



**Stuadte v Transzoia Securities Limited (Civil Application
E038 of 2023) [2023] KECA 1222 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1222 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E038 OF 2023
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
OCTOBER 6, 2023**

BETWEEN

ANN MUTHONI STUADTE APPLICANT

AND

TRANSZOIA SECURITIES LIMITED RESPONDENT

(Being an application for temporary and/or interim orders of stay of execution of the judgment and orders issued by the Environment and Land Court at Kwale (Dena, J.) in ELC Case No. 31 of 2021 in a judgment dated 1st February 2023)

RULING

1. In a judgment delivered on February 1, 2023 in favour of the respondent, Transzoia Securities Limited, in ELC Case No 31 of 2022, the Environment and Land Court at Kwale (AE Dena, J.), issued a mandatory injunction directing the applicant, Ann Muthoni Staudte, her agents, servants or persons claiming through her to vacate the respondent's property known as Cape Blush Maisonette on Title No Kwale/Diani Beach Block/1228 within 90 days of service of the judgment and in default eviction to issue. Other reliefs granted in favour of the respondent included an order for payment of mesne profits for trespass from February 1, 2019 and a permanent injunction restraining her from putting up any structures, carrying out any alterations, leasing, damaging, or wasting the said property.
2. Dissatisfied with that judgment, the applicant filed a notice of appeal dated February 13, 2023 and lodged before the ELC on February 15, 2023. Pending the hearing and determination of her intended appeal, the applicant has moved the Court with her present application dated May 12, 2023 principally under Rule 5(2)(b) of the Court of Appeal Rules, seeking an order of "temporary and/or interim orders of stay of execution" of the said judgment.
3. It is the applicants case that her intended appeal is arguable; that the matter is connected to a succession cause in the matter of the estate of George Barbour, deceased, who bequeathed the suit premises to



- her under his Will; that she is also a beneficiary of 135 shares in the respondent through a mediation agreement in the succession cause; that she is now threatened with eviction from the suit premises on the basis of the impugned judgment and stands to suffer untold pain and loss and she will be rendered homeless and suffer irreparable loss should the execution of the decree proceed.
4. Tracy Deborah Pirie, a director of the respondent in her replying affidavit sworn in opposition to the application deposed that the notice of appeal on which the present application is hinged is incompetent as it was lodged by an advocate who did not appear for the applicant in the lower court without either prior leave of the court being obtained or without the consent of the applicant's previous advocates; that the applicant's letter bespeaking proceedings from the lower court was lodged out of time and the 60 days for lodging the memorandum and record of appeal have also lapsed.
 5. It is the respondent's case that the intended appeal is not arguable as the suit property is indisputably registered in the name of the respondent; that in any event the intended appeal will not be rendered nugatory as the applicant was given 90 days to vacate the property and get alternative housing but failed to do so and continues to disobey the decree of the ELC; that the applicant has dual citizenship without any known attachable assets in Kenya; that she will waste away the property and leave Kenya any time in avoiding execution of the accumulating decretal amount standing at Kshs 7,150,500.00 and continuing to accrue at the rate of Kshs 158, 900.00 per month; that the deceased who was until his demise in October 2018 a director and majority shareholder of the respondent was living with the applicant as his girlfriend in the property as a director's benefit but was never registered as the owner of the property; that the applicant is neither a director nor a shareholder of the respondent and cannot unilaterally arrogate the property to herself without the consent of the respondent; and that her stay in the property terminated with the death of the deceased on 3rd October 2018. Moreover, the applicant has been renting out the premises for Air BNB as advertised online and her claims that she resides on the property are false.
 6. We heard the application on June 14, 2023. Mr Mochere, learned counsel, appeared for the applicant, while Mr Litoro Learned counsel appeared for the Respondent. The principles governing the exercise of the court's jurisdiction under Rule 5(2)(b) of the Court of Appeal Rules are well settled. Firstly, the intended appeal should be arguable and not frivolous; and secondly, this Court should ensure that the appeal, if successful, will not be rendered nugatory by the refusal to grant the order of stay sought. See *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* – Civil Appl No Nai 93/02 (UR)
 7. The challenge by the respondent regarding the competence of the notice of appeal on the basis that it was filed by an advocate who did not represent the applicant in the lower court has no merit. Apart from the consideration that we are not dealing with an application to strike out the notice of appeal, an appeal to this Court, for purposes of representation is a new proceeding and the requirements under the Civil Procedure Rules pertaining to requirement consent prior to change of advocates do not apply in this court. See *Temo & 6 others v Abdalla & another* (Civil Application E005 of 2019) [2023] KECA 779 (KLR) (23 June 2023) (Ruling)
 8. As to whether the intended appeal is arguable, it was submitted that the applicant is a legatee of the estate of the deceased and a de facto partner; that the subject of the appeal is a house on a subdivision of the suit property that is yet to be registered and which is pending before the family court in the succession cause in respect of the deceased; and that the applicant is a beneficiary of 135 shares in the respondent. Although we have not had sight of the memorandum of appeal, and bearing in mind that an arguable appeal is not one that will necessarily succeed, we are persuaded that the intended appeal is not frivolous. There is for instance the question whether applicant has an interest in the property, as she claims, based on which the conclusion by the trial judge that she is a trespasser can be impeached.



9. On the nugatory aspect it was urged for the applicant that if the impugned judgment of the ELC is executed, the subject matter is “likely to be erased through demolishing and reconstruction of another premises rendering the intended appeal nugatory and inconsequential in the end”; that in the event of demolition, what may follow may be irreversible and detrimental to the appeal; and that the question before the court is not monetary in nature. There is however no material placed before us to demonstrate that there is a threat of demolition of the property, and it is not clear on what factual basis that claim is made. As to the claim that the applicant will be rendered homeless if she is evicted, the respondent has demonstrated, prima facie, that the applicant is not in occupation but rather, is carrying on the business of Air BnB on the property. We are not satisfied that the applicant has met the test in this regard. Consequently, the application fails and is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

