



**Brookside Pearl Limited v Verhoef & another (Civil Application
E418 of 2024) [2025] KECA 283 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 283 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E418 OF 2024
M NGUGI, JA
FEBRUARY 21, 2025**

BETWEEN

BROOKSIDE PEARL LIMITED APPLICANT

AND

ALEXANDER JULUS VALENTIJN VERHOEF 1ST RESPONDENT

HASS CONSULT LIMITED 2ND RESPONDENT

*(Being an application for leave to file an appeal out of time from the judgment
of the High Court in Nairobi Commercial and Tax Division (Dr. Prof.
Nixon Sifuna J.) dated 15th March 2024 in Civil Case No. E083 of 2018)*

RULING

1. In the application dated 7th August, 2024 brought under rule 4 and 46 of the Court of Appeal Rules, 2022, the applicant seeks leave to amend the typographical error on the face of the notice of appeal dated 20th March 2024 in the manner set out in the draft amended notice of appeal; and that the draft amended notice of appeal be deemed as duly filed and served upon payment of the requisite court fees. The applicant prays further that time be enlarged and that it be granted leave to file the record of appeal out of time. In the alternative, the applicant prays for extension of time and for leave to file a fresh notice of appeal and a record of appeal out of time.
2. The application is based on the grounds set out on its face and in the affidavit in support sworn by its Managing Director, Gulhamid M Jivanji, on 7th August 2024.
3. The background to the application is that the applicant, a property developer, entered into a sale agreement with the 1st respondent for sale of apartment No. 84 in Brookside Pearl Apartments. The sale agreement required that the funds for the sale of the apartment were to be paid directly to the applicant. Instead of paying the said funds to the applicant, however, the 1st respondent paid the funds



to the 2nd respondent, which withheld the funds on the basis that it had a lien on the funds in order to recover funds owed to it by the applicant. As a result, the applicant, not having received the funds from the 1st respondent, rescinded the sale agreement.

4. The 1st respondent then filed a suit against the 2nd respondent for a refund of the purchase price as well as Kshs. 1,614,520 being the legal costs paid to the applicant's advocates in the transaction, and Kshs. 887,400 that he paid to his own advocates as legal costs. He also sought recovery of the rent payments he had made after the date he was entitled to receive the suit property.
5. The 2nd respondent, the defendant in the suit, joined the applicant as a third party, claiming contribution or full indemnity from it, and the suit proceeded to hearing.
6. In the judgment dated 15th March 2024, the 1st respondent's suit as against the 2nd respondent was dismissed, but the trial court entered judgment against the applicant, the third party in the suit.
7. Aggrieved, the applicant's advocates filed a notice of appeal dated 20th March 2024 on 21st March 2024, but erroneously titled it 'Notice of Cross Appeal'. The applicant avers that this was a typographical error as a perusal of the said document shows that it is a notice of appeal, both in substance and in form, even though otherwise titled.
8. The applicant avers further that it filed a letter bespeaking proceedings dated 20th March 2024, but its former advocates did not take any further steps until a letter was issued to them by the 1st respondent dated 16th April 2024 requiring it to settle the decretal amount within 3 days failing which the 1st respondent would be constrained to commence execution proceedings.
9. The applicant avers that it then changed advocates and, in an attempt to correct the apparent error in the title of the notice of appeal, the new advocates opted to file an application before the trial court dated 14th May 2024 seeking leave to file a notice of appeal and memorandum of appeal out of time, but the application was dismissed in a ruling dated 6th June 2024. The applicant once again changed advocates and appointed the current advocates on record.
10. The applicant contends that its intended appeal raises substantial points of law and has a high chance of success, and unless this application is allowed, it stands to suffer irreparable loss. It is its contention further that the respondents will not suffer any prejudice if the application is allowed.
11. In his affidavit in reply to the application, the 1st respondent, Alexander Julius Valentijn Verhoef avers that the parties had already consented that the document titled 'Notice of Cross- Appeal' is for all intents and purposes a notice of appeal and shall be treated as such; that the applicant was present when the issue of the notice of appeal was addressed, and that the issue was subsequently captured in paragraph 6 of the ruling of the superior court dated 6th June 2024; that the applicant had the option of appealing from that ruling if he was dissatisfied with it, but is instead taking parties in circles and wasting precious judicial time on matters put to rest; and that the applicant should be punished with costs.
12. The 1st respondent further avers that the applicant has filed an application seeking leave to file a notice of appeal and record of appeal five months since the judgment was delivered; that equity aids the vigilant, not the indolent; and that the applicant was at all times represented by advocates and was at all times aware of the statutory timelines with respect to instituting appeals. The 1st respondent avers that by its own doing, the applicant has locked itself out of the safety net of rule 84(1) of the Court of Appeal Rules, 2022; and that it has not given sufficient reason for the delay. It is his case that the present application therefore lacks merit and should be dismissed with costs.



