



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCC CAUSE NO. 785 OF 2000**

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

**VERSUS**

**SINA SANGHANI.....1ST RESPONDENT**

**SAROJA SURESH KHIROYA.....2ND RESPONDENT**

**R U L I N G**

1. By a Notice of Motion dated 4th June 2013, the Applicant has come to this Court seeking an order that the execution of the orders of this Honourable Court made by Hon. Mwera, J on 12th October 2009 be set aside, varied and/ or be discharged. In the said orders, the Hon. Judge directed the applicant to render full accounts with regards to rent received from Plot No. Block 7/88 within 60 days of the order, that the 1st respondent's Counsel do lead in opening of a joint fixed deposit account as ordered on 5th November 2008 and that tenants do deposit in the opened account rent arrears since November 2008 and any future rents until further orders of this Court or the Court of appeal.

**BACKGROUND AND FACTS**

2. This matter has a lengthy history and the facts are fairly undisputed. It all began with the bereavement of one Ratilal Tribhovandas Khiroya (hereinafter the deceased) on 14th May 2000. On 4th December, 2000 Suresh Ratilal Khiroya (the petitioner/applicant herein) petitioned for grant of probate in respect of his father's estate on the strength of a will the deceased is said to have written before his demise. Suresh alleged that he was the sole executor of the will. Among the property listed as belonging to the deceased at the time of his demise was a parcel of land known as L.R NO. Kisumu Municipality/ Block 7/88 which is a commercial property.

3. On 29th January 2001, Bina Sanghai, the petitioner's sister and the 1st respondent herein lodged a caveat with the High Court Registry barring the undertaking of any actions with regards to the deceased's estate without her knowledge. Despite the caveat, the Court issued the grant of probate to the Applicant on 7th February 2001. Being aggrieved by the issuance of the grant of probate to the applicant notwithstanding her caveat, she filed summons for annulment of grant on 7th August 2001 but the same was dismissed by a ruling of the court delivered on 26th November 2004. On 2nd of December 2004, the applicant brought an application for confirmation of the grant under certificate of urgency and the same was dealt with the very next day and the grant of probate was confirmed. Following the confirmation of the grant, the applicant together with his wife Saroj, the 2nd respondent herein caused parcel of land Kisumu Municipality/Block 7/88 to be registered in their names. The registration was done on 14th December 2004 only 12 days after the confirmation of the grant of probate.

4. Again being aggrieved by the decision of the High Court dismissing her application for annulment, Bina filed an appeal in Civil Appeal No. 28 of 2006 in the Court of Appeal praying that the ruling and order of the High Court delivered on 26th November 2004 set aside. As the appeal was ongoing, the Applicant and his wife Saroj sublet part of Kisumu Municipality Block 7/88 and were getting rent of about Kshs. 40,000/- per month and the tenancy was to run for 5 years. Subsequently, Bina moved this court by way of a summons seeking the following orders:

- a. **this Court do issue an order inhibiting all dealings with Plot No. Kisumu Municipality/ Block 7/99 until her CIVIL APPEAL NO. 28/06 in the Court of Appeal against the ruling by Tanui J. delivered on 26th November 2004 is finally determined.**
- b. **an order do issue that all rents collected from the subject property from the date of demise of one Ratilal Khiroya be deposited in a joint account of the counsel of the litigants; and**
- c. **that the respondent render accounts of all the rent collected as per (b) above.**

5. The application was heard and finally determined on 5th November 2008. In his Ruling Mwera J ordered that the applicant herein **do render a full account of the rents he, with his wife, had received from the subject property for five years beginning 1st September 2003.** The Hon. Judge also ordered that **"rent proceeds be deposited in a joint income earning account of both counsel until further orders or the court of appeal orders otherwise."**

6. Hot on his heels, the applicant herein filed an application dated 8th December 2008 seeking to stay, suspend, review and/ or set aside the ruling and orders of the court made on 5th November 2008. The Court heard all the parties and delivered its ruling on 12th October 2009. It is the order of the court made on 12th October 2009 that is the subject of this application. Subsequently, the Court of Appeal delivered its judgment wherein it annulled the grant of probate issued on 7th February 2001.

## **PARTIES' CASES**

7. The Applicant's case is contained in the affidavit of Saroj Suresh Khiroya sworn on 4th June 2013 in support of this application and written submissions filed herein.

8. The applicant argued that the order of this Court issued on 12th October 2009 was an interim order pending the outcome of the Court of appeal decision in Civil Appeal No. 161 of 2006 and in essence the same was only preservative in nature and was dependent on the Court of appeal decision. That unexpected by the impression of the High Court Order of 12th October 2009, the Court of appeal only dealt with the issue of objection to probate in this case but ignored the interim orders. As a result, the said order of this court is prejudicial to the applicant as he is still shut from accessing rent proceeds from his own property long after the decision of the Court of Appeal.

9. It was his case that as at 28th October 1975, the subject property was registered in the names of the applicant and his mother Kashben. That after the death of his mother, the deceased took out letters of administration and successfully obtained a grant as the executor of the estate of Kashben. The applicant argued that the deceased never got to transfer the subject land into his name and that explained why his name did not feature anywhere in the land register. That in essence, the deceased has never had interest in the property.

