Rajab v Kaur & another (Civil Application E073 of 2023)
[2025] KECA 40 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KECA 40 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E073 OF 2023

AK MURGOR, P NYAMWEYA & GV ODUNGA, JJA

JANUARY 24, 2025

BETWEEN

ASHA RAJAB ..... APPLICANT

AND

SUKHJIT KAUR ..... 1ST RESPONDENT

ARJINDERPAL SINGH BAMRAH ..... 2ND RESPONDENT

(An application for stay of execution of the ruling and order of the High Court at Mombasa (Gregory Mutai, J.) dated 4{{^th}} August 2023 in Succession Cause No.38 of 2018)

RULING

1. The dispute the subject matter of this ruling revolves around the Estate of Inderjeet Singh also known as Inderjeet S. Sohanpal (the deceased) who passed away on 10th May 2018 leaving a Will dated 15th June 2016. Following the death of the deceased, Arjinderpal Singh Bamrah, the 2nd respondent herein, in his capacity as the executor of the Will, filed a petition for Grant of Probate of Written Will. By his Will the deceased appointed the 2nd respondent as his executor and bequeathed his Indian assets to his wife Sukhjit Kaur, the 1st respondent, and her two children, Pamela and Prince Paul Singh. His account in UCO Bank was bequeathed to his nephew, Surinder Singh Sohanpal of England and his various assets in Kenya were bequeathed to Asha Rajab Ali, the applicant herein, and her son, Prince Sohanpal Inderjeet.

2. On 16th October 2018, the 1st respondent filed an objection to the making of the said grant of probate to the 2nd respondent claiming that she was the sole widow of the deceased and that the Will was procured by fraud, importunity or mistake and was accordingly void. According to her, the Will was made at the time when the deceased was gravely physically ill such that the same could not be said to have been an expression of the true intention and wishes of the deceased.

3. After hearing viva voce evidence, the learned trial Judge in his ruling delivered on 4th August 2023 found: that on 15th June 2016, the deceased could not have had the mental capacity to make the Will; that the impugned Will was a product of fraud and was not an expression of the wishes of the deceased; that the deceased held out the applicant as his wife and that they lived together for a considerable period of time as mutual spouses; that Prince Sohanpal Inderjeet, was the applicant's son with the deceased; that the Will dated 15th June 2016 was invalid and that the deceased died intestate and his estate should be governed by the law governing intestacy; that to preserve the estate, the 1st respondent and Prince Sohanpal Inderjeet to file a joint petition for Letters of Administration Intestate within 30 days of the ruling.

4. Dissatisfied with the decision the applicant filed a Notice of Appeal on 21st August 2023 dated the same day.

5. By a Notice of Motion dated 24th August 2023, the applicant seeks stay of execution of the said orders made on 4th August 2023 and stay of further proceedings in Mombasa High Court Succession Cause No. 38 of 2018 pending the hearing and determination of this application and the intended appeal. The application is premised on grounds: that the High Court's ruling invalidating the Will dated 15th June 2016 dispossessed the applicant; that the intended appeal is arguable with overwhelming prospects of success as evinced by the draft Memorandum of Appeal; that the applicant will be evicted from her matrimonial home and locked out of the inheritance as a co- wife which would adversely affect her state of health; that the estate in dispute is worth Kshs. 150,000,000 hence constitutes special circumstances meriting the grant of stay of execution; that no prejudice will be suffered by the 1st respondent should the application for stay of execution be granted; and that the applicant is not guilty of laches.

6. In support of the application, the applicant swore an affidavit on 24th August 2023 in which she reiterated the grounds of the application and averred: that the learned trial Judge erred in finding that the deceased was mentally incapacitated contrary to the medical evidence adduced; that there was no proof of fraud in the preparation and attestation of the will; and that the learned trial Judge was biased in his determination.

7. It was further averred: that unless the stay sought is granted the 1st respondent, who was bequeathed a house and the deceased's bank accounts in India, effectively gives her all the powers to deal with the deceased's properties in India unless the Court makes intervenes; that the 1st respondent has been creating disturbance both in the applicant's matrimonial home and in her business necessitating the intervention by law enforcement officers; that the effect of the invalidation of the deceased's will is that the applicant was dispossessed since the learned Judge appointed the 1st respondent and the applicant's son as joint administrators while excluding the applicant who was the deceased's wife for 27 years and with whom the jointly deceased acquired properties in Diani during their marriage; that there is a danger of the applicant being wholly disinherited unless the orders sought are granted; that the 1st respondent who has been a resident of India and who is on a vengeful mission to ensure that the applicant does not get her share of the property bequeathed to her, may waste the deceased's properties by disposing them off to third parties before relocating back to India; and that the applicant is willing to abide by such directions as the Court may give.

