



**Toncap Investment v Luore Management (Environment and Land Appeal  
8 of 2022) [2023] KEELC 15685 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15685 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL 8 OF 2022  
GMA ONGONDO, J  
FEBRUARY 21, 2023**

**BETWEEN**

**TONCAP INVESTMENT ..... APPELLANT**

**AND**

**LUORE MANAGEMENT ..... RESPONDENT**

**RULING**

1. This ruling is in respect of two applications namely:
  - a. A notice of motion dated May 10, 2021 and lodged in court on May 17, 2021 pursuant to, *inter alia*, Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#) and sections 1A,1B,3A and 80 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya by the Appellant/Applicant, Toncap Investment through Nyauke and Company Advocates now, Aluoch Odera and Nyauke Advocates (the Appellant's application herein).
  - b. A notice of motion dated May 10, 2021 and filed in court on June 23, 2021 under, *inter alia*, section 51(2) of the [Advocates Act](#) Chapter 16 Laws of Kenya and section 13(7)(1) and 14 of the [Environment and Land Court Act, 2015\(2011\)](#) by the respondent, Luore Management through the firm of Kabiru and company Advocates. (The Respondents application herein)
2. The orders sought in the appellant's application are infra
  - a. Moot
  - b. That upon Hearing of this Application the honourable court be pleased to review and or vary the Taxing Master's Ruling delivered on February 25, 2021 as to remove VAT of 16% added to the party and party Bill of costs.
  - c. That the costs of this application be provided for.



3. The appellant's application is premised on grounds 1 to 3 stated on the face of the same as well as a supporting affidavit of seven paragraphs sworn on May 10, 2015 by one Tom Ndege and a copy of a ruling rendered on February 25, 2021 by the Court's Deputy Registrar and annexed thereto. Briefly, the appellant's lamentation is that there was an error in the said ruling as the court awarded a Value Added Tax (VAT) of 16% in the sum of Kshs 40,598.40 which should not be awarded in party and party costs. That thus, the orders sought in the appellant's application be granted in the interest of justice.
4. In Response to the appellant's application, the respondent filed grounds of opposition dated July 8, 2021 namely;
  - a. That, the application as filed is incompetent and contrary to the law hence tantamount to being an abuse of the court process.
  - b. That, the application is incompetently filed and fatally defective for want of compliance with mandatory requirement of Rule 11 of the Advocates Remuneration Order.
  - c. That, the appellant has neither filed nor raised any objection to the taxing officers ruling dated and delivered on February 25, 2021 and the law does not envisage a waiver of filing of the notice of objection to taxation.
  - d. That, the appellant's application amounts to an abuse of the Court process.
5. The gist of the respondent's application is that after this appeal was dismissed as per the judgment (EPO3), party and party bill of costs (EPO1) was taxed at Kshs. 294,338.4 in favour of the respondent on February 25, 2021 by the Deputy Registrar of this court. That the certificate of costs (EP02) was issued on February 15, 2021 accordingly. Copies of documents marked as EPO1, EPO2 a EPO3 are annexed to the affidavit of 12 paragraphs sworn on May 10, 2021 by Engineer Philip Okundi in support of the respondent's application.
6. So, the Respondent is seeking the following orders are sought:
  - a. That, judgment be entered for the Applicant against the Respondent in the sum of Kshs. 294,338.4 being the sum of money taxed and certified by the Deputy Registrar of this court as due and payable to the Applicant together with interest thereon at 14 % from February 25, 2021 until payment in full.
  - b. That, the said sum of Ksh. 294,338.4 be deducted from the security for costs of Kshs 300,000 deposited in this Honourable court on November 20, 2018 by the Respondent following the order of Judge G.M.A Ong'ondo on September 26, 2018.
  - c. That, costs of this application be provided for.
7. The appellant failed to respond to the Respondent's application.
8. On June 21, 2022, this court ordered and directed that the Applicant's application as was well as the respondent's application be heard by written submissions; See Order 51 Rule 16 of the [Civil Procedure Rules, 2010](#) and Practice Direction number 32 of the Environment and Land Court Practice Directions, 2014.
9. Accordingly, the appellant's counsel filed submissions dated September 22, 2022 regarding the appellant's application. Counsel relied on section 6(1) of the VAT Act, 2015, [Shreeji Enterprises Limited v John Munga Chai](#) [2022] eKLR and article 159 (2)(d) of the [Constitution of Kenya, 2010](#) hence, urged the court to allow the appellant's application and that VAT charged on party and party costs, be removed.