13. The 2nd respondent opposes the application by a replying affidavit sworn on 9th October, 2024 by its director, Farhana Hassanali. Terming the present application facetious, lacking in merit and a misuse of the time and process of the Court,
14. Mr. Hassanali avers that following the judgment dated 15th March 2024, the applicant belatedly filed two applications, one dated 14th May 2024 seeking stay pending appeal, and another dated 13th June 2024 seeking leave to settle the decretal sum by instalments; that both applications, which were supported by affidavits sworn by Gulhamid M. Jivanji, a director of the applicant, were heard on merit and dismissed; that the applicant has filed the present application grounding it entirely on a litany of recriminations against its former advocates; and disowning the applications which had been filed and prosecuted on its ostensible instructions and evident support; and that the applicant is now seeking to depart from the path it had followed and litigate the same matters afresh.
15. The 2nd respondent avers that the applicant has been indolent, guilty of laches and has offered no tenable excuses for the delay in approaching the Court for the remedies sought; and that the delay was excessive and unwarranted. The 2nd respondent further avers that the applicant does not have an arguable appeal and has failed to demonstrate that it stands to suffer any irreparable loss should this application be dismissed.
16. The applicant filed submissions dated 30th September 2024 in support of its application, which I have read and considered. There were no submissions by the respondents on record.
17. The applicant seeks two main orders from the Court. The first relates to amendment of what it terms a typographical error with respect to the notice of appeal filed on 21st March 2024, which it avers that its former advocates erroneously titled 'Notice of Cross-appeal'. The averments by the 1st respondent, as I understand it, is that the application in this regard is superfluous, the parties hereto having agreed that the said notice should be deemed a notice of appeal. In light of this averment, I need not linger on this issue, and the prayer for amendment is allowed as prayed in prayer 2 of the application dated 7th August 2024.
18. The second prayer seeks enlargement of time and for leave to file the record of appeal out of time. The power of the Court to enlarge time is set out in rule 4 of the Court's Rules, and the principles to be applied on an application seeking exercise of the Court's discretion are well settled. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997) the Court stated:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
19. In the present case, judgment was delivered on 15th March 2024. The 1st respondent filed a notice of appeal dated 20th March 2024. On its part, the applicant filed what its advocates termed a notice of cross appeal on 21st March 2024. As I found earlier in this ruling on the basis of averments by the 1st respondent, the parties agreed that this notice was a notice of appeal, despite the applicant's previous advocates naming it a notice of cross-appeal.
20. Under rule 84 of the Rules of this Court, the applicant was required to file its record of appeal within 60 days of the filing of the notice of appeal. This should have been done on or about 20th May 2024. It



was not done, the applicant and its erstwhile counsel instead filing a number of applications, ultimately unsuccessful, before filing the present application dated 7th August 2024.

21. The delay in this matter, from the day when the memorandum and record of appeal should have been filed is slightly over two months. This cannot be said to be inordinate delay.
22. The applicant has also satisfactorily explained the delay: in the period of five months from the date of the judgment to the date of this application, the applicant filed two applications before the trial court. Perhaps they were misguided as the applicant now avers, but the facts do not demonstrate indolence on the part of the applicant. Rather, they are indicative of a party wishing to follow the process of the Court, but perhaps not getting appropriate legal counsel.
23. Additionally, I am satisfied that the applicant has demonstrated that it has an arguable appeal, though it is not for me at this stage to weigh the chances of its success. The question whether the trial court erred in dismissing the 1st respondent's case against the 2nd respondent but rendering judgment against the applicant, the third party, is one that merits further inquiry.
24. In the circumstances, I am satisfied that the applicant is deserving of the exercise of the Court's discretion in its favour. I therefore allow prayer 4 of the application dated 7th August 2024. The applicant shall file and serve its memorandum and record of appeal within 30 days from the date hereof. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

