



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MUSINGA & GATEMBU, J.J.A)**

**CIVIL APPLICATION NO. 124 OF 2019**

**BETWEEN**

**DEVNA OM PARKASH PANDIT..... 1<sup>ST</sup> APPLICANT**

**NIROO PANDIT OJHA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RAJIB BALI ..... RESPONDENT**

***(Being an application for injunction pending the hearing and determination of an intended appeal from the Judgment and Order of the High Court of Kenya, Family Division at Nairobi (Abida Ali-Aroni, J.) delivered on 28<sup>th</sup> February, 2019***

***in***

***High Court Petition No. 29 of 2017***

***Consolidated with***

***High Court Petition No. 63 of 2017)***

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**RULING OF THE COURT**

1. Before us is an application by the applicants seeking an order of stay of execution of a judgment of the High Court given on 28<sup>th</sup> February 2019 granting guardianship of Indra Bali, a 95 year old lady, to her son, the respondent. In the same application, the applicants also seek an order of injunction to restrain the respondent from managing his mother's estate.
2. The circumstances in this case are not pleasant. Indra Bali, the subject of these proceedings, was born on 14<sup>th</sup> June 1924 in the Republic of Pakistan. She later became a citizen of the United States of America. At the time of hearing this application on 25<sup>th</sup> June 2019 she was just over 95 years old. The High Court referred to her as "old and frail" and sick with "chronic lung disease, seizure disorder, a brain tumour (meningioma) and an element of dementia."
3. The events giving rise to present litigation began in September 2015. All appears to have been well with Indra Bali (Indra) until that time (September 2015) when her daughter and care giver, Meera Bali, with whom she was living in Pittsburg, Pennsylvania in the United States of America (US) died in a car accident. Upon the death of Meera Bali, Indra was moved by friends to a hospital and subsequently to a nursing home in Pittsburg from where her nieces, Devna Om Parkash Pandit and Niroo Pandit Ojha (the applicants) got her and brought her to Kenya.
4. Rajib Bali, the respondent, is Indra's only surviving child. He is 70 years old and a resident of Albuquerque, New Mexico in the US. According to him, he was away when his sister Meera Bali died in September 2015. He learnt of his sister's death and of the fact that his mother was in the nursing home in Pittsburg on his return to the US in October 2015. Upon his return he visited his mother at the nursing home and spent a couple of days with her. The applicants were also present at the nursing home.
5. On a subsequent visit to the nursing home, Rajib did not find his mother. He learnt that the applicants had without any reference to him

removed her from the home “without leaving any information as to where they had taken her.

6. On 1<sup>st</sup> November 2015, he made a report to the police and filed a complaint with the Department of Elderly Persons Abuse in the US that he believed that his cousins, the applicants, had kidnapped his mother. The stage was set for the litigation that ensued in the US and in Kenya.

7. On 3<sup>rd</sup> November 2015, Rajib petitioned a county court in Pennsylvania to be appointed as a guardian of his mother and her estate. On being informed by the applicants’ lawyer that Indra had been flown to Kenya, the court in Pennsylvania held that it had no jurisdiction over the matter.

8. In February 2017, Indra’s nieces, the applicants, petitioned the High Court at Nairobi (Petition No. 29 of 2017) under the Mental Health Act seeking to be appointed as guardians and managers of Indra’s affairs with powers to transact her affairs including powers to transfer or otherwise deal with any property comprised in her estate.

9. In April 2017, Rajib petitioned the High Court at Nairobi (Petition No. 63 of 2017) under Articles 45 and 47 of the Constitution and the Mental Health Act seeking, among other orders, that the applicants should provide information “on the whereabouts and wellbeing” of his mother; and that the applicants be ordered to return his mother to the US under his custody or alternatively he be granted custody.

10. Those two petitions were consolidated, and after extensive acrimonious interlocutory applications and proceedings, the petitions were heard before **Abida Ali-Aroni, J.** who delivered judgment on 28<sup>th</sup> February 2019 which is the subject of the intended appeal and the present application for stay of execution.

11. In that judgment, the Judge was satisfied that given Indra’s state of health and state of mind, it was befitting, under Section 26 of the Mental Health Act, to appoint a guardian to take care of her and her affairs. The court was also satisfied that Rajib, Indra’s son, being the “nearest relative” of Indra had priority over the nieces, the applicants, to be appointed as the guardian. His duties would include, the court ordered, “taking care of Indra’s health, her affairs and full control and management of her estate.” The court further ordered that,

**“considering Indra’s wish to stay with the son, the fact that the two are citizens of the United States of America and resident in that country and the doctors having indicated that Indra could travel; the court is of the view that Indra should be taken back to her home country.”**

The court also directed that Rajib should seek the assistance of the American Embassy to facilitate Indra’s travel to the US.