10. In the submission dated October 13, 2022, learned counsel for the respondent only submitted on the appellant's application and made reference to the appellants' application, the grounds of opposition thereto and identified a single issue for determination; whether the appellant's application is merited. Counsel argued that the said application is time barred and that the appellant did not follow due process in mounting it. Counsel cited Rule 11 (1) and (4) of the [\*Advocates Remuneration Orders, Andrew Shisala Angalusbi v Zephania K. Yego and Ayinga Asiligwas Chanzu\*](#) (2020) eKLR which applied the reasoning in [\*County Executive of Kisumu v County Government of Kisumu and 8 others\*](#) (2017) eKLR, among others to fortify the submissions.
11. The Appellant is agreeable to the costs entitled to the Respondent being deducted from security earlier deposited in Court by the Respondent. However, the appellant is opposed to the whole amount taxed as 294,338.40 being deducted from security as the cost is inclusive of VAT charge and interest being charged as well as cost of the application as both parties have filed applications simultaneously.
12. Interestingly, counsel for the respondent did not submit with regard to the respondent's application.
13. In the foregone, the issues for determination in the twinned application crystalize to whether the parties deserve the orders sought in their respective applications.
14. It was the appellant's contention that an addition of 16% VAT was an error of law apparent on the record as VAT is not supposed to be added on a party and party bill of costs as provided for at Section 16(1) of the [\*VAT Act, 2013\*](#). That a party and party bill of costs does not attract an aspect of taxable supply as an Advocate client Bill of costs would as held in [\*Shreeji Enterprises Limited\*](#) case (*supra*)
15. The appellant's application aims to review the Taxing Officer's ruling delivered on February 25, 2021 pursuant to Order 45 Rule 1 and section 80 as noted in paragraph 1b hereinabove. That there is an error in the ruling regarding a VAT of 16% awarded in party and party bill costs.
16. This court is aware of the power of the court to correct any apparent errors in its judgment, ruling or order; see [\*Charles Karatbe and 2 others v Administrator of the Estate of John Waliace Mathare \(deceased\) and 2 others\*](#) (2020) eKLR.
17. Be that as it may, the appellant did not raise any objection to the Taxing Officer's ruling as prescribed. Rule 11 of the [\*Advocates Remuneration Order\*](#) (*supra*) makes provision for objection to decision on taxation and appeal to court of Appeal. The Rule stipulates the procedure or steps an aggrieved party should follow in case of dissatisfaction with the Taxing Officer's findings and objection to the same in a matter; see also Vishisht Talwar case (*supra*)
18. This court is guided by Order 50 of the [\*Civil Procedure Rules, 2010\*](#) in its entirety as regards time. See also [\*County Executive of Kisumu\*](#) case(*supra*).
19. The Taxing Officer rendered her ruling in respect of the party and party bill costs on February 25, 2021. The applicant's application was lodged in court on May 10, 2021. The appellant failed to comply with Rule 11(*supra*) thereof.
20. Moreover, the court did not enlarge time as envisioned in Rule 11(4) (*supra*). It is well settled that extension of time is an equitable discretionary relief to a deserving party; see [\*Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others\*](#) (2014) eKLR and [\*Halai and another v Thorton and Turpin \(1963\) Ltd\*](#) [1990] eKLR.
21. The failure by the appellant herein is fundamental. Thus, the same is not curable by section 19 [\*Environment and Land Court Act, 2015 \(2011\)\*](#) and Article 159 (2) (d) of the [\*Constitution of Kenya\*](#),



2010. So, the appellant's application is fundamentally defective, incompetent and an abuse of the court process as stated in the respondent's grounds of opposition.

22. I take into account this court's ruling delivered on September 26, 2018 at paragraph 19 (b), this court's judgment rendered on September 30, 2019 at paragraph 27 (i) as well as this court's ruling of June 11, 2020 in respect of the applicant's notice of motion dated November 4, 2019 and the Taxing Officer's ruling delivered on February 25, 2021. It follows that the orders sought in the respondent's application are deserved.
23. In the result, the appellant's application is contrary to the mandatory legal requirement. It must fail. The respondent's application is, unopposed and meritorious.
24. Thus, the appellant's application is hereby struck out.
25. The respondent's application is allowed in terms of orders 1 and 2 sought therein and as set out at paragraph 6(a) and (b) hereinabove.
26. By dint of the proviso to section 27(1) of the Civil Procedure Act, chapter 21 Laws of Kenya, the appellant shall bear the costs of the twined application.
27. It is so ordered.

**DELIVERED AND DATED AT HOMABAY THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023.**

**G.M.A ONG'ONDO**

**JUDGE**

**PRESENT**

Mr. R. Ochieng holding brief for Kabiru, learned Counsel for the Respondent.

Ms. Oriche, holding brief for Nyauke, learned counsel for the appellant.

**Court Assistant, Okello**

