



**Alton Homes Limited & another v Chelegoi & 4 others; Transnational Bank Ltd (Third party)
(Environment & Land Case 371 of 2019) [2024] KEELC 1093 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 371 OF 2019
EK WABWOTO, J
FEBRUARY 29, 2024**

BETWEEN

**ALTON HOMES LIMITED 1ST PLAINTIFF
JOHN KANGOGO 2ND PLAINTIFF**

AND

**DAVIS NATHAN CHELEGOI 1ST DEFENDANT
JOHN NDUATI NJUGUNA 2ND DEFENDANT
SAMUEL KUGEKA NDEGWA 3RD DEFENDANT
JOSHUA OMONDI HALLONDA 4TH DEFENDANT
COMMERCIAL BANK OF AFRICA LTD 5TH DEFENDANT**

AND

TRANSNATIONAL BANK LTD THIRD PARTY

RULING

1. The dispute in this suit relates to property Land Reference Number Nairobi Block 26/113 (“the suit property”) for which this Court delivered a judgment on 30th August 2023.
2. This ruling is in respect to three applications, two Notice of Motion applications dated 9th October 2023 and 9th January 2024 and a Preliminary objection dated 13th October 2023.
3. The Plaintiffs filed the application dated 9th October 2023 which was supported by an affidavit sworn by Nelson Havi Advocate seeking the following prayers:
 - a. ...Spent.



- b. The time of filing and service of the Notice of Appeal herein dated 9th October 2023 be and is hereby enlarged to include up to until the date of making the order herein.
 - c. The Notice of Appeal herein dated 9th October 2023 be and is hereby deemed as having been filed and served on time.
 - d. The judgment delivered herein on 30th August 2023 be and is hereby corrected to address and include relief no. (h), in the Plaint dated 27th April 2010 in the final orders.
 - e. The costs of this application be provided for.
4. In opposition to the Plaintiffs' Application, the 4th Defendant filed a Notice of Preliminary Objection dated 13th October 2023 seeking that the application be struck out on two points of law;
 - a. That the Environment and Land Court has no jurisdiction to enlarge time within which to lodge a Notice of Appeal.
 - b. That the Plaintiff having elected to appeal, the court has no jurisdiction to entertain a prayer for review.
 5. Thirdly, the 2nd Defendant filed a Notice of Motion Application dated 9th January 2024 which was supported by the affidavit of John Nduati Njuguna seeking for the following reliefs:
 - a. That this Honourable Court be pleased to grant leave to the 2nd Defendant to file the Notice of Appeal out of time.
 - b. That costs of this application be provided for.
 6. The applications and the preliminary objection were heard simultaneously and by way of oral submissions made by counsel for the parties. Learned Counsel Ms. Otto submitted on behalf of the Plaintiff, Learned Counsel Ms. Waweru for the 2nd Defendant, Learned Counsel Mr. Odhiambo for the 4th Defendant, Learned Counsel Ms. Kariuki for the 5th Defendant and Learned Counsel Ms. Muyuka for the third party.
 7. The Plaintiff relied on the Replying Affidavit sworn by Nelson Havi Advocate on the 9th October 2023. It was submitted that the judgment was delivered on 30th August 2023 but the Plaintiffs' Advocates got a copy on the 5th October 2023 and subsequently filed a Notice of Appeal dated 9th October 2023. It was argued that the judgment had omitted the award of ksh 20,000,000/- which was liquidated damages that had been sought as prayer (h) of the Plaintiffs' plaint dated 27th April 2010. It was also argued that the court has powers to review and correct its own judgment.
 8. The application was opposed by the 4th Defendant and Third Party. The 4th Defendant filed a preliminary objection while the Third Party filed a Replying Affidavit sworn by Moses Ngaywa on 16th October 2023. The 4th Defendant argued that section 95 of the [Civil Procedure Act](#) as quoted by the Plaintiffs doesn't apply to the instant application herein and that the Plaintiffs ought to have relied on the provisions of the Court of Appeal Act and rules.
 9. It was contended by the 4th Defendant that the Plaintiffs' desire to file the appeal out of time is an afterthought and further that the Plaintiffs cannot prefer and appeal and a review at the same time.
 10. The Third Party on the other hand argued that Plaintiffs have not demonstrated that there are any arithmetic or such errors or mistakes apparent on the face of the record or judgment to warrant a violation or review of the judgment as the orders being sought would require the court to give an



elaborate argument as the error or error omission is not self-evident. The Court was urged to dismiss the application.