8. In opposition to the application, the 1st respondent through her Notice of Preliminary Objection dated 10th July, 2024, stated that the applicant had filed a similar application dated 15th March 2024 before the High Court seeking similar orders which application was still pending determination before the High Court; that the instant application is therefore sub judice, bad in law and ought to be struck out as it violates Section 6 of the *Civil Procedure Act*; that this application is untenable and an abuse

of the court process; and that it is in the interest of the expeditious administration of justice that the application be dismissed with costs to the 1st respondent.

9. Apart from the preliminary objection, the 1st respondent filed a replying affidavit sworn on 7th September 2023 in which she deposed: that she got married to deceased in India on 29th August 1976 under the Indian law and they remained married till the deceased's death on 10th May 2018; that their marriage was blessed with two issues, namely Pamela Sohanpal who was born in 1978 and Prince Paul Sohanpal who was born in 1990 in India; that although he lived in India, during the course of his life, the deceased relocated to Mombasa in 1976 in pursuit of business interests but still regularly and consistently travelled to India; that in May 2016 the deceased suffered a heart attack on account of health complications; that when the 2nd respondent filed the petition, she never served the 1st respondent; that she realised the circumstances surrounding the making of the Will could not have reflected the deceased's wishes; and that the Will left out a vast majority of the deceased's estate to the applicant and her adult son, Prince Sohanpal Inderjeet, but excluded the 1st respondent and her children.

10. According to the 1st respondent, although the High Court directed that she and the applicant's son Prince Sohanpal Inderjeet file a joint Petition for Letters of Administration, the applicant continued to act in blatant disregard of the Court's ruling by directly being involved in the management of the deceased's estate; that her attempts to reach out to the applicant's son have been met with accusations of invasion of the applicant's property and instead the applicant has continued to intermeddle and irregularly dispose of some of the estate's assets; that the applicant has denied the 1st respondent any form of access to the properties belonging to the deceased claiming that they form part of her matrimonial properties; that she has never threatened or stormed into the applicant's house; that her instructions to her advocates to reach out to the applicant's advocates have been turned down; that allowing stay of execution would be affirming validity and operation of an already invalidated Will without the rigors of an appeal against the findings of the trial court; and that filing the instant application without first filing such an application before the High Court was an attempt of misusing the process of the court and was meant to frustrate the seamless transition of the management of the estate's assets, in the hope that the invalidated Will continues to be in place.

11. We heard the application on GoTo virtual Court platform on 18th July 2024 when learned counsel, Mr Tindi, appeared for the applicant while learned counsel, Ms Baraza, appeared for the 1st respondent. Both counsel relied on their written submissions which they highlighted briefly.

12. The applicant in her submissions cited the case of Co-operative Bank of Kenya Limited & Finance Union (Kenya) [2015] KLR, and Republic v Kenya Anti Corruption Commission & 2 Others [2009] eKLR 31 while highlighting that the decision whether or not to grant stay pending appeal is discretionary and should be exercised judicially and not capriciously or at the whims of the judge, as well as the two principles necessary to be satisfied before such relief is granted. It was submitted, based on the cases of Tropical Institute of Community Health & Development & Others v Paramount Investment Ltd [2004] eKLR, Joseph Gitahi Gachau & Another v Pioneer (A) Limited & 2 Others [2009] eKLR and East African Portland Cement company Ltd v Superior Homes (K) Ltd [2014] eKLR that an arguable appeal is not one that must necessarily succeed but one which ought to be argued fully before the Court, and that for the purposes of the application for stay, one does not need a plethora of arguable points to show that the appeal is arguable .

13. It was contended that the intended appeal is not frivolous since the applicant intends to argue: that the learned Judge erred in holding that the deceased was, due to the state of his health, lacking the mental capacity to appreciate the effects of his action when there was no medical report to support

such a finding; that the learned Judge erred in finding that the Will was the product of fraud when the mistakes were only due to mis-stapling of documents which were satisfactorily explained; that the learned Judge erred in making findings of fraud when there was no evidence in support thereof; and that the learned Judge erred in appointing the 1st respondent, and Prince Sohanpal Inderjeet to be joint administrators while excluding the applicant hence showing bias against the applicant.

