal writ Petition 199 of 2003 as rightly cited in Odilia *v Kenyatta University (Petition E271 of 2021)* (2022) KEHC 13171 (KLR) (Constitutional and Human Rights) (30 September, 2022) Ruling the court stated:

Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta.
10. They concluded that there is no sufficient basis to set aside the ruling delivered on 18<sup>th</sup> April, 2024 as the correct schedule of A.R.O was applied and the Tribunal rendered a well-reasoned ruling. They urged the court to dismiss the reference.

### **Analysis & Determination;**

11. Both parties have submitted on the principles governing taxation of party and party costs. They also agree that the correct schedule was applied. Their point of departure is in the amount of Kshs.5million awarded. In the decision now contested, the Tribunal at paragraph 28 of its ruling held thus;

“Having come to the unescapable 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 Premchand Raichand Ltd. V. Quarry Services of East African Ltd (No. 3) (1992) EA 162 where it espoused the following guidelines;

  - a. That costs should 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.”
12. They reduced the amount of Kshs.15,000,000/= pleaded as instructions fee to Kshs.5,000,000. It is the Applicant’s argument that the instructions fee provided for in undefended claim is Kshs.35,280.
  13. Scheduled 11 of the A.R.O provides for costs of proceedings before the Tribunal other than those under schedule 8 and 9 of the Order. Paragraph 2 of Schedule 11 states thus;
 

“Costs exceeding the scale in this schedule may be allowed for special grounds arising out of the nature and importance or the difficulty or the urgency of the case. Except for good reason to be recorded, costs shall be awarded to the party who substantially succeeds upon the reference or other proceedings.”
  14. Equally, paragraph 3 (a) and (d) sets out what is to be taken into consideration when taxing the costs. The sum of Kshs.35,280/= proposed by the Applicant only applies where the claim is undefended. Secondly, the sum of 25,280/= was given as the minimum to be charged where the value of the subject matter is not ascertained.
  15. Paragraph 9 of schedule 11 states in part thus;
 

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.
  16. The essence of this provisions implies the exercise of discretion on the part of the Tribunal. It is trite law that this court sitting as an appellate court to interfere with the exercise discretion of the Tribunal, it must be shown that the Tribunal was not exercised judiciously.
  17. One of the arguments fronted by the Applicant is that the Tribunal failed to take note that the case was filed on behalf of the community thus within the ambit of a public interest litigation and that the Applicant was also acting for the good of the community in seeking to properly dispose the asbestos. On the other hand, the Respondents argue they presented the suit as private citizens.
  18. Although the Respondents submit they brought the claim as private citizens but being an environmental claim by itself opens it to being a public interest litigation. The environmental protection is intended for the common good.
  19. The second ground presented for arguing the discretion was not exercised judiciously was the finding by the Tribunal that the Appeal before them was complex in nature and raised novel points of law which required considerable research and industry.
  20. On this point, I am in agreement that environmental claims are not the easiest to plead and prove. Research and industry must be employed to persuade the judicial authority. It is not just a matter of relying on the readily available law. For instance, one must elaborate on the meaning of a right to clean and health environment. I would not fault the taxing master for using this as a ground to enhance the instructions fee.



21. However, that exercise of discretion failed the public interest arm of the claim. It is only on this account that I am persuaded to reduce the sum of Kshs.5 million awarded. In their submissions before the Tribunal, the Applicant had submitted a fee of Kshs.200,000 as reasonable for instructions fee.
22. It is my considered view that the sum of Kshs.200,000 conceded by the Applicant which is way above the 35,280 provided for by Advocates Remuneration Order was a concession that the matter was complex. The Tribunal considered the said sum of Kshs.200,000 as too low. As stated earlier, they proceeded to award the sum of Kshs.5 million based on the nature and complexity of the appeal. Continuing on this, I reduce the said sum on account of the P.I.L limb of the appeal, instructions fee shall be taxed at Kshs.3 million.
23. The other amounts awarded was for attendance at Kshs.45,700 the Applicant deposed in paragraph 10 of the supporting affidavit these items reduced to Kshs.500 each and 2100 each respectively (Kshs.1,500 + 4,200) to reduce the same to Kshs.5,700/=. The Respondents did not address the said items 39 – 50 both in their Replying Affidavit and the submissions.
24. Since the rates for attendance are specifically provided for in the Order, they shall be taxed as per scheduled on higher scale. Items on attendances for amount taxed at Kshs.500 each (total Kshs.5,000) items 43 taxed at Kshs.10,000 item 44 to 46 taxed at Kshs.5,000 each (total Kshs.15,000). Hence the amount for attendances is reduced from Kshs.45,700 to Kshs.30,000/=.
25. In conclusion, the reference succeeds. The Respondent's party and party bill is allowed at Kshs.3,030,000. Each party to bear the costs of this reference.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH, 2025**

**A. OMOLLO**

**JUDGE**

