



Nazerali v Regional Criminal Investigations Office Coast & 4 others (Criminal Application E001 of 2022) [2022] KECA 1091 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1091 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPLICATION E001 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 7, 2022**

BETWEEN

KIRAN A NAZERALI APPLICANT

AND

**REGIONAL CRIMINAL INVESTIGATIONS OFFICE COAST 1ST
RESPONDENT**

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

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

OCS CENTRAL POLICE STATION , MOMBASA 4TH RESPONDENT

**MANAGEMENT KOJA SHIA ITHNASHERI CEMENTRY MOMBASA 5TH
RESPONDENT**

(An application for stay pending appeal from the ruling of the High Court of Kenya at Mombasa (Onyiego J.) delivered on 24th August 2022 in Criminal Revision Application No. E177 of 2022)

RULING

1. The applicant, Kiran A. Nazerali, is the widow of Abbas Anverali Nazerali, deceased, who died on May 15, 2022 in Mombasa and whose body was interred at Koja Shia Ithnasheri Cemetery along Haile Selasie Avenue Mombasa on the same day. The deceased is survived by the applicant and four children aged 18, 13, 9 and 9 months. Two weeks after the burial, on May 30, 2022, a brother of the deceased, one Shakir Anwar, a Pakistan national, made a report at Kilindini Port Police Station Mombasa complaining that the circumstances under which the deceased died were unclear.



2. Later, by an application dated July 6, 2022, the Regional Directorate of Criminal Investigations, the 1st respondent, through Police Constable Pharis Thoya, applied before the Chief Magistrate's Court at Mombasa for an order of exhumation of the body of the deceased for purposes of medical examination to confirm cause of death.
3. In his affidavit in support of that application, Police Constable Pharis Thoya deposed that the brother of the deceased had provided treatment records from Aga Khan Hospital showing that the deceased was released from hospital, at the behest of the applicant, on 14th May 2022 against medical advice and taken to his house; that on 15th May 2022 at 4.00 a.m. the deceased was pronounced dead at Mombasa Hospital emergency room where he had been rushed by the applicant; that at Mombasa Hospital, the applicant was advised to report the death at Central Police Station which then issued a letter addressed to the Administrator, Mombasa Hospital requesting assistance in the preservation of the body of the deceased.
4. Constable Pharis Thoya deposed further that contrary to the directive by the OCS Central Police Station for the body of the deceased to be preserved, the applicant and a family friend, Hussein Chandu, proceeded to bury the body of the deceased at Koja Shia Ithnasheri Cemetery without informing the brother of the deceased and other siblings of the death. He asserted that the process of burial was suspicious and that the immediate family of the deceased are questioning the circumstances under which the deceased died.
5. In opposition to the application replying affidavits sworn by the applicant, Dr. Brian Wazori, two of the daughters of the deceased, the family friend Hussein Chandoo and Khamisi Hussein Mali, a Muslim cleric in the Shia sect of Islam were filed. In substance, the effect of which is that the complainant, Shakir Anwar, and the deceased were estranged and were not in speaking terms; that at the gravesite, the complainant had threatened that he would ensure that the applicant and her children became destitute; that Anwar was actuated by malice in making a false report; that the deceased was unwell for some time and had refused to go to hospital for treatment; that the condition of the deceased deteriorated and he was not passing urine prompting the applicant to take him to hospital; that at the hospital he was admitted in the general ward before being transferred to ICU where the doctors recommended dialysis; that at the hospital the deceased vehemently refused treatment insisting he wanted to go home; that when all persuasion to keep him in hospital failed he was discharged against medical advice after the applicant signed the release form; that at home they got a doctor from Tudor Healthcare to check on the deceased but at 3.00 a.m. the deceased developed breathing difficulties and was rushed to Mombasa Hospital where he was pronounced dead at the emergency.
6. The applicant stated that there was nothing suspicious about the burial of the deceased which was carried out in accordance with Islamic religion and the rituals and customs of Khoja Shia Ithnasheri jamaat; that it is plain that the cause of death was kidney failure; and that exhumation of the body of the deceased will traumatize the family and will not serve any purpose as the cause of death is established. It was further contended for the applicant that the court had no jurisdiction to entertain the application; and that the application was entirely based on hearsay.
7. In a ruling delivered on July 27, 2022, the learned Magistrate was satisfied that the court had jurisdiction; and that to the extent that the affidavit of Constable Pharis Thoya on which the application was based was not aimed at establishing the truth but to establish the claims made, it was not hearsay. The magistrate concluded that "the events after the discharge of the deceased from Aga Khan Hospital on 14th May 2022 should be subjected to investigation to establish the cause of death" which "can only be done by conducting an autopsy on the body of the deceased" which required the body of the deceased to be exhumed.