10. The applicant argued that his quest to enjoy the fruits of his property as a lawful property owner has become impossible and he has suffered great prejudice as the rent therefrom is his only source of livelihood. He urged the court to allow this application.

11. The application was opposed by the 1st respondent. She began by stating that this court lacks jurisdiction to entertain this application. Her reason was that the application herein seeks to review orders dismissing an application for review. The applicant submitted in that regard that Order 45 Rule 6 of the Civil Procedure Rules expressly bars this Court from hearing an application for review of an order made

on an application for review. It was her view that the applicant should have appealed against the order of 12th October 2009. She relied on the case of **Otieno, Ragot & Co. Advocates vs. City Council of Nairobi & 2 others NRB HC Misc. Civil App No. 148 OF 2013.**

12. The 1st respondent argued that this court was *functus officio*. Her reasoning was that after the Court of Appeal's decision annulling the grant of probate issued to the applicant, the petition herein came to an end. That the parties herein entered into a consent and agreed that the 1st respondent should file a petition for a grant of letter of administration of the deceased estate. That the applicant herein also filled a cross petition and as such all the issues raised in this application should be raised in those petitions.

13. It was the case for the 1st respondent that, the effect of the judgment of the Court of appeal annulling the grant is that everything that had been done pursuant to the grant including the subsequent confirmation stood annulled. As such the transfer and registration of the subject property also stood annulled as it was done pursuant to the grant. The 1st respondent relied on the case of **Omega Enterprises (Kenya )Ltd vs.- Kenya Tourist Development Corporation & 2others CA No. 59 of 2003** (unreported)

14. The 1st respondent argued further that the applicant was acting in cohorts with the 2nd respondent to obtain an unfair advantage over her because despite the fact that the application is brought by the applicant the affidavit in support thereof is sworn by the 2nd respondent who had earlier brought an application for review before this court but the same was dismissed. It was the view of the 1st respondent that this application is an abuse of court process and the applicant together with the 2nd respondent were acting in contempt of this court.

15. The 1st respondent concluded by urging this court to allow the rent to continue being secured as it is currently pending the hearing and determination of Petition 889 of 2013 as there was a chance that the subject property formed part of the deceased estate and should that be established the applicant may not be in a position to refund the rent accrued from the property. That there is also a possibility that the applicant would dispose of the property thereby prejudicing the 1st respondent and the other beneficiaries.

### **Court's Rendition**

16. The 1st Respondent has raised the issue of jurisdiction. Once an issue of jurisdiction has been raised, the court is obliged to decide on the issue right away. As stated in the often quoted decision of **The owners of Motor vessel "Lilian S" –vs- Caltex Oil (Kenya) Limited [1989] 1 KLR 1.** **"Jurisdiction is everything. Without it a Court has no power to make one more step."**

17. To begin with it is important to understand the nature of the application before this court and the prayers it seeks. From the history of this matter, it is obvious that the applicant herein obtained grant of probate for the estate of the deceased herein. It is also clear that the transfer of the subject land was effected pursuant to that grant of probate issued by this court. The 1st respondent herein applied to have the grant annulled but her application was disallowed. Being dissatisfied with the decision of this court, the 1st respondent appealed to the Court of Appeal and the Court of Appeal allowed her appeal thereby annulling the grant of probate issued on 7th February 2001. Subsequently, parties herein consented that the 1st respondent should file another petition for grant of letter of administration of the deceased's estate.

18. In her petition for grant of letter of the said administration, the 1st respondent has named the subject land as part of the deceased estate. On the other hand, the applicant and the 2nd respondent contend that the land does not form part of the deceased estate and never has. It is also clear from the land register extract filed in court that the registration of the land in the names of the applicant and the 2nd respondent was done pursuant to the grant issued on 7th February 2001 which has since been annulled by the Court of Appeal. It is now trite law that act done pursuant to a null and void order of the court is itself a nullity. Lord Denning in **Macfoy vs.- United Africa Co. Ltd [1961] 3 AllER1169** stated in that regard thus:

**If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no**

**need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.**

see also **Omega Enterprises(Kenya) Limited vs.- Kenya Tourist Development Corporation& 2 other NRB Court of Appeal CA No. 59 of 1993**

19. To my mind, these are issues that call for evidence, where all the parties are allowed a chance to make out their case. As already stated the parties herein have already filed a fresh petition and cross-petition. It is my finding that the issues raised in these application should be handled in the petition. It is only after a determination of whether the subject land forms part of the deceased's estate or not that a sound order can be issued regarding the subject land and proceeds arising therefrom.

20. In any case its clear that Honourable Justice Mwera had made a sound finding which none of the parties has appealed against and it would be superflous for this court to sit on it again. Let the parties agitate their position in the new succession cause. The application is otherwise dismissed with costs to the respondents.

**Dated, signed and delivered this 10th day of March, 2016.**

**H. K. CHEMITEI**

**J U D G E**