Bhatti v Bhatti & another (Civil Application 209 of 2020)
[2024] KECA 1738 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1738 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 209 OF 2020

MSA MAKHANDIA, S OLE KANTAI & A ALI-ARONI, JJA

DECEMBER 6, 2024

BETWEEN

RAJ SINGH BHATTI ..... APPELLANT

AND

DHRUV KUMAR BHATTI ..... 1ST RESPONDENT

MOHAN RAM SINGH BHATTI ..... 2ND RESPONDENT

(Being an application for an injunction and stay of the Judgment of the High Court of Kenya (Constitutional & Human Rights Division) at Nairobi (Korir, J.) dated 28th May 2020 in Const. HR Petition No. 22 of 2020)

RULING

1. Before us is a Notice of Motion dated 31st July 2020, brought under rules 1 (2), 5 (2) (b), 41, 42, 43, and 47 of this Court's Rules and all other enabling provisions of law. The application is made subsequent to the judgment and decree of the High Court, Constitutional and Human Rights Division, Korir, J. (as he then was) in Petition No. 22 of 2020. By the judgment and decree, the trial court dismissed the applicant's petition in which he had claimed violation of his constitutional rights by the respondents and sought that: he be reinstated into the LR. No. 209/7509 - 308 Ewaso Ngiro Park ("the suit property"); the respondents be precluded from harassing him; that the Court do appoint a medical practitioner to assess whether by reason of impaired memory or as a consequence of undue influence, Jagdish Ram Singh Bhatti ("the father"), was incapable of managing his financial and legal affairs; that until then, he be appointed as guardian of the father and manager of his estate with general power for the management of the estate, business/financial matters, legal transactions, and other dealings and affairs of a similar kind; after hearing the petition inter parties, he be appointed guardian of the father. Lastly, he prayed that the purported transfer of the suit property by the father to the respondents, who are his siblings be declared null and void in the circumstances as the transfer was procured by undue influence over the father by the respondents or each of them.

2. In response to the petition, the father filed a replying affidavit dated 4th February 2020, asserting that he was of sound mind and good health, as confirmed by a mental examination. That though he was 92 years old, he had nonetheless consistently enjoyed good health, with any medication prescribed by his doctors in Kenya and the United Kingdom ("UK"). That he believed that the petition was a disguised attempt by the applicant to claim the suit property, which he had already gifted to his brothers, the 1st and 2nd respondents respectively. He also deposed that he had similarly gifted the applicant a property in Berkshire in the UK and another one in India. He maintained that he did so willingly and with legal advice, despite the applicant's dissatisfaction. He asserted his right to deal with his property as he wished. He therefore sought dismissal of the petition with costs.

3. The 1st and 2nd respondents, in an affidavit sworn by the 2nd respondent, on his own and on behalf of the 1st respondent, on 5th February 2020, supported the father's assertion that he was of sound mind and decision-making ability. He deposed that the petition was intended to restrict their father's freedom and was based on falsehoods. He believed that the appellant's request to be appointed as the father's guardian was malicious and unfounded. The 2nd respondent argued that the appellant's claim to the suit property was baseless, as the applicant had no legal or equitable right to it, the same having been transferred and registered in their names by the father as a gift inter vivos. He noted that the applicant, who resides in the UK, was gifted a six-bedroom house and a business by the father, as well as a larger portion of a building in India.

4. The 2nd respondent emphasized that the father had the right to manage his properties as he wished during his lifetime and that the suit property was gifted to them willingly and without coercion. That nobody had denied the applicant access to his father but because of the fracas and nuisances he normally causes on such occasions, his access had to be restricted, curtailed, and or monitored. Indeed, on one such occasion, the applicant pulled out a knife on the deponent. In summary, the 2nd respondent claimed that the appellant had no legal interest in the suit property, and had not proved that the father needed protection under the *Mental Health Act*. They viewed the petition as an abuse of court process and sought its dismissal with costs.

5. Upon hearing the Petition, Korir, J. as already stated deemed the applicant's allegations to be without merit and dismissed the petition in its entirety.

6. The applicant, aggrieved by the judgment and decree, filed a notice of appeal on 10th June 2020 and thereafter, filed this application seeking three main prayers: that pending the hearing and determination of the appeal, this Court be pleased to issue an injunction maintaining the status quo obtaining with regard to the suit property prior to the judgment and decree of the High Court, stay of execution of the judgment and decree thereof; and that this Court be pleased to allow the applicant access to his elderly and frail father, currently domiciled in the suit property.