11. Having considered all the applications and respective submission made by counsel for the parties, the Court has identified the following four issues for determination:
 - a. Whether this Court has jurisdiction to enlarge time for lodging of a notice of appeal?
 - b. Whether an applicant can seek a review and an appeal at same instance?
 - c. Whether the Court can correct an omission in its judgment delivered on 30th August 2023?
 - d. What orders should issue as to costs?
12. The court shall now proceed to address the said issue sequentially.
13. On the issue of the Environment and Land Court's jurisdiction to enlarge time, this Court is guided by Section 7 of the [Appellate Jurisdiction Act](#):

“...The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”

14. In view of the foregoing proviso, it is evident that this Court has jurisdiction to determine the applications, it will further apply its discretionary powers in favour of the Plaintiffs and 2nd Defendant who both seek for enlargement of time for lodging a Notice of Appeal. Both parties have explained the reasons for the delay in filing their appeal and considering the fact that a party should not be barred from exercising his or her right to appeal, request unless otherwise stated ought to be granted.
15. On the issue of whether the applicant can seek a review and an appeal at same instance, I have considered the parameters under Order 45 of the [Civil Procedure Rules](#). I have also considered the deliberations by the Court of Appeal in the case of [Multichoice \(Kenya\) Ltd v Wananchi Group \(Kenya\) Limited & 2 Others](#) [2020] eKLR where it was stated;

“...It is the notice of appeal, evincing the aggrieved party's intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4), respectively. For the purposes of the latter, an appeal to the Court of Appeal is “deemed to have been filed when under the Rules of that Court notice of appeal has been given”. This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court....

.... legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that



party must, in the first place withdraw the appeal. So, quite clearly, the learned Judge had jurisdiction to entertain the application for review as no appeal had been filed...”

16. In this instant suit, a similar scenario presents itself. On one hand the Plaintiffs’ application for corrections in essence sought a review while on the other hand sought for extension of time to lodge an appeal. Being that a notice of appeal is distinctly different from an appeal, then this Court is rightly placed to hear and determine the Plaintiffs’ application dated 9th October 2023.

17. With regards to the question of whether the Court erred in an omission of a prayer, I have perused the judgment delivered on 30th August 2023. The Plaintiffs’ prayers were extensively deliberated under Issue no. 7 of the said judgment. In Paragraph 132, the Court then conclusively arrived at the conclusion that only some specific prayers were successful. The Court held as follows;

...”In view of the foregoing, this court shall proceed to grant only prayers (a), (g), (i) and (j) of the Plaint dated 27th April 2010....”

In view of the above, it is the finding of this Court that the Court made no error apparent or mistake that requires review and/or correction.

18. On the issue of costs, it is normative practice that costs are determined at the discretion of the Court as also prescribed in Section 27 of the *Civil Procedure Act*. I have considered the age of this matter and do believe that for litigation to truly come to an end, it is in the interest of justice to refrain from awarding any costs.

19. In the upshot, the applications dated 9th October 2023 and 9th January 2024 and a Preliminary objection dated 13th October 2023 are dispensed with in the following terms:

- i. The 4th Defendant’s Notice of Preliminary Objected dated 13th October 2023 is devoid of merit and dismissed in its entirety.
- ii. The Plaintiffs are hereby granted extension of time to file and serve their Notice of Appeal dated 9th October 2023 which is deemed as duly filed and served on time.
- iii. The 2nd Defendant is hereby granted leave to file and serve his Notice of Appeal within 30 days from today.
- iv. Any other relief not expressly granted is deemed as declined.
- v. Each party will to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF FEBRUARY 2024.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Nelson Havi for the Plaintiffs.

Mr. Ombayo for the 1st Defendant.

Ms. Waweru for the 2nd Defendant.

N/A for the 3rd Defendant.



Mr. Odhiambo for the 4th Defendant.

Ms. Kariuki for 5th Defendant.

N/A for the Third Party.

Court Assistant – Caroline Nafuna.

