

REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

APPEAL CASE NO. NET/03/05/2005

**1. ADNAN KARAMA PETROLIUM LIMITED
TRADING AS A.K. FILING STATIONAPPELLANT**

Versus

**1. NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY-(NEMA)..... RESPONDENT**

RULING ON COSTS

1. In its response dated 23rd May, 2005 to the Appeal dated 3rd May, 2005, the Respondent had prayed that the appeal be dismissed with costs. In the ruling dated 3rd November, 2005 dismissing the Appeal, the Tribunal invited the parties to address it formally on the issue of costs on 14th November, 2005. On that date, counsel for the Respondent, Ms. Jane Kinuthia of Mohamed & Kinyanjui Advocates filed a Bill of Costs and appeared before the Tribunal. Mr. George Kithi of Madzayo Mrima & Co. Advocates, counsel for the Appellant, was absent and had not been served with the Bill of Costs. The Tribunal therefore adjourned to 17th November, 2005 to enable Ms. Kinuthia serve the Bill of Costs. On 17th November, 2005, both counsel were present and the matter proceeded. Submissions by both counsel are summarised below.
2. Ms. Kinuthia argued that under Rule No. 39 of the National Environment Tribunal Procedure Rules, Legal Notice No. 191 of 2003, the Tribunal has power to award costs. The Respondent deserved to be awarded costs in this case because the appeal had been vexatious, frivolous and unreasonable, and that none of the grounds of appeal had succeeded. The vexatious and unreasonable nature of the appeal was shown by the manner in which counsel for the Appellant and the Appellant had repeatedly failed to appear on scheduled hearing dates, leading to numerous adjournments.
3. In drawing up the Bill of Costs, Ms. Kinuthia submitted that in the absence of specific provision in the National Environment Tribunal Procedure Rules on the assessment of costs, she had relied on the Advocates Remuneration Order. Her Bill of Costs therefore comprised Instruction Fees and other costs for attendance, perusal, copies and other items, as provided for in the Advocates (Remuneration) (Amendment) Order 1997, Legal Notice No. 550 of 1997.

4. In calculating the Instruction Fees, she had relied on a figure of Ksh. 4 million as representing the value of the matter in dispute. Ksh. 4 million was the value the Appellant had placed on the petrol station which had been ordered to be closed. The Instruction Fees therefore was calculated at Ksh. 100,000/=.
5. Ms. Kinuthia submitted that under Rule 39 (1) of the Tribunal Procedure Rules, the Tribunal is given the power to assess any costs which needed to be taxed. Accordingly, the Tribunal could rely on any appropriate formula in assessing costs, and the Advocates Remuneration Order was an appropriate basis for such an assessment.
6. Mr. Kithi for the Appellant vigorously resisted the prayer for the award of costs against the Appellant. He submitted that he had lodged an appeal in the High Court against the Tribunal ruling of 3rd November, 2005, and therefore the prayer for the award of costs must await the outcome of that appeal. In any case, he contended, the Tribunal has no mandate to award costs in the circumstances of this case. He accepted that under Rule 39 of the Tribunal Rules, the Tribunal has the power to award costs but only if the Appeal had been frivolous or vexatious.
7. Mr. Kithi contended that the appeal in this case was not vexatious. The Appellant had lodged the appeal following directions from the High Court in which the Appellant had initially lodged an application for judicial review. In any case, the Appellant had a right to come before the Tribunal with a weak or a strong case, and the fact that the appeal did not succeed does not render the appeal vexatious. Equally, the adjournments which had occurred did not mean that the Appellant's conduct had been unreasonable. There was, with respect to each adjournment, a valid reason.
8. With respect to the Bill of Costs, Mr. Kithi submitted that presently the Tribunal has no basis upon which to exercise its power to assess costs. The Tribunal could not rely on the Advocates Remuneration Order as alleged by Ms. Kinuthia. Under Section 44 of the Advocates Act, Chapter 16 the Chief Justice has the power to give directions on the amount chargeable before any Tribunal. So far, the Chief Justice has not given any orders on costs applicable in this Tribunal. The Advocates Remuneration Order does not apply to this Tribunal, and therefore no law exists on how costs before the Tribunal can be assessed.
9. Mr. Kithi also questioned the basis for the specific amounts included in the Bill of Costs. He submitted that there was no basis for charging Instruction Fees. All one could charge in respect of costs was Adjournment Costs, and even then evidence of these costs would need to be supplied, which had not been done in this case.
10. But even if Instruction Fees was to be charged, Mr Kithi submitted, there was no justification for basing it on the Ksh. 4 million, which had been stated to be the value of the petrol station. The issue in the appeal was not the petrol station but

the threat of environmental damage, and the environment does not have a value, argued Mr. Kithi.


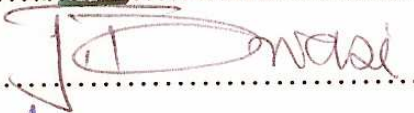

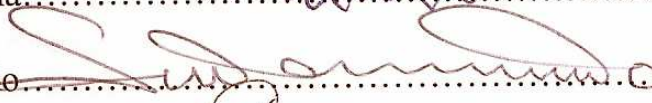

11. With respect to the other items detailed in the Bill of Costs, Mr. Kithi submitted that schedules 6 and 7 of the Advocates Remuneration Order on which these items had been based, do not apply to the Tribunal. They deal respectively with the High Court and the Magistrates Courts. Mr. Kithi therefore resisted the award of these costs, amounting to Ksh 18,600/=, to the Respondent. Finally, Mr. Kithi questioned how any award of costs by the Tribunal would be enforced.
12. Following deliberations on this matter, the Tribunal unanimously finds as here under:
13. It was common ground between the parties that the Tribunal has powers to award costs under section 129 (3) (c) of the Environmental Management and Coordination Act (EMCA) No. 8 of 1999, as further detailed in Rule 39 of the Tribunal Procedure Rules. What is in issue is whether the appeal in this case was vexatious, frivolous or unreasonable, justifying the award of costs against the Appellant.
14. The Tribunal takes note of the fact that this appeal was lodged as a challenge to a Stop Order issued by the Respondent against the Appellant on 4th March, 2005. It was lodged after Appellant failed to get a stay order in the High Court.
15. Despite the Stop Order, the Appellant did not cease operations. The petrol station continued to function throughout the proceedings. The Tribunal itself witnessed the petrol station in operation on 29th August, 2005 when it visited the site in the presence of the Appellant. In effect, the Appellant ignored the Stop Order. The Tribunal was informed that other public authorities, apart from the Respondent, also attempted to get the Appellant to cease operations, but in vain.
16. The adjournment on 1st August, 2005 was occasioned by the fact that the Appellant had been locked up on the orders of the District Officer, Kibera, who was trying to enforce the Stop Order. Following the dismissal of the Appeal by the Tribunal, the Appellant has lodged an appeal to the High Court. Meanwhile, the petrol station, the subject of the Stop Order, continues in operation.
17. It is quite clear therefore that the Appellant sees these proceedings as a means to avoid having to comply with the Stop Order. An appeal lodged in defiance of a Stop Order, with no intention to comply with the Stop Order, is vexatious.
18. The Tribunal finds further that the manner in which the appeal was conducted was wholly unreasonable. The Appellant caused unjustified adjournments not less than three (3) times. The effect was to make the conduct of the appeal a great deal more protracted than it should have been.

19. With regard to the basis for assessing an award of costs, the Tribunal notes that Section 39 (3) of the Tribunal Procedure Rules provides that the Tribunal shall assess any costs which require to be taxed. The basis for assessment is not prescribed.
20. The Tribunal does not accept the submission that in the absence of a prescribed basis for assessing costs, the Tribunal's hands are tied. The Tribunal has the discretion to adopt any reasonable criteria which it deems just. In exercising this discretion, reference to the principles upon which the Advocates Remuneration Order is founded is a reasonable basis for assessing the costs to be awarded by the Tribunal, notwithstanding that the Advocates Remuneration Order does not apply to the Tribunal.
21. The Advocates Remuneration Order provides for both Instruction Fees and other costs, which it itemises. Instruction Fees may be charged on the basis of the value of the matter in dispute; on the basis of the time in put involved, taking into account the nature and complexity of the matter; or on the basis of an agreement between the Advocate and the client.
22. Any of these three criteria will form a basis for assessing costs before the Tribunal. Given however the conceptual and methodological difficulties associated with any attempt to assign a value to the environment, the protection of which is at the root of the Stop Order that led to this appeal, and in the absence of evidence of the agreed fees, if any, between the Respondent and its Advocate, the Tribunal will base its assessment of costs in this matter on the time input involved and the nature of the matter.
23. The instructions in this case were to respond to an Appeal against a Stop Order to close down a filling station. The Appeal was argued by counsel. It took eight (8) attendances before the Tribunal and the preparation of written submissions dealing with both factual and legal arguments. These inputs lasted over a period of 4 months, but in terms of working days, would probably have taken about 7 to 10 working days in total, including the time taken up in preparing for and arguing the prayer for the award of costs. Ksh. one hundred thousand (100,000/=) is reasonable legal fees an Advocate practicing in Nairobi would charge for instructions to handle a matter of this nature.
24. The Tribunal recognises that disbursements are normally charged as part of legal fees, to defray the actual costs incurred in dealing with a client's matter. The Bill of Costs which was filed gives an indication of some of the items which the Respondent's Advocates would have had to pay for. In addition, there are costs, such as those associated with transport to and from the venue of the proceedings which is some distance out of town. Ksh. 10,000/= represents a reasonable estimate of these costs.

25. The Tribunal therefore makes the following order: That the Appellant do pay to the Respondent Kenya Shillings one hundred thousand (100,000/-) towards professional legal fees and another Ksh. ten thousand (10,000/-) towards disbursements.
26. In making this order, the Tribunal is cognisant of the information communicated from the Bar, that an appeal has been lodged with respect to its Ruling of 3rd November, 2005 dismissing the Appeal. The Tribunal notes however that no stay of its order against which an appeal was lodged, has been granted by the High Court. In the circumstances, nothing stands in the way of the Tribunal dealing with the prayer for the award of costs and making orders thereon.
27. The Tribunal notes that Mr. Kithi had submitted that the Chief Justice had not yet promulgated orders on the applicable costs in the Tribunal. The Tribunal also notes however, that under Section 147 of EMCA and Rule 47 of the Tribunal Procedure Rules, the power to make rules on fees and costs lies with the Minister.
28. Mr. Kithi had also submitted that the environment does not have value on the basis of which an assessment as to costs could be made. To the contrary, the Tribunal finds this assertion fundamentally flawed. The Tribunal points out that the environment is of great value, even if this may be difficult to quantify.
29. Mr. Kithi has questioned how the Tribunal's order on costs would be enforced. The Tribunal expects the Appellant to comply with its orders, including the order on costs, and that action to enforce it will not be called for. Should that eventually arise, however, the Respondent is at liberty to apply for appropriate orders.

Dated at Nairobi this 27th day of February, 2006.

Signed:

Donald Kaniaru.....	Chairman
Dwasi Jane.....	Member
Albert Mumma.....	Member
Stanley Waudo.....	Member
Joseph Njihia.....	Member