8. Aggrieved, the applicant presented an application before the High Court on July 29, 2022 seeking revision of the orders allowing exhumation. That application was opposed. In a ruling delivered on August 24, 2022, the High Court (J.N. Onyiego, J.) held that the applicant had not established that the application met the threshold for revision under Section 362 and 364 of the *Criminal Procedure Code*; that the appropriate recourse for the applicant's grievances would have been through an appeal; and that on the merits, the applicant had not established sufficient ground to interfere with the decision of the Magistrate's court as no illegality, impropriety or irregularity of proceedings had been established.
9. Intending to appeal that decision to this Court, the applicant filed a notice of appeal dated 30th August 2022 on the strength of which she has presented the application before us dated 30th August 2022. It is made under Rule 5(2)(b) of the *Court of Appeal Rules* and seeks an order of injunction to bar the 1st respondent from exhuming the body of the deceased or interfering with the grave site until the appeal is fully heard and determined.
10. We heard the application virtually on 7th September 2022 when Mr. Makori, learned counsel, appeared for the applicant. There was no appearance for the 1st and 2nd respondents despite service of the application and of notice of hearing. Mr. Makori informed the Court that the 3rd to 5th respondents had not participated in the proceedings and are not affected by the application.
11. Relying on his written submissions which he orally highlighted, Mr. Makori urged that the intended appeal is arguable as demonstrated in the applicant's draft memorandum of appeal; that there is the question whether the magistrate had jurisdiction to grant the orders; that on the strength of the decision of this Court in *Attorney General & another vs. Tolphin Nafula & 5 others* [2021] eKLR, an issue of jurisdiction renders an appeal eminently arguable; that there is also the question of the courts below having relied entirely on the affidavit of Police Constable Pharis Thoya, which according to the applicant is hearsay evidence; and that the orders granted by the two courts below have no factual basis.
12. It was submitted that the exhumation of the body of the deceased forms the substratum of the appeal; that if exhumation is carried out before the appeal is heard and determined and the appeal eventually succeeds, the appeal will be rendered moot or nugatory as it will be impossible to reverse the exhumation and neither can damages compensate the family for the trauma.
13. Having considered the application, the background and the submissions, we are satisfied that the intended appeal is arguable. There is, for instance, the question whether the High Court erred in upholding the decision of the Magistrate's court on jurisdiction. There is also the question whether the affidavit on the basis of which the orders was granted comprised of hearsay evidence and whether the threshold for granting orders of exhumation and in declining revision were met. We are aware that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
14. We are also satisfied that that unless we grant the orders sought and the exhumation is carried out and the appeal ultimately succeeds, no purpose will be served and the appeal will be rendered moot.
15. Consequently, we allow the application in terms of prayer 3 of the application dated August 30, 2022 with the result that the 1st respondent is restrained by order of injunction, whether by itself or agents, from exhuming the body of Abbas Anverali Nazerali, or interfering with the grave site until the applicant's appeal is heard and determined.
16. However, to balance the interests of the parties, we further order that the applicant shall file and serve her memorandum and record of appeal alongside written submissions in support of the appeal, within 14 days from the date of delivery of this ruling. The respondents will have a corresponding 14 days from



the date of service of the memorandum and record of appeal to file written submissions. Thereafter the appeal shall be fixed for hearing on basis of priority in the month of November 2022. If the applicant defaults in filing her memorandum and record of appeal in accordance with these directions, the order of injunction granted herein shall stand automatically discharged and the respondents shall be at liberty to execute the orders of exhumation granted by the lower courts.

17. Finally, we should point out that upon hearing the application on September 7, 2022, we reserved the ruling for delivery to December 16, 2022. However, upon consideration of the nature of the matter, we directed the Deputy Registrar of the Court to bring forward the date of delivery of this ruling and to give notice of delivery to the parties.
18. We make no orders as to costs of the application.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER 2022.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