14. Regarding the second condition, it was submitted that the appeal will be rendered nugatory since the 1st respondent will exclude the applicant and ensure she is dispossessed fully from the estate whose properties shall be transferred to third parties. This submission was based on the cases of Julius Matasyo v Pyrethrum Board of Kenya [2013] eKLR and Permanent Secretary Ministry of Roads & Another v Fleur Investments Ltd [2014] KLR which defined term "nugatory". On the authority of East African Portland Cement Company Ltd v Superior Homes (K) Ltd (supra), it was submitted that a court as a general rule ought to exercise its best discretion in a way so as to prevent an appeal, if successful from being rendered nugatory. According to the applicant, she ought to be afforded an opportunity to prosecute the intended appeal lest it is rendered nugatory and that no prejudice will be suffered by the 1st respondent if stay is granted.

15. The 1st respondent, in its submissions relied on Kenya Industrial Estate Limited & Another v Matilda Tenge Mwachia [2021] eKLR while highlighting the conditions necessary for an application for stay pending appeal to be granted. It was submitted that there is no appeal before this Court since the applicant filed her Notice of Appeal out of time on 21st August 2023 as opposed to 18th August 2023 which was the last date when it ought to have been filed; that no prima facie case has been proved as the trial court dealt with all the issues raised in the attached draft Memorandum of Appeal; that pursuant to rule 84 of the Court of Appeal Rules, 2020, she filed an application dated 11th September 2023 seeking to have the said Notice of Appeal struck out.

16. The 1st respondent further submitted: that it is the deceased's estate that will suffer irreversible damage owing to the ongoing litigation and lack of management and preservation of the estate; that the estate has been wasting since the year 2018 hence the application, if granted, would imply stay of management and administration of the estate hence causing immense irreversible harm and waste pending the appeal; that since the applicant's son was appointed a joint-administrator to the estate of the deceased, the applicant stands to suffer no damage in the distribution of the estate; and that the applicant having failed to satisfy both limbs of the application, the application ought to be dismissed with costs.

17. We have considered the application and the submissions made before us. As a preliminary objection, it was submitted that this application is sub judice since there is, pending before the trial court, a similar application dated 15th March 2024. Section 6 of the *Civil Procedure Act* provides that:

> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

18. The doctrine of the sub judice rule arises from the realisation that in the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter should be avoided so as to preserve judicial resources in terms of time spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases that the courts have to deal with. However, as the rule states, it is the subsequent suit or proceedings

that are to be stayed. This application is dated 24th August 2023 while the application before the trial court is indicated as dated 15th March 2024. The applicant submitted that this application was the first in time. Therefore, it cannot be stayed on the strict application of the sub judice rule.

19. That notwithstanding, a party who files multiple applications before different court having jurisdiction in a matter seeking the same orders may well be found to be abusing the court process. As was held in Mitchell and others vs- Director of Public prosecutions and another (1987) LRC (const) 128:

> " ...in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly, it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process."

20. There can be no doubt that the conduct by a party of invoking two concurrent jurisdictions in pursuit of the same remedy in the hope that, in at least one forum, it will achieve what he seeks, amounts to an abuse of the process of the court since to do so amounts to playing lottery with the court process. We will say no more on that issue.

21. The respondent also took issue with the competency of the Notice of Appeal, submitting that it was filed out of time and disclosing that there is a pending application seeking to have it struck out. That application is, however, not before us. While, it is true that the filing of a Notice of Appeal is a pre-requisite to the grant of stay under Rule 5(2)(b) of the Court of Appeal Rules, at the point of a rule 5(2)(b) application, the Court is not concerned with the validity or otherwise of that Notice of Appeal since the Rule does not talk about a valid Notice of Appeal. This was the position in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR where this Court expressed itself as hereunder:

> " The applicant filed its notice of appeal against the said decision on 26th May, 2005; the Court accordingly has jurisdiction to hear and determine the motion for stay. Mr. Ohagga, learned counsel for the respondents Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out Rule 5 (2) (b) does not provide that "..... where a valid notice of appeal ....;" the Rule simply provides that:-
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> 'In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74. '
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> Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered."

22. We cannot, therefore, determine this application on the basis of the yet to be determined application for striking out of the Notice of Appeal.

23. On the merits of the application, this Court in its numerous decisions has crystallised the basis for the exercise of this Court's jurisdiction under rule 5(2)(b) aforesaid. The exercise of this jurisdiction

is original, independent and discretionary (see Githunguri v Jimba Credit Corporation Ltd No (2) (1988) KLR 838). It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see Equity Bank Ltd v West Link Mbo Limited [2013] eKLR). It only arises where the applicant has lodged a notice of appeal or the appeal itself (see Safaricom Ltd v Ocean View Beach Hotel & 2 Others Civil Application No. 327 of 2009 UR).

