



**IN THE COURT OF APPEAL  
AT KISUMU**

**CORAM: (OMOLO, BOSIRE & NYAMU J.J.A)**  
**CIVIL APPLICATION NO. NAI. 102 OF 2011( UR 68/2011)**

**BETWEEN**

**SURESH RATILAL KHIROYA ..... APPLICANT**  
**AND**  
**BINA SANGHANI ..... 1<sup>ST</sup> RESPONDENT**  
**SAROJ SURESH KHIROYA ..... 2<sup>ND</sup> RESPONDENT**

**(Being an application of execution of the order and ruling of the High Court of Kenya at Kisumu  
(Abida-Aaron J.) dated 5<sup>th</sup> November 2008**

**in**  
**HIGH COURT SUCCESSION CAUSE NO. 785 OF 2000)**

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**RULING OF THE COURT**

Before us is a motion on notice by **Saroj Suresh Khiroya**, the applicant, under **rule 5(2) (b)** of the Court of Appeal Rules. **Bina Sanghani**, ( *the 1<sup>st</sup> respondent*) and **Suresh Ratilal Khiroya**, ( *the 2<sup>nd</sup> respondent* ) are named as the respondents. The applicant seeks an order of stay of execution of the orders of the superior court made on 5<sup>th</sup> November, 2008, by Mwera J.

The applicant and the 2<sup>nd</sup> respondent are wife and husband respectively, and both are registered proprietors of property known as **Kisumu Municipality/Block 7/88**, situated within Kisumu Municipality. They became registered following a grant of probate made to the 2<sup>nd</sup> respondent of the estate of **Ratilal Tribhorandas Khiroya**, the father of both respondents. However, later it became clear that the aforesaid property was, as at 28<sup>th</sup> September, 1975 owned by the 2<sup>nd</sup> respondent and his mother, one **Kashben**, deceased, as tenants in common, and Ratilal Tribhovandas Khiroya, was merely the executor of her will. Curiously on 14<sup>th</sup> December, 2004, the property was registered in the names of the 2<sup>nd</sup> respondent and his wife, the applicant herein. The 1<sup>st</sup> respondent, is the sister of the 2<sup>nd</sup> respondent.

Following the grant of probate to the 2<sup>nd</sup> respondent of the estate of their father, Ratilal Tribhovandas Khiroya, the 1<sup>st</sup> respondent moved the superior court by her application dated and filed in court on 10<sup>th</sup> June 2009 for an order annulling that grant on the ground that it was fraudulently obtained and that there was concealment of certain material facts. She prayed for an account of the rents which had been received so far and for an order that future rents be deposited in a joint – income earning account in the names of both parties’ respective counsel. She also prayed for an order inhibiting any transactions over the property. Mwera J. heard the application and granted the orders sought. Those are the orders the applicant herein wants stayed.

In the meantime, by his application dated 6<sup>th</sup> May 2009 and filed in the High Court on the same

day, the 2<sup>nd</sup> respondent applied through his wife for stay and review of those orders contending that he was a registered proprietor of the suit property, and that there was an error on the face of the decision of that court which he wanted reviewed. He filed that application notwithstanding the fact that there was a similar application pending before the same court. That application which was dated 8<sup>th</sup> December, 2008, was scheduled for hearing on 2<sup>nd</sup> February 2009 but it is not clear whether or not it ever came for hearing at all before that of 6<sup>th</sup> May 2009. What is clear, however, is that the 2<sup>nd</sup> respondent's application was heard and completed by Mwera J., who rendered his decision on 12<sup>th</sup> October 2009, dismissing that application with costs. It is apparent that the applicant re-activated her application dated 6<sup>th</sup> May 2009 following the dismissal of her husband's application. Be that as it may her application was heard by Ali-Aroni J. One of the arguments which were proffered on behalf of the applicant in that application was that she was not served with the 1<sup>st</sup> respondent's application which gave rise to the orders of 5<sup>th</sup> November, 2008, which argument the court rejected. For that and other reasons the court dismissed her application. The applicant is before us to seek a stay on the orders of 5<sup>th</sup> November, 2008 pending the filing of an appeal against Ali-Aroni J's decision.

In his submission before us, Mr. Odunga, stated that the applicant's intended appeal is not against the order declining review, but against one granting a conditional injunction. He submitted that no notice of appeal was lodged against the order declining review. However, a perusal of the record of the application reveals that there is only one notice of appeal on record dated 21<sup>st</sup> October, 2010 and filed in the High Court on the same day. It reads, in pertinent part, thus:

“Take notice that Saroj Suresh Khiroya being dissatisfied with the decision of the Honourable Lady Justice Abida Ali-Aroni given at Kisumu on the 15<sup>th</sup> day of October 2010 appeals to the Court of Appeal against the whole of the said decision.”

If indeed the applicant did not intend to appeal against Ali-Aroni J's order, then the applicant has not satisfied one of the requirements of **rule 5(2)(b)** of the Court of Appeal Rules, namely the filing of a notice of appeal as a prerequisite to this court entertaining an application either for stay of execution or an injunction. The time for lodging a notice of appeal against the ruling of Mwera J. dated 5<sup>th</sup> November, 2008 expired in early 2009, and we have no evidence to show that the applicant has taken essential steps to mount a competent appeal against the conditional injunction.

As for the intended appeal against the order declining review the main issue before Ali-Aroni J. was whether the applicant was granted an opportunity of being heard before the injunction was granted. Mr. Odunga submitted before us that the applicant was not heard and yet the order affected her adversely being one of the registered proprietors of the suit property.

Mr. Otieno for the 1<sup>st</sup> respondent was of a contrary view. It was his submission that the applicant was served with the application giving rise to the inhibition order and she was also notified of the hearing date of that application through her husband, the 2<sup>nd</sup> respondent herein. He did not however, point out that there was counsel present at the hearing who according to Mwera J. was representing the applicant. In his ruling Mwera J. remarked as follows:

“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.”

From that remark it is quite clear, contrary to Mr. Odunga's submission, that the applicant was represented at the hearing of the 1<sup>st</sup> respondent's application for inhibition, but her advocate did not say much in support of her case. Besides, the applicant and the second respondent being husband and wife who, at the material time, we were told, lived together, it would be unbelievable to say that the applicant was not aware of the injunction application. Mr. Otieno submitted, and that fact is clear from the affidavit of service filed in the High Court by Julius Otieno Raminya on 21<sup>st</sup> October, 2008, that when the 1<sup>st</sup> respondent's application for an inhibition was served upon the 2<sup>nd</sup> respondent, the applicant was

present. That may probably explain her advocate's presence in court when that application came for hearing.

In view of the foregoing it is not clear why the applicant did not cause her application for review to be listed for hearing together with that of her husband. It is clear she deliberately failed to prosecute her application to await the outcome of her husband's application after which she would pursue her own to try her luck. The High Court having dealt with her husband's application which as we stated earlier was similar, it was, *prima facie*, an abuse of the court process to seek the same court's decision on her application as it was essentially a rehearing of the same matter.

We are not satisfied that the applicant has demonstrated that her intended appeal is arguable. Besides on the nugatory aspect, there is some evidence on record that the 2<sup>nd</sup> respondent has substantial savings out of the country in the **Isle of Man**, and because they live together as husband and wife, it is doubtful whether the applicant is truthful in saying that she has no means of livelihood.

In the result, the applicant's application dated 19<sup>th</sup> April 2011 fails and it is accordingly dismissed with costs to the 1<sup>st</sup> respondent only in view of the fact that Mr. Ondego for the 2<sup>nd</sup> respondent indicated that he was supporting the motion.

**Dated and delivered at Kisumu this 29<sup>th</sup> day of July 2011.**

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**