



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU

Civil Appeal 161 of 2006

**BINA SANGHANI.....APPELLANT**

**AND**

**SURESH RATILAL KHIROYA.....RESPONDENT**

*(Appeal from the ruling and orders of the High Court of Kenya at Kisumu (Tanui, J) dated 24<sup>th</sup> November, 2004*

**in**

**H.C.C.C. NO. 785 OF 2000)**

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**JUDGMENT OF ONYANGO OTIENO, J.A.**

The appellant in this appeal **BINA SANGHANI** and the respondent **SURESH RATILAL KHIROYA** are the daughter and son respectively of **Ratila Tibhovandas Khiroya** (deceased). They had other siblings but those other children did not feature prominently in the High Court Succession Cause No. 785 of 2000 the decision of which has given rise to this appeal. Their father **Ratila Tribhovandas Khiroya** (hereinafter the deceased), died on 14<sup>th</sup> May, 2000 having allegedly left a Will. In a petition dated 4<sup>th</sup> December, 2000 and filed on 6<sup>th</sup> December, 2000 the respondent filed Succession Cause NO. 785 of 2000 in the High Court of Kenya at Kisumu. He petitioned the court for probate of the will of the deceased alleging that he was the sole executor of the Will and he thus petitioned as executor of the same Will. In his affidavit in support of the petition, he allegedly annexed that Will dated 24<sup>th</sup> November, 1998. Of course he also annexed certificate of death No. 534718. Following that petition, Kenya Gazette Notice was issued on 29<sup>th</sup> December, 2000 NO. 8418. The gazette notice stated:-

“TAKE NOTICE *that an application having been made in this Court in:-*

CAUSE NO. 785 OF 2000

*By Suresh Ratilal Khiroya, of P.O. Box 267, Kisumu in Kenya, the sole executor named in the deceased’s will for a grant of probate of the will of Ratila Tribhovandas Khiroya, who died at Kisumu, on 14<sup>th</sup> May, 2000.*

*The court will proceed to issue the same unless cause be shown to the contrary and appearance in this respect entered within thirty (30) days from the date of publication of this notice in the Kenya Gazette.”*

The record shows, and it is not in dispute that a duly signed grant of Probate of written will was issued on 16<sup>th</sup> January, 2001 well before the thirty days spelt out in the gazette expired. It is not certain as to how this came to be, because although none disputes that that grant was properly signed by a Judge of the High Court, there is no explanation in the record, in evidence or in the learned Judge's ruling as to the circumstances that gave rise to the issue of the grant long before the period stated in the gazette notice expired. The learned Judge in his ruling did refer to the issue but never resolved it. All he said was as follows:-

***“The first ground relied by the Objector is that the grant of probate was issued on 16<sup>th</sup> January, 2001 before the 30 days notice in terms of the Gazette Notice No. 8418 of 29<sup>th</sup> December, 2000 had expired. As indicated above there are copies of a grant of probate claimed to have been issued on 16/1/2001 and on 1/2/2001. I note from a copy of a letter on record that by a letter dated 30<sup>th</sup> January, 2001 by Morzeria of M/s Kohli, Patel and Raichura advocates who had acted for the Executor applied for an issue of a grant of Probate since the Gazette notice had expired. In view of that letter I accept that this Court issued a Grant of Probate on 7/2/2001 and not on 16/1/2001 as there is no evidence how the latter Probate came into existence.”***

One would have expected to get some explanation as to how the grant of 16<sup>th</sup> January, 2001 came to be signed by the same officer who apparently also signed the grant of 7<sup>th</sup> February, 2001, as no forgery was alleged. We will revisit this aspect of the appeal later in this judgment.