24. The conditions to be met before a party can obtain relief under rule 5(2)(b), as enunciated in case law, are that the applicant has to demonstrate that the appeal is arguable on the one hand and, on the other hand, that if the stay sought is not granted, the appeal or the intended appeal, as the case may be, will be rendered nugatory (see Githunguri v Jimba Credit Corporation Ltd No (2) (supra). By the term "arguable", it is not meant an appeal or an intended appeal that will succeed, but one which raises a bona fide issue worth of consideration by the Court (see Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 UR). An appeal need not raise a multiplicity or any number of such points, and a single arguable point is sufficient to earn an applicant such a relief, subject to the satisfaction of the second condition (see Damji Praji Mandavia v Sara Lee Household Body care (K) Ltd Civil Application No. Nai 345 of 2005 (UR)). It is therefore trite that demonstration of one arguable point will suffice (see Kenya Railways Corporation v Ederman Properties Ltd Civil Appeal No. Nai. 176 of 2012; and Alimohamed Musa Ismael v Kimba Ole Ntamorua & 4 others Civil Appeal No. Nai. 256 of 2013.)

25. As for the second requirement, an appeal or intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible or, if it is not reversible, whether damages will reasonably compensate the party aggrieved (see Stanley Kangethe Kinyanjui v Tony Keter & 5 others Civil Appeal No. 31 of 2012). Loss to the parties on both sides of the appeal plays a central role in the determination since it is what the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited versus Kenya Revenue Authority Civil Application No. 135 of 2012*).

26. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2) (b) (see Republic v Kenya Anti- Corruption Commission & 2 others (2009) KLR 31; Reliance Bank Ltd v Norlake investments Ltd (2012) IEA 22); and Githunguri v Jimba Credit Corporation (supra)).

27. In his decision, the learned Judge nullified the Will and directed that the deceased's estate be governed by the law governing intestacy and that to preserve the estate, the 1st respondent and Prince Sohanpal Inderjeet, the applicant's son do file a joint petition for Letters of Administration Intestate within 30 days of the ruling. The applicant's intended appeal will be based on, inter alia, the fact that there was no evidence adduced to prove that the deceased was not in his proper state of mind when making the will and further, that the evidentiary standard of proving fraud was not met. We find that, based on the said grounds, the intended appeal cannot be said to be frivolous. It is arguable.

28. The applicant's apprehension is that unless the stay is granted, the respondent will, due to the exclusion of the applicant from administration, disinherit the applicant and is likely to waste the deceased's properties by disposing them off to third parties before relocating back to India. With due respect, we find this assertion far-fetched. Our understanding of the order issued by the learned Judge is that the 1st respondent, together with the applicant's son, Prince Sohanpal Inderjeet, upon successfully petitioning for grant of letters of administration of the estate of the deceased will commence the process of identifying the beneficiaries of the estate during which the applicant will be at liberty to put forward her claim to the estate, if any, for determination. It is only upon determination of the assets and liabilities of the estate as well as its beneficiaries and their respective entitlements that the disposal thereof may be done. This cannot be done until the grant is confirmed and there are prescribed timelines for that process. In our view, it is premature to state at this stage that the estate is likely to

be wasted by the execution of the order intended to be appealed against. In any case, the mere fact of the execution of the order does not render the applicant's appeal, should it succeed nugatory. If the applicant succeeds, the will is likely to be restored and the order made by the trial court set aside including the consequential proceedings. At this stage, we are not satisfied that the matter will be beyond this Court when hearing the appeal to restore the status quo ante. Similarly, there is no evidence that the applicant is at risk of being evicted from her home.

29. The applicant's allegations that the 1st respondent is wasting the estate, in our view, can be addressed elsewhere. If true, such actions amount to intermeddling with the estate of a deceased person and there are remedies provided for such actions. An order staying execution pending an appeal is not one of them.

30. Consequently, we find that the applicant has failed to prove that the appeal, should it succeed, will be rendered nugatory in which event the application dated 24th August 2023 fails and is dismissed, but being a succession matter involving family members of the deceased, with no order as to costs.

31. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

A.K. MURGOR

JUDGE OF APPEAL

P. NYAMWEYA

JUDGE OF APPEAL

G.V. ODUNGA

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

Deputy Registrar