



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Nazerali v Regional Criminal Investigation Office, Coast & 4 others (Criminal Revision 177 of 2022) [2022] KEHC 12541 (KLR) (10 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL REVISION 177 OF 2022
OA SEWE, J
AUGUST 10, 2022**

BETWEEN

KIRAN A NAZERALI APPELLANT

AND

REGIONAL CRIMINAL INVESTIGATION OFFICE, COAST 1ST RESPONDENT

**COUNTY GOVERNMENT OF MOMBASA, PUBLIC HEALTH
OFFICE 2ND RESPONDENT**

**MEDICAL SUPERINTENDENT, COAST GENERAL HOSPITAL,
MOMBASA 3RD RESPONDENT**

OCS, CENTRAL POLICE STATION, MOMBASA 4TH RESPONDENT

**MANAGEMENT, KOJA SHIA ITHNASHERI CEMETARY, MOMBASA 5TH
RESPONDENT**

RULING

- [1] By the Notice of Motion dated July 28, 2022, Kiran A Nazerali (the applicant) seeks orders that:
- [a] Spent
 - [b] The court be pleased in the first instance to stay execution of the ruling issued in Criminal Application no 313 of 2022 delivered on July 27, 2022 pending the hearing and determination of the application (spent);
 - [c] The court be pleased to grant an injunction barring the 1st respondent either by themselves or their agents, from exhuming the body of Abbas Anverali Nazerali or interfering with the grave site, pending the hearing and determination of the revision application;



- [d] The court do issue an order for the maintenance of the status quo during the pendency of the revision application;
- [e] The costs of the application be provided for.
- [2] The application was based on the grounds that the 1st respondent instituted a miscellaneous application no 313 of 2022 before the lower court seeking for the exhumation of the body of the applicant's husband; and that although the applicant and her adult children opposed that application, an exhumation order was granted by the lower court on July 27, 2022. The applicant was aggrieved by that decision and has applied for revision. She therefore prays that a temporary injunction be granted pending the hearing and determination of the revision application.
- [3] The application is supported by the applicant's affidavit, sworn on July 27, 2022 to which she annexed copies of the documents filed before the lower court in miscellaneous application no 313 of 2022. The documents include a copy of the certificate of death issued in respect of the deceased, Abbas Anverali Nazerali, no 1377346 (Annexure KN3) and the impugned ruling delivered by Hon Adet on July 27, 2022.
- [4] The application was opposed by the 1st respondent and an affidavit to that effect filed herein on August 3, 2022, sworn by no 76452 PC Pharis Thoya. He deposed to the circumstances that led to the issuance of the exhumation order dated July 27, 2022; particularly the fact that a report was made at Kilindini Port police station by Shakir Anwar, a Pakistani national, to the effect that his brother, Abbas Anverali Nazerali died in suspicious circumstances on May 15, 2022. PC Thoya further averred that, thereupon investigations were instituted and the relevant treatment documents collected from which they established that the deceased was discharged from Aga Khan Hospital against medical advice; and that the body of the deceased was buried contrary to the express directive by the Officer Commanding Station, Central Police Station.
- [5] Thus, PC Thoya averred that it became imperative to have the body exhumed for an autopsy to be conducted to conclusively ascertain the cause of death of the deceased. He consequently urged for the dismissal of the application positing that it is only aimed at obstructing the ongoing investigations into the cause of death of Abbas Anverali Nazerali.
- [6] At the hearing of the application, Mr Abed, assisted by Mr Makori, submitted that no proper basis was laid before the lower court to warrant the orders made by the learned magistrate; and therefore that the applicant has good chances of success on revision. Counsel then went on to show why the revision has good chances of success and pointed out that no justification was made for exhumation. In addition, Mr Makori submitted that the purpose of the stay orders is to protect the substratum of the revision application pending its hearing and determination.
- [7] On behalf of the 1st and 4th respondents, Mr Makuto opposed the application and submitted that article 165 of the Constitution and Order 40 of the Civil Procedure Rules which the applicant relied on do not apply to these proceedings. He likewise argued that neither section 362 nor section 364 of the Criminal Procedure Rules provide for stay of proceedings. He also submitted that the applicant has not demonstrated what prejudice, if any, will be suffered by her if stay is not granted. Lastly, Mr Makuto submitted that since the impugned order is appealable, the applicant ought to have appealed instead of filing an application for revision. He consequently submitted that this court lacks the jurisdiction to entertain the revision and by extension the stay application. He relied on the Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 in urging the court to down its tools by striking out the substantive revision application, including the stay application.



[8] Mr Oloo, for the interested party, opposed the application, contending that nothing has been put forth by the applicant to show that she has good chances of success on revision. He relied on Eldoret High Court Criminal Appeal no 5 of 2019: *Elijah Oginda v DCI* and Mombasa Criminal Appeal no E149 of 2021: *ODPP v Principal Magistrate*, Shanzu and urged the Court to find that the 1st respondent is engaged in an investigation into the cause of death of the deceased; and therefore that any further delay would work against the interest of justice and the discharge of a constitutional duty. Mr Oloo was also of the view that the court lacks the requisite jurisdiction to hear and determine the revision application.

[9] Thus, before embarking on a discussion on the merits of the application for injunction, it is imperative for the court to grapple with the issue of jurisdiction as raised by Mr Makuto and Mr Oloo on behalf of the 1st respondent, the 4th respondent and the interested party. Indeed, in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 it was held:

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”

[10] The Supreme Court of Kenya expressed itself on the issue of jurisdiction in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, thus:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

[11] Hence, section 362 of the *Criminal Procedure Code*, stipulates that:

“The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

[12] Further to the foregoing, section and 364(1)(b) of the *Criminal Procedure Code* stipulates that:

“In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High



Court may ... in the case of any other order other than an order of acquittal alter or reverse the order."

[13] Looked at from that prism, it cannot be said that the application for revision is misplaced. Nevertheless, Mr Makuto relied on section 364(5) of the [Criminal Procedure Code](#) which provides that:

“When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

[14] Section 347 of the [Criminal Procedure Code](#) which provides for the right of appeal, in general strokes, is specific to convicted persons. I am therefore not convinced that it encompasses orders such as the instant one. Hence, the applicant had the option to either apply for review or appeal. It is therefore my finding that the court has the requisite jurisdiction to entertain the revision application as well as the interlocutory application for a temporary injunction.

[15] Although the court was addressed at length on the applicant’s prayer for stay, that prayer was spent when the court granted stay on August 1, 2022 pending the hearing and determination of the instant application. What remains for consideration is the prayer for injunction, expressed to be brought under order 40 of the [Civil Procedure Rules](#). I would agree with Mr Makuto that the orders sought are sought within the context of the criminal procedure regime; and therefore that order 40 of the [Civil Procedure Rules](#) cannot avail the applicant. Moreover, sections 362 and 364 of the [Criminal Procedure Code](#) are not applicable to the application for injunction. Nevertheless, article 165(6) and (7) of the [Constitution](#) is explicit that:

“[6] The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

[7] For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

[16] Thus, the court has the constitutional duty to ensure such orders as are appropriate, to ensure the fair administration of justice, are given in this matter. I have therefore taken into account that there is a disputation as to whether or not the order of exhumation should be executed. It would serve no purpose for the 1st and 4th respondents to proceed with exhumation before a determination is made on the revision application. Accordingly, the Notice of Motion dated July 28, 2022, is hereby allowed and orders granted as follows:

- (a) The status quo now prevailing be maintained pending the hearing and determination of the revision application;
- (e) Given the nature of the application, there is no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF AUGUST 2022.

OLGA SEWE



JUDGE