Be that as it may, the appellant says in her affidavit and it was not disputed, that the gazette notice of 29<sup>th</sup> December, 2000 came to her attention in or about third week of January, 2001. She responded to it by instructing her advocates to file and they did file a caveat on 29<sup>th</sup> January, 2001. The caveat, addressed to the Registrar of the High Court cited the Succession Cause No. 785 of 2000 and stated it was being filed in the matter of the Estate of ***Ratilal Tribhovendas Khiroya*** (deceased). It stated:-

**“CAVEAT**

***Let nothing be done in the Estate of the above RATILAL TRIBHOVANDAS KHIROYA who died on the 14<sup>th</sup> day of May, 2000 without NOTICE to BINA SANGANI OF 263 Copper Field, Chigwell, Essex IG7 SNW, ENGLAND and whose address for service is:-***

***C/O M/s Mandla and Sehmi,  
Advocates  
Queensway House, (5<sup>th</sup> Fl.)  
P.O. Box 48642  
NAIROBI***

***DATED the 27<sup>th</sup> day of January, 2001”***

That caveat was filed on 29<sup>th</sup> January, 2001 as I have stated and receipt of it was duly acknowledged in a note dated 30<sup>th</sup> January 2001 which stated:-

**“30/1/2001**

***Pursuant to Rule 15(2) of the Succ. Act Cap 160 the caveat lodged on 29.1.2001 is acknowledged.”***

Notwithstanding that caveat and acknowledgement of its receipt at the Registry vide a letter dated 30<sup>th</sup> January 2001, the advocate of the respondent finally applied for issue of probate, alleging that the gazette notice period had expired and acting on that letter, another Grant of Probate of written will was issued on 7<sup>th</sup> February, 2001. The appellant felt aggrieved by the issuance of the grant of Probate to the respondent notwithstanding her caveat as she said she was not informed of the actions that were taken to

grant the probate with will to the respondent. She filed summons for annulment of Grant on 7<sup>th</sup> August, 2001. That chamber summons sought an order that:-

***“The grant of probate to Suresh Ratilal Khiroya made on the 16<sup>th</sup> day of January, 2001 be annulled on the grounds specified hereunder.”***

The grounds for seeking the annulment were:-

- (a) ***That the proceedings to obtain the grant were defective in substance.***
- (b) ***That the Grant was obtained fraudulently by the making of a false statement and or by the concealment from this Honourable Court of matters material to this case.***
- (c) ***That the Grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the Grant.”***

That chamber summons was supported by affidavit of the appellant in which she elaborated at length on the allegations given in support of the application. The respondent responded to the application and filed two affidavits, one by himself and another by Mr. Morzeia, his advocate at the relevant time. There were on record other short affidavits sworn by the siblings of the two parties. When the application came up for hearing before Tanui, J. (as he then was) on 12<sup>th</sup> May, 2004, the appellant’s learned counsel made submissions in support of the chamber summons but the respondent’s learned counsel relied on the replying affidavits of the respondent and by Mr. Norzeria and did not address the court any further. The ruling was reserved from time to time till 26<sup>th</sup> November, 2004 when the learned Judge dismissed the application. In dismissing the application, the learned Judge having found that there was no evidence how the Grant of 16<sup>th</sup> January, 2001 came into existence, accepted that the Grant of probate issued on 7<sup>th</sup> February, 2001 was properly issued and stated further in pertinent parts:-

***“The issue of the said grant was not issued prematurely as claimed.....***

***The Objector indicates that she had filed a caveat in court in which she had claimed that nothing should be done in the estate without a notice to her. She did not seek prohibition an issue of a grant of the probate. In any case the court did not intend to do anything with the said estate. I note that the said caveat was not properly (sic).***

***Having completely considered all the ground relied on in this objection, I am not satisfied that there are sufficient grounds to warrant that the grant issued to the executor ought to be annulled or cancelled. The objection is therefore dismissed with costs.”***

That is the ruling that has prompted this appeal premised on five grounds of appeal cited in a memorandum of appeal dated 17<sup>th</sup> July, 2006 and filed on the same day. Those grounds are that:-

- 1. The learned Judge erred in fact and in law in failing to find that the grant issued to the respondent was so issued irregularly and in contravention of the mandatory provisions of the law.***
- 2. The learned Judge erred in fact and in law in failing to find that the proceedings leading upto issuance of the grant to the respondent were so defective in substance as to the (sic) warrant the annulment of the grant.***
- 3. The learned trial Judge erred in fact and in law in holding that the appellant’s caveat was not properly filed and that she was required to prohibit an issue of grant of probate to the respondent.***
- 4. The learned trial Judge erred in fact and in law in failing to consider and find that the grant was obtained by the making of false statements and allegations of fact material to the case and essential in point of law to justify the grant.***