12. That, as mentioned, is the judgment that is the subject of the intended appeal. The application now before us seeks an order of injunction to restrain Rajib from taking his mother out of Kenya. The application is presented under Sections 3, 3A and 3B of the Appellate Jurisdiction Act and Rule 5(2)(b) of the Rules of the Court and is supported by the affidavit of the 2<sup>nd</sup> applicant, Niroo Pandit Ojha. Also sought in the application is:

**“an order of stay of execution against the respondent, his servants and/or agents from appointing the respondent herein, Rajiv Bali as guardian of Indra Bali, from managing her estate, properties, bank account and from taking full control and management of her estate and the affairs of the subject Indra Bali pending the lodging, hearing, and determination of an intended appeal from the order/decreed and judgment of the High Court...”**

13. The application was argued before us by **Mr. Lakicha**, learned counsel for the applicants, who pointed out, at the onset that the prayer for injunction to restrain Rajib from taking his mother out of Kenya was no longer being pursued as she (Indra) left Kenya for the US on 6<sup>th</sup> March 2019.

14. Counsel, however, argued that the applicants were still pursuing the prayer for stay of execution as reproduced above because part of Indra’s estate, in particular a bank account at Diamond Trust Bank which the applicants had been operating, is in Kenya. In that regard, counsel referred to the draft memorandum of appeal and submitted that the intended appeal is arguable.

15. According to counsel, in rendering the judgment, the Judge: failed to appreciate that the applicants are best placed to take care of Indra; failed to properly evaluate the pleadings and the evidence with the result that she granted guardianship to the respondent against the weight of evidence; did not have sufficient regard to the evidence before the court showing that the respondent was not suitable for appointment as the guardian; that in the best interests of Indra, it is the applicants who should have been appointed as her guardians. It was submitted that the Judge granted orders that were not pleaded and erred in dismissing the applicants’ petition.

16. Opposing the application, **Mr. S. K. Ngeru**, and **Mrs Thongori**, learned counsel for the respondent, relied on a replying affidavit sworn on 19<sup>th</sup> June 2019 in the State of New Mexico, US in which the respondent deposed that following delivery of the judgment by the High Court on 28<sup>th</sup> February 2019 granting guardianship to him, he travelled with his mother to the US on 6<sup>th</sup> March 2019 and the intended appeal has therefore been overtaken by events.

17. In the same affidavit, the respondent deposed further that the respondents have subsequently filed a fresh petition before a county court in the State of New Mexico seeking a protective order in respect of Indra’s assets on grounds that the respondent “may financially abuse” his mother and “coerce her” “to sign over her current assets” amongst other reliefs sought.

18. It was submitted for the respondent that the intended appeal is not arguable; that the account at Diamond Trust Bank in Kenya is one of Indra’s assets and the respondent requires access to it in order to support his mother who is in need of medical care and medication; that the

account is a running account that is funded by rental income and the funds in that account belong to Indra and she is entitled to access the same; and that as the duly appointed guardian of Indra, the respondent should have access to the funds in order to provide for her.

19. It was submitted that apart from the fact that the application is overtaken by events, the applicants have not demonstrated that the intended appeal is arguable and neither has it been shown how the intended appeal will be rendered nugatory if the application is declined.

20. We have considered the application, the affidavits and the submissions by counsel. To succeed in an application of this nature, the applicant should demonstrate that the intended appeal is arguable; and that if the application is declined and the appeal subsequently succeeds, it would have been a futile exercise. As stated by the Court in Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006:

***“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”***

21. As to whether the intended appeal is arguable, counsel for the applicants have, for instance, argued that in appointing the respondent, as opposed to the applicants, as the guardian of his mother, the court failed to consider evidence to the effect that the respondent was unsuitable and that his appointment was not in the best interests of Indra. Bearing in mind, as held by the Court in Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR; and Kenya Commercial Bank Ltd vs. Hon. Nicholas Ombija, Civil Application No. Nai. 153 of 2009 that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court or one that is deserving of the Court’s consideration, we do not think the intended appeal is frivolous. It is arguable.

22. In a bid to satisfy the Court that the intended appeal will be rendered nugatory if the orders sought are not granted, the applicants averred that *“the entire family will be completely alienated from”* Indra if she is moved to the US and that they would suffer prejudice and that it is in the best interest of Indra, the applicants and entire family that the orders sought be granted.

23. In our view, the applicants have failed to demonstrate to the Court how the intended appeal will be rendered nugatory. It is not in dispute that following the judgment of the High Court awarding guardianship of Indra to the respondent, she travelled to the US on 6<sup>th</sup> March 2019 where we understand she is under the care of the respondent. We do not think that we can, at this stage, sever the order granting guardianship to the respondent, from the order granting him authority to take care of her *“health, her affairs and full control and management of her estate.”* It would be undesirable, in the interim, to restrain the respondent from having access to Indra’s resources with which to care for her. Furthermore, given that Indra is already in the US, it seems to us that it would be futile to grant the orders sought. As stated by this Court in Olive Mwihaki Mugenda & another vs. Okiya Omtata Okoiti & 4 others [2016] eKLR, *“this Court should not make orders in vain.”*

24. The result is that applicants’ application dated 16<sup>th</sup> April 2019 and presented to this Court on 18<sup>th</sup> April 2019 fails and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 11<sup>th</sup> day of October, 2019.**

**P. WAKI**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**