



Waste Africa Limited v Hassan & 79 others (Environment and Land Miscellaneous (Reference) Application E126 of 2023) [2024] KEELC 6415 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS
(REFERENCE) APPLICATION E126 OF 2023
AA OMOLLO, J
SEPTEMBER 26, 2024**

BETWEEN

WASTE AFRICA LIMITED APPLICANT

AND

HASSAN NOOR HASSAN & 79 OTHERS RESPONDENT

RULING

1. What is up for my determination is the Preliminary Objection dated 12th January, 2024 raised by the Respondents. The Preliminary Objection stated that;
 1. The Applicants Chamber Summons dated 15th May, 2023 is bad in law and incurably defective as it offends section 130(1) of the *Environmental Management and Co-ordination Act* which provides as follows;

“(1) Any person aggrieved by a decision of order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.”
 2. Without prejudice to item 1 above, the Applicants Chamber Summons offends the mandatory provisions of Paragraph 11 of the Advocates Remuneration Order which states;-

“Should any party object to the decision of the taxing officer he may within 14 days after the decision give notice in writing to the Taxing officer of the items of taxation to which he objects.”
 3. That no Objection has been filed with respect to the Ruling on taxation delivered on 4th May, 2023. In addition, no request has been made to the Taxing Officer to give reasons regarding



the taxed items so as to enable the Applicant invoke the jurisdiction of this court to consider any decision on any objected item(s).

2. On 30th April, 2024, the court gave directions for prosecution of the Preliminary Objection by way of filing written submissions. The Respondents filed their submissions dated 3rd June, 2024. The Respondent submitted that the Preliminary Objection meets the threshold outlined in the case of *Mukisa Biscuit Man. Ltd v. Westend Distributors Ltd* (1969) EA 696 where Sir Newbold observed thus;

“A Preliminary Objection is in the nature of what used to be a demurrer, it raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

3. The Respondents submit that the chamber summons application dated 15th May, 2023 offends the provisions of section 130(1) of the EMCA because the format of an appeal from the NET to this court should be by way of Memo of Appeal as provided in order 42 (1) of the *Civil Procedure Rules*. That the said order is couched in mandatory terms. It is their contention that the Rules do not provide for filing of a reference from the NET’s award on costs.
4. The argument is premised that the Tribunal members while exercising jurisdiction on awarding costs is not done as a taxing officer. The chamber summons sought to set aside the bill of costs dated 21st December, 2022 and that this court does apply its mind on the bill to come up with its own decision.
5. Order 42(1) of the *Civil Procedure Rules* relied upon by the Respondents states thus; “Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”
6. In ordinary suits filed in the magistrates’ courts, once costs are awarded, the costs are assessed either by the Court administrator or the court which awarded the said costs. A decision is normally rendered in the form of a ruling which then would entitle a party where a right of appeal lies to file a memo of appeal like any ordinary appeal. The appeal lodged by the Appellant in this case is presented in the format of a chamber summons (reference). The subject matter before the court is an applicant who is unhappy with costs awarded in Tribunal case No. 144 of 2015 – *Hassan Noor & 79 Others v Waste Africa Ltd*.
7. The National Environmental Tribunal order being challenged is not the merit decision but an order purely on the costs awarded. The argument that the current appeal ought to have been brought by way of a memo of appeal and not a reference has merit. However, the error is a procedural technicality which should not form the basis for striking out the reference as striking it out does not close the door to the appellant from challenging the order. It will do so by probably seeking leave to file an appeal out of time and thereafter file the actual appeal.
8. I am persuaded by the decision in the case of *Gacau Kariuki & Co. Advocate v Allan Mbugua* (2012) eKLR, where Odunga J (as he then was) held:

“Where it comes clear that to order the parties to make an application would amount to going through the motions, that would defeat the provisions of Article 159(2)(d) of the *Constitution* which abhors the promotion of procedural technicalities at the expense of substantive justice. To delay what is inevitable simply for the sake of complying with procedures is, in my considered view, unacceptable.”



9. The second limb of the objection was that there was no objection filed in respect to the ruling on taxation. It is averred that no request was made to the taxing officer to give reasons for the taxed items. Paragraph 11 contemplates;
 - a. The aggrieved party issues notice within 14 days on the items objected.
 - b. The taxing officer shall forth give reasons for his decision
 - c. Upon receipt of the reason, the objector shall within 14 days file an application to the high court setting out the grounds for the objection.
10. The second limb of whether or not there was an objection addressed to the NET requires proof by way of evidence. The Respondents insisted on the preliminary objection being independent of the application which then denies the Applicant an opportunity to present any such evidence to give any explanation to the objection. In *Abmed Nassir –v- National Bank of Kenya Ltd* [2006] EA the court held: -

Although Rule 11(1) of the *Advocates Remuneration Order* stipulates that any party who wishes to object to the decision of the Hon. Taxing Officer should do so within 14 days, after the said decision and thereafter file his reference within 14 days from the date of receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of Sub-rule (2) of Rule 11 of the *Advocates Remuneration Order* demands so. The said Rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling.”
11. The P.O does not give an opportunity for the Applicant to elaborate whether or not the reasons were contained in the NETs ruling hence there was no need to request the reasons for the decision.
12. The net effect is my finding that there is no merit in both of grounds of the preliminary Objection. The same is dismissed with an order that each party bears their costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024

A. OMOLLO

JUDGE