**5. *The learned trial Judge erred in fact and in law in failing to consider the circumstances and facts of the case before him in their entirety and in failing to find that justice would only have been done by the making of an order revoking the grant.***”

Mr. Otieno, the learned counsel for the appellant addressed us at length on the appeal, contending that the first grant of 16<sup>th</sup> January, 2001 was prematurely issued and there should have been an explanation as to how that mistake came to be as it vitiated the entire proceedings on the matter, it being noted that it was duly signed by the same officer of the court who did not deny signing it and did not investigate the circumstances under which it was issued. He submitted, further that the former advocate for the respondent mislead the court vide his letter of 30<sup>th</sup> January, 2001 vide which he sought grant to be issued alleging that the 30 days indicated in the gazette notice had expired whereas that was not so as the expiry date was in fact 7<sup>th</sup> February, 2001 court vacation period being not counted for purposes of computerizing the time that was stated in the gazette notice. He finally maintained that as there was a caveat in the court by 29<sup>th</sup> January, 2001, the court should not have issued grant on 7<sup>th</sup> February, 2001 without referring to the appellant. In his view there was no need for any application to prohibit any further action once a caveat was filed and received as was done in this case.

Mr. Gichaba, the learned counsel for the respondent on the other hand, opposed the appeal submitting that the caveat could not be acted upon as it was not an effective caveat pursuant to **Rule 15(c)** of the succession rules, and there was no proof that **Rule 15(2)** was complied with. In any event, he said that although there was a receipt on record showing that a payment was made but that receipt did not specifically state that it was for filing a caveat. Further, there was no acknowledgment in the register of the receipt of the caveat and there was nothing to indicate that the Registrar was aware of the existence of the caveat. Thus the caveat allegedly filed on 29<sup>th</sup> January, 2001 did not meet the requirements of Rule 15 and thus was not an effective caveat that would solicit any action by the Registrar. He stated further that no grant was issued on 16<sup>th</sup> January, 2001 and as such the application seeking annulment of the grant issued on 16<sup>th</sup> January, 2001 could not succeed. Will was attached to the petition and that is no longer in dispute, as there was payment of Kshs.300/= fees for the same will. He added that after the annulment application was dismissed the grant of the probate was confirmed on 3<sup>rd</sup> December, 2004 and the estate has been administered though the homes, the subject matter of the probate is still intact and the rent is being paid into a joint account.

The above are in a summary, the salient aspects of this appeal. In my view, having considered the record, the chamber summons that was before the trial court, the petition, the affidavits by both sides of the divide the entire conduct of the proceedings and the ruling of the learned Judge of the High Court, a number of issues disturb me. First, it is not in doubt that the issue of grant dated 16<sup>th</sup> January, 2001 was not proper. It was premature when it is considered that the Gazette notice was dated 29<sup>th</sup> December, 2000 and gave 30 days within which would be objectors could lodge their objections, yet only seventeen days into those thirty days an issue of grant had been made and was in the file. It was signed by a Judge of the High Court and one would have thought it was presented to him by the Registry personnel after fully perusing the file and ascertaining that it was proper to be issued. None offered any explanation as to how it came to be in the file. None claimed it was a forgery. There was apparently no application from the respondent for its issuance. One is bound to wonder how it came to be in the file. In my view, before the second grant was issued on 7<sup>th</sup> February, 2001, it was necessary to resolve that apparent mysterious existence of what was clearly an improper grant in the file. This was not done. The effect of that omission is that one is left with a doubt as to which grant was meant to be issued by the court. It being in the record leaves much to be desired as to whether the conduct of the proceedings was indeed above board.

Secondly, the grant issued on 7<sup>th</sup> February, 2001, which the learned Judge accepted as the effective grant, was granted some nine days after the appellant had lodged a caveat against any action on the petition for probate. That caveat was received at the Registry is plain and I do not agree with Mr. Gichaba that there was no evidence of its lodgment. There was a receipt showing that on the date it was lodged i.e. 29<sup>th</sup> January, 2001 a receipt No. L401221 for Shs.500/- was issued to the advocates for the appellant for “other charges” in respect of payment for something filed in court. The appellant says it was for filing

caveat and the copy of that caveat in the record shows it was filed on that same day 29<sup>th</sup> January, 2001. Further, the handwritten acknowledgement of receipt of that caveat which is reproduced above also shows it was lodged on 29<sup>th</sup> January, 2001. Common sense demands that I accept that the caveat was duly lodged and paid for on 29<sup>th</sup> January, 2001. It was the duty of the Deputy Registrar to inform the respondent that there was already a caveat lodged against any action on the matter and further and even more so, to stop issuing that grant of 7<sup>th</sup> February, 2001. The registry, in my view, had no reason for failing to do so as a letter from respondents then advocates (*Mr. Morzeria*) was written to the court on 30<sup>th</sup> January, 2001, one day after the caveat had been lodged. One may ask a simple question: if the registry could see and act on the respondent's counsel's letter of 30<sup>th</sup> January, 2001 and issue grant on the strength of that request, why could they not act on the caveat which was there on 29<sup>th</sup> January, 2001 and of which receipt they did acknowledge in writing? The answer to that question may be obvious but whatever one says something is not adding up as far as this case is concerned. If the registrar felt the caveat was not effective in law, still it was not on him to fail to act on it without first informing the respondent of its existence and giving the respondent opportunity to seek court orders to remove the caveat, but the registrar could not on his own decline to act on the caveat already lodged in the file and even worse, proceed to take counter-action on the matter as happened here.

Further, as concerns the issue of the grant dated 7<sup>th</sup> February, 2001, one may ask whether it was issued after the expiry of 30 days from 29<sup>th</sup> December, 2000 as was stated in the gazette notice. Together with that question is as to whether *Mr. Morzeria's* letter of 30<sup>th</sup> January, 2001 seeking grant of probate on the basis that the 30 days provided in the gazette had expired was proper or was misleading may also be considered. **Rule 63(1)** of the Probate and Administration Rules provides:-

***“Save as is in the Act or in these Rules otherwise provided and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules namely Orders V, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.”***

The petition that commenced the proceedings which have culminated into this appeal were proceedings under Probate and Administration Rules. Thus, the then **Order 49** (which is now **Order 50**) of the Civil Procedure Rules applies to this matter. **Order 49 rule 3A** (now Order 50 rule 4 but slightly amended) stated:-

***“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December, in any year and the sixth day of January, in the year next following, both days included shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act;***

***Provided that this rule shall not apply to any application in respect of a temporary injunction.”***

It is clear to me that respondent's advocates letter dated 30<sup>th</sup> January, 2001 was premature.

From what I have stated above, it is my view that the learned Judge misdirected himself in rejecting the application for annulment of the grants, both of which were not properly issued in that one was issued well before the thirty days stated in the Gazette Notice and the other was obtained in the face of a caveat which was lodged on 29<sup>th</sup> January, 2001 and was in the court file at the time the said grant was issued on 7<sup>th</sup> February, 2001. As I have stated, it is also clear to me that the letter written to the Registrar on 30<sup>th</sup> January, 2001 upon which the court acted to issue grant of 7<sup>th</sup> February, 2001 did not consider that the days from 21<sup>st</sup> December, 2000 and 6<sup>th</sup> January, 2001 should not have been counted in computing time.

In conclusion, this appeal would succeed and I would allow it. As Koome, J.A. also agrees, it is allowed. Orders of the High Court dated and delivered on 26th November, 2004 are hereby set aside. The appellant to have the costs of this appeal and for the chamber summons in the High Court. Judgment accordingly.

This judgment is delivered pursuant to the provisions of **Rule 32 (3)** of this Court's Rules.

**DATED and DELIVERED at KISUMU this 10th day of OCTOBER, 2012.**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**JUDGMENT OF KOOME, J.A.:**

I have had the advantage of reading in draft form the judgment prepared by *Onyango Otiemo, J.A.* I agree with him that the appeal should succeed to the extent indicated in the said judgment. I also agree with his order on the costs of the appeal. The orders proposed in *Onyango Otiemo's* judgment shall accordingly be the orders of the Court.

**Dated and delivered at Kisumu this 10<sup>th</sup> day of October, 2012.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**