



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**IN THE MATTER OF THE ESTATE OF: RATILAL TRIBHOVANDAS KHIROYA DECEASED**

**BETWEEN**

**IN THE MATTER OF AN APPLICATION BY:**

**SURESH RATILAL KHIROYA ..... APPLICANT**

**VERSUS**

**BINA SANGANI ..... 1<sup>ST</sup> RESPONDENT**

**SAROJ SURESH KHIROYA ..... 2<sup>ND</sup> RESPONDENT**

**Coram:**

**Mwera, Judge**

**Gichaba for the Applicant**

**D. Otieno Advocate for the 1<sup>st</sup> Respondent**

**Ogejo for Odunga for 2<sup>nd</sup> Respondent**

**George CC.**

**RULING**

The history of these proceedings is fairly well-known, save to state that the applicant, Suresh Ratilal Khiroya applied and was granted a grant of probate to administer the estate of one deceased Ratilal Tribhovandas Khiroya, the father of the applicant as well as Bina Sanghani (the 1<sup>st</sup> respondent) and late father-in-law of Saroj Suresh Khiroya, the wife of the applicant (the 2<sup>nd</sup> respondent).

The motion for determination brought under ss. 3A, 80, 63 CPA and O44 rr. 1, 2, also invoked the powers donated by O50 rr.1, 2 CPR. The main prayer was that this court do:

**a) review and/or set aside its orders of 5.11.2008 which required the applicant to deposit rents collected from the subject property KSU MUNICIPALITY/BLOCK 7/88 into a joint account of counsel and that he renders accounts of rents he had collected in the past; also he was inhibited from transacting with the property.**

The application was based on several grounds and an affidavit sworn by the applicant. These were to the effect that in fact the property Block 7/88 was at some stage registered with the applicant and his mother, one Kashben Ratilal Khiroya as owners in common and when Kashben died the applicant's half share in the property remained intact. That when Kashben died the deceased herein Ratilal (the applicant's father) in KSU HC. SUCC. C. NO. 249/94 got a grant as executor of Kashben's estate. Ratilal never got the title to the plot Block 7/88 transferred into his name so he never featured in the title to that plot. That information of such sequence and state of things was not known by the applicant's counsel at the time of arguing the application 10.6.2008 that resulted in the orders now sought to be reviewed.

The other ground was that the 1<sup>st</sup> respondent has at no time complained about the estate of their late mother, Kashben, her only concern being with that of their late father, Ratilal. Any disputes that arose were resolved by agreements arrived at by the family members before Mr. Onsongo, Advocate. It was a further ground that this motion had been made timeously and so with:

**“--- an error apparent on the face of the record [it]that warrants --- [a] review ---.”**

Further, that the review was also warranted on the ground that the applicant's sustenance was solely derived from the subject property since he had no other source of income following what is now commonly referred to as “post – election violence” during which his business was destroyed.

Following the grounds above and the contents of the supporting affidavit, Mr. Gichaba urged this court to find that it is only after the court heard arguments that led to the ruling of 5.11.2008 that it became known to the applicant, or the applicant gave the information that in fact plot no. BLOCK 7/88 was as at 28/9/75 owned by the applicant and his mother (Kashben) as tenants-in-common. Then on 14.12.2004 the property was registered in the name of the applicant and his wife (2<sup>nd</sup> respondent). Accordingly, it was an error on the part of this court to order that rents coming from that property be deposited in the joint account of both counsel here. The property never belonged to Ratilal about whom this succession cause is, and through whom the 1<sup>st</sup> respondent lays claim.

Mr. Ogejo for the 2<sup>nd</sup> respondent (Saroj, the applicant's wife) did not have much to say in the proceedings as at this point.

Mr. Otieno for the 1<sup>st</sup> respondent holds the view that the title documents regarding plot no. BLOCK 7/88 have been tampered with and that, with other disputes are pending in their KSU C.A 28/06.

Counsel added that it was unbelievable that as a fact and until this application was filed, the applicant and/or his counsel genuinely did not know that in 1975 he with his mother alone owned the suit property, yet there were land records which he now produces. Mr. Otieno went over the papers in support of the petition herein and noted that at every stage the applicant asserted or deposed that half of the subject plot was owned by the deceased, Ratilal. He did not see how that changed between 16.1.2001 when he obtained a grant of probate, through the proceedings of 2008 to the time of filing this review application.

The court was told that the orders of 5.11.2008 were only preservative in nature as the appeal or such other proceedings move on. Mr. Otieno doubted that this court would grant discretionary orders to a party who had not complied with the orders he begs reviewed: no joint account had been opened and about a year down the line, an account of rents collected had not been rendered. And the applicant had not disclosed some three bank accounts in the Isle of Man (U.K) which belonged to the deceased which he was enjoying.

Mr. Gichaba, on his part, said that his client was still compiling the accounts of rents he received and no documentary evidence showed that the applicant succeeded and enjoys some accounts alleged to have been held by the deceased abroad. This is the determination here.

The decision of 5/11/2008 ought to have aptly been headed – ruling, not a judgment. It followed arguments in the 1<sup>st</sup> respondent's chamber summons dated 10/6/2008. Part of orders of the court read,

among others:

**“In the circumstances of this case and before the Court of Appeal handles any part of it, this court is inclined to and it issues the inhibition sought so that the subject property is preserved.**

**--- This court is also minded to order that the respondent do render a full account of all the rents he, with his wife, has received from the property.**

**--- It is also ordered that the rent proceeds be deposited in a joint income-earning account of both counsel until further orders ---.”**

At this point those orders will not be reviewed. The appeal alluded to above is said to be still pending. The issue of the property ownership of plot no. BLOCK 7/88 is not finally determined. It is not entirely convincing at this time that even with title documents said to originate in 1975 available, before November 2008 the applicant did not know of their existence. Or that he owned BLOCK 7/88 in common with his late mother or that the deceased Ratilal never owned it as part of his estate. The applicant has not refuted by affidavit that the deceased also held 3 accounts in the Isle of Man or that he did not disclose them in this petition and whether he enjoyed the proceeds of the accounts. It was so deponed in the replying affidavit to this application. And it is not easy to be convinced that a year down the line the applicant is still honestly and diligently, working out to render the account of the rents he with the 2<sup>nd</sup> respondent received. Even no draft has been produced.

All in all the orders sought are refused. It is now directed that in the next 60 days a full account be rendered of the rents received. It was said by Mr. Gichaba that his client has not received rents since November 2008. May it be so. However, in the light of the conduct of the applicant, it is directed that in the same 60 days the 1<sup>st</sup> respondent's counsel leads in opening the joint account ordered on 5.11.2008 and all the tenants do deposit in it all the arrears of rent since November 2008 to the present plus any future rents until further orders of this court or the Court of Appeal.

Prayers are dismissed, costs to the 1<sup>st</sup> respondent.

Orders accordingly.

Delivered on 12/10/2009.

**J. W. MWERA**

**JUDGE**

*JWM/hao*