7. The application was supported by the grounds on its face and those in the supporting affidavit of the applicant dated 31st July 2020. They all speak to, reiterate, and expound on the pleadings before the High Court that we have already alluded to elsewhere in this ruling. There is, therefore, no need to rehash them. Suffice to add that the applicant feels that his intended appeal will raise serious and fundamental grounds with a high probability of success and that if the orders sought are not granted, the appeal may well be rendered nugatory. That among the grounds to be urged include that the court erred in fact and law by finding that: the Petition had been filed in the wrong court but proceeded to hear it nonetheless; not addressing the questions of fraud and undue influence over the father by the respondents; made several errors in fact and law in dismissing the Petition in its entirety amongst other grounds. Therefore, the intended appeal had reasonable prospects of success.

8. On the nugatory aspect, the applicant argues that if the execution of the current orders was allowed to proceed, it would cause irreversible changes and harm that cannot be undone even if the appeal is later successful. That the father will have been caused to sign and transfer several properties and monies at the instigation of the respondents as he is mentally unstable. Essentially, without the conservatory orders, the status quo would change in a way that would make it impossible to achieve the intended relief through the appeal, thus making the entire process superfluous and academic.

9. The application was opposed by the respondents through the replying affidavit of the 2nd respondent dated 9th September 2020. He, too, also reiterated and expounded on their pleadings in the High Court. Again, we need not rehash them. Suffice to add that the applicant had not demonstrated that he could not meet his father at any other place other than in the suit property. That the status quo ante judgment and order sought means that the suit property belongs to the respondents and the applicant had no right of automatic access to it. That the applicant does not have any legal or equitable rights over the suit property capable of enforcement. That the applicant is free to visit the father at an agreed-upon date, time, and place.

10. The application was canvased by way of written submissions. When it came up for hearing on 24th June 2024, no appearance was made by both parties, either by themselves or their counsel though they were all served with the hearing notices. The parties had nonetheless filed written submissions. On that basis, we allowed the application to proceed, the absence of the parties notwithstanding.

11. In his written submissions dated 21st August 2020, the applicant, however, forgot the fact that what was before us was an application under rule 5 (2) (b) of this Court's Rules and not the hearing of the substantive appeal. Accordingly, to the extent that his submissions dwelt wholly on the substantive appeal as opposed to twin principles well-known by practitioners of this Court, for applications of this nature, the submissions are irrelevant.

12. In response, the respondents through their written submissions dated 19th June 2023, were of the view that the trial court properly dismissed the petition and the reasons given for the decision cannot be faulted. While relying on the case of Attorney General and Okiya Omtatah Okoiti vs. The National Assembly [2009] eKLR, the respondents submitted that the applicant had not demonstrated that the appeal was arguable nor will it be rendered nugatory if the orders sought are denied. This is because the suit property belongs to the respondents, and the Court should not be used by the applicant to exert rights over the suit property which does not belong to him. That no evidence had been tendered to show that the father was vulnerable, disregarded, or destitute. Indeed the father himself had opposed the application, stating that the applicant had become a nuisance to his family. It is not shown in what sense the appeal will be rendered nugatory if the applicant does not access the father in the suit property. Nothing irreversible will happen to the suit property which cannot be compensated in damages.

13. Before delving into the merits of the application, we may, at this juncture, point out to the applicant, however, that the remedy of a stay of execution is not available to him given that his Petition in the trial court was dismissed. The dismissal of the Petition resulted in a negative order, which is incapable of being stayed. See Co- operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR. We shall, therefore, confine our determination of the application on the prayer for injunction.

14. Back to the merits of the application. The jurisdiction of this Court on an application under rule 5 (2) (b) of this Court's Rules is discretionary. In the exercise of this discretion, the Court must be satisfied on the twin principles, which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal, if successful will be rendered nugatory.

15. This Court in the case of Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others [2000] eKLR delineated such jurisdiction as follows:

> " The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case..."

16. In considering the twin principles set out above, we are cognizant that both limbs must be demonstrated to the Court's satisfaction.

17. On the first limb, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant to warrant ventilation before this Court. In Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR, this Court described an arguable appeal in the following terms:

> " vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.

18. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal and we are satisfied that they are not idle. We say so bearing in mind that an arguable appeal is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court.

19. On the nugatory aspect, looking at the application, we do not see any prejudice that would be occasioned to the applicant if the orders sought are not granted. The determination that we are called upon to make has been conceded to by the respondent to the effect that the applicant is free to visit the father on any date, time and place.

    Secondly, the status of the suit property before the Petition in the High Court was that it was transferred and registered in the names of the respondents by the father as a gift intervivos and currently, the ownership has not changed. In the premises, even if we were to grant the prayer of status quo ante judgment sought, it would mean that the suit property still remains registered in the names of the respondents who retain the right to allow or refuse who accesses the suit property. Given the foregoing, we are satisfied that there is nothing that would destroy the substratum of the appeal if the orders sought are not granted.

20. The applicant has failed to prove the second limb required in applications of this nature. Accordingly, the notice of motion dated 31st July 2020 is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024.

ASIKE-MAKHANDIA

... JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

ALI-ARONI

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR