



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 500 OF 1997

IN THE MATTER OF THE ESTATE OF KIBOWEN KOMEN (DECEASED)

SOTE KOMEN.....APPLICANT

VERSUS

GRACE SAMSON KOMEN.....1ST RESPONDENT

WILLIAM KIPROP KOMEN.....2ND RESPONDENT

RACHEL CHEPNG'ENO KOMEN.....3RD RESPONDENT

MOHAMMED KOMEN.....4TH RESPONDENT

RULING

In a Chamber Summons dated 14th May 2013 and expressed to be brought under Rule 74 of the Probate and Administration Rules, (*the Application*) Sote Komen (*the Applicant*) sought orders -

1. that the Application be certified urgent,
2. that the orders of stay made on 12.10.2011 be set aside,
3. that the costs of the application be provided for.

The Application was supported by the Affidavit of Sote Komen sworn on 14th May 2013, and the grounds on the face thereof.

The Application was not opposed by the 2nd–4th Respondents. It was opposed only by the counsel for the 1st Respondent. This is the background to this application.

The judgment herein was delivered on 30th July 2010, and it also provided for the distribution of the deceased's vast estate to the various beneficiaries including his widows. One large property Title No. 10684 Njoro comprising about 666 acres was distributed among the various beneficiaries and the Applicant was allocated 150 acres by the court, while 66 acres and other lands was to be sold to defray the debts of the Estate.

The 1st Respondent was unhappy with this distribution and moved to the Court of Appeal by a Notice of Appeal dated 9th August, 2010, and filed an Application for stay of execution of the orders of the court granting the Applicant the 150 acres, and the sale of the 66 acres of that parcel of land, on the grounds inter alia that the area allocated to the Applicant constituted her “home”, and that she would lose 216 acres.

The court was persuaded by that argument and granted a stay of distribution to her pending the Appeal. The Applicant cries foul that the appeal was to be filed within 60 days of the proceedings being typed, and ready for compilation of the Record of Appeal. The proceedings were typed and the parties notified on 30th January 2013. The 1st Respondent was required to file the Appeal within 60 days from the date when the proceedings were ready. The Respondent has failed to file the Record of Appeal, and pleads that continued stay of the stay orders is oppressive to her, that the other beneficiaries have already accessed their share of the estate except her and at 74 years of age she is not only old but also sickly. She pleads that in the interest of justice her application be allowed.

As noted already, the only opposition to the Application is from the 1st Respondent through the Replying Affidavit of her counsel on record, Mildred G. Gakoi. The affidavit in substance says that there has been no delay in pursuing the proceedings, and therefore the preparation of the Record of Appeal. I am not persuaded by this argument.

The proceedings were ready by 30th January 2013. The sixty day grace period expired on 1st April 2013.

The Application herein was filed on 14th May 2013, some forty-three (43) days after expiration of the said grace period. It cannot be said that the 1st Respondent has been diligent in seeking to file the Record of Appeal. I think the delay which is over 2 years since judgment was delivered on 30th July 2010 is inordinate, and the Applicant's anxiety on account of both her age and the delay is both understandable and justified.

In the circumstances I allow the Applicant's application and set aside the orders of stay made on 12th October 2011. The 1st Respondent will also bear the costs of the application herein.

It is so ordered.

Dated, signed and delivered at Nakuru this 28th day of June, 2013

M. J. ANYARA EMUKULE

JUDGE