



REPUBLIC OF KENYA



**In re Estate of the Late Kibowen Komen (Deceased) (Succession Cause 500 of 1997) [2024] KEHC 7567 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7567 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 500 OF 1997  
SM MOHOCHI, J  
JUNE 21, 2024**

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

**BETWEEN**

**GRACE SAMSON KOMEN ..... 1<sup>ST</sup> APPLICANT  
MICHAEL KIGEN KOMEN KOMEN ..... 2<sup>ND</sup> APPLICANT  
MOHAMED TANUI KOMEN ..... 3<sup>RD</sup> APPLICANT**

**AND**

**PETER KIPRUTO KOMEN ..... 1<sup>ST</sup> RESPONDENT  
ABDULGHANI MOHAMED KOMEN ..... 2<sup>ND</sup> RESPONDENT  
ABRULKADIR MOHAMMED ..... 3<sup>RD</sup> RESPONDENT  
EVAN KIPTUI KOMEN ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. On the 20<sup>th</sup> March 2024 the Court dismissed a summons for revocation of a grant filed by the Applicants. The Applicants immediately and without leave of the court filed a notice of Appeal dated 26<sup>th</sup> March 2024 together with a Notice of Motion Application under certificate of urgency dated 15<sup>th</sup> April 2024.
2. The Application principally sought for stay of proceedings pending hearing and determination of their intended Appeal
3. It should be recalled that the succession cause was due for mention on the 16<sup>th</sup> April 2024 and the court directed the Application be served on All the parties by 10am on the 16<sup>th</sup> April 2024 to be orally heard and disposed-off with.



4. On the 16<sup>th</sup> April 2024 the court heard the Application for stay of proceedings and dismissed the same.
5. Before court for determination a Notice of Motion Application dated 19<sup>th</sup> April, 2024 filed pursuant to Article 159 of the Constitution of Kenya, Section 47 of the Law of Succession Act, Rule 49, 63 and 73 of Probate and Administration Rules seeking the following orders.
  - i. Spent
  - ii. The Applicants/ Intended Appellants be granted leave by this court to appeal to the Court of Appeal against the ruling delivered on 20<sup>th</sup> March 2024.
  - iii. That upon grant of prayer 2 above, the Notice of appeal dated 26.03.2024 and lodged in court on 27.03.2024 be deemed as properly filed.
  - iv. That then cost of the application be on then cause.
6. The Motion is on the grounds set out in the Application and supported by an Affidavit of Grace Samson Komen, sworn on 20<sup>th</sup> April, 2024. She deponed that, she together with her co-applicants filed an application for revocation of grant on 17.05.2023 that was heard and ultimately dismissed on 20.03.2024.
7. That having been dissatisfied with the said ruling she and her Co-Applicants are desirous of seeking another opinion at the court of appeal.
8. That her is appeal arguable and has overwhelming chances and probability of success since the impugned ruling ignored the bequeaths of the deceased.
9. That it is in the interest of justice and overriding objectives of the law that status quo ante be maintained on the deceased estate being land parcel LR NO. 10684 so as to restrain the Respondents from disposing off a portion thereon while their appointments as administrators is contentious.
10. That it is only fair and just and for preservation of the estate that the application herein be heard on priority basis and the orders sought be issued.
11. That it is her prayer that the orders sought herein be granted as prayed as the application has been lodged timely, in good faith, for the interest of justice and for the protection of the beneficiaries to the estate of the late Kibowen Komen and no party will be prejudiced if the application is allowed as prayer.
12. On the 14<sup>th</sup> May 2024 the court issued further directions on the hearing and disposal of this Application with a Ruling date being reserved for the 21<sup>st</sup> April 2024.
13. None of the Parties complied with directions of court and no written submissions or responses from parties are on file and the court shall nonetheless proceed to consider the Application

### **Analysis and Determination**

14. I have carefully considered the Notice of Motion observing that the format the Applicant is moving court is not provided for in the laws of succession, however it is in the interests of justice for the court to discern from the motion what the Applicants seek from the court.



15. Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules* set out decrees/orders that are appealable as a matter of right. Under Section 75 of the *Civil Procedure Act*, an appeal shall lie as of right from the following orders: -

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

(1)

- a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- b. an order on an award stated in the form of a special case;
- c. an order modifying or correcting an award;
- d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- e. an order filing or refusing to file an award in an arbitration without the intervention of the court;
- f. an order under section 64;
- g. an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- h. any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.”

16. On the other hand, Order 43 of the *Civil Procedure Rules* lists those orders from which appeals would lie as a matter of right. The Order provides:

“1.

- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the *Act*—
  - (a) Order 1 (parties to suits);
  - (b) Order 2 (pleadings generally);
  - (c) Order 3 (frame and institution of suit);
  - (d) Order 4, rule 9 (return of plaint);
  - (e) Order 7, rule 12 (exclusion of counterclaim);
  - (f) Order 8 (amendment of pleadings);
  - (g) Order 10, rule 11 (setting aside judgment in default of appearance).



- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
  - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
  - (j) Order 19 (affidavits);
  - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
  - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
  - (m) Order 24, rules 5, 6 and 7 (legal representatives);
  - (n) Order 25, rule 5 (compromise of a suit);
  - (o) Order 26, rules 1 and 5(2) (security for costs);
  - (p) Order 27, rules 3 and 10 (payment into court and tender);
  - (q) Order 28, rule 4 (orders in proceedings against the Government);
  - (r) Order 34 (interpleader);
  - (s) Order 36, rules 5, 7 and 10 (summary procedure);
  - (t) Order 39, rules 2, 4 and 6 (furnishing security);
  - (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
  - (v) Order 41, rules 1 and 4 (receivers);
  - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
  - (x) Order 45, rule 3 (application for review);
  - (y) Order 50, rule 6 (enlargement of time);
  - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
  - (aa) Order 53 (judicial review orders).
- (2) An appeal shall lie with the leave of the court from any other order made under these Rules.
- (3) An application for leave to appeal under section 75 of the *Act* shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.



(4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”

17. The Application is undefended and in fact it ought to have been made orally in the 1<sup>st</sup> instance prior to filing the Notice of Appeal.
18. The court is unable to determine the arguability or success of the intended Appeal.
19. This court is unable to determine with regards to prejudice being occasioned on the parties by the intended Appeal but reiterates the fact that a succession has been pending conclusion for the last twenty-seven (27) years is indicative of the intergenerational prejudice being occasioned by the delay and as such this court had disallowed the Application for stay of proceedings.
20. The right to Appeal in this instance is not absolute but in furtherance of access to justice and in the interest of justice this court deems it necessary to allow the Application.
21. I do find that the Applicants are entitled to pursue their appeal against the Ruling dated 20<sup>th</sup> March 2024. I do allow the application dated 19<sup>th</sup> April, 2021 in the following terms: -
  - I. Leave is granted to the Applicants to file appeal against the Ruling delivered on 20<sup>th</sup> March 2024.
  - II. The Notice of Appeal dated 26<sup>th</sup> March 2024 is hereby deemed as duly filed.
22. There shall be no orders as to costs.

It is so Ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 21<sup>ST</sup> DAY OF JUNE 2024.**

**MOHOCHI S. M.**

**JUDGE**

