



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: GATEMBU, M'INOTI & J. MOHAMMED,  
J.J.A)**

**CIVIL APPEAL NO. 210 OF 2013**

**BETWEEN**

**GRACE SAMSON KOMEN .....  
APPELLANT**

**AND**

**WILLIAM KIPROP KOMEN ..... 1<sup>ST</sup>  
RESPONDENT**

**RACHAEL CHEPNG'ENO ..... 2<sup>ND</sup>  
RESPONDENT**

**MOHAMED KOMEN ..... 3<sup>RD</sup>  
RESPONDENT**

*(Being an Appeal from the Judgment and Orders of the High Court of  
Kenya at Nakuru (M. K. Koome, J.) dated 30<sup>th</sup> July, 2010*

*in*

***SUCCESSION CAUSE NO. 500 OF 1997)***

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**JUDGMENT OF THE COURT**

1. The appellant, Grace Samson Komen, is a beneficiary of the estate of Kobowen Komen, deceased. She is the daughter in law of the deceased. In this appeal, she has challenged the judgment of the High Court (M. K. Koome, J. as she then was) delivered on 30<sup>th</sup> July 2010 in which that court distributed the intestate estate of Kobowen Komen ("the deceased").

2. Although in her notice of appeal the appellant intimated that she is dissatisfied with the whole judgment, it is clear from the memorandum of appeal and the submissions of counsel that the appellant's complaint is in relation to the distribution of Land Reference Number 10684 Njoro. The part of the estate of the deceased distributed to the appellant (to hold in trust for herself and her children with her late husband Samson Komen who was the son of the deceased) comprises 450 acres of Land Reference Number 10684 Njoro (which measures approximately 666 acres); a developed commercial property known as Land Reference Number 9038/2 and motor vehicle registration

3. The appellant complains that: the learned judge erred in failing to allocate the entire parcel of Land Reference Number 10684 Njoro to her and her children; in ordering that 150 acres to be excised from that property and be allocated to the deceased's second wife, Sote Komen and her child; and in ordering a further 66 acres to be excised from the same property and be sold to raise money to settle the liabilities of the estate of the deceased. According to the appellant the learned trial judge failed to take into account and properly evaluate the evidence presented and thereby erred in her decision refusing to allocate exclusively to her and her children all the 666 acres making up Land Reference Number 10684 Njoro.

### **Background**

4. The deceased was polygamous. He died intestate on 15<sup>th</sup> February 1997. He was aged 87 years. His three wives and children survived him. The first wife is Magdalena Tapsiarkani Komen (the first widow). The record shows she died during the pendency of the cause in the High Court. The deceased and the first widow were blessed with five children namely Willy Kiprop Komen, Mohammed Tanui Komen, Michael Kigen Bowen and Samson Kipchirchir Komen who was the husband to the appellant and who died in 1982.

5. The deceased's second wife, Sote Komen (the second widow) was blessed with one child Stephen Kiptui Komen. Mohammed Komen and Willy Komen asserted before the court that the second widow was not married to the deceased. That assertion was rejected by the learned trial judge who found as a fact that the second widow "was able to prove that she is the widow of the deceased."

6. The deceased and his third wife Rachel Chepng'eno Komen were blessed with five children Beatrice Chekurui Komen, Bernard Kiplangat Komen, Catherine Cheronon Komen, Agatha Cherotich Komen and Patrick Toroitich Komen.

7. It was established during the trial that the deceased distributed the bulk of his assets during his lifetime and his free property constituting his estate was the following properties:

***"L.R. No. 10684 Njoro – 666 acres (occupied by Grace Samson)***

***L.R. No. 10013/5 Njoro, 4.5 acres (Bequeath to the children of the late Reuben Chepkonga)***

***L.R. No. 10013/4 Njoro 418 acres. (occupied by Mohammed)***

***L.R. No. Kabarnet Municipality***

***Nakuru Municipality Block 4/25 (occupied by Mohammed)***

***Plot No. 18 Seguton – 20 acres (occupied by Rachael Komen)***

***Plot No. 113 Seguton***

***Zone 58 Kabarnet Municipality***

***L. R. No. 9038/36***

***100 Acre farm at Keriget (this was to be ascertained by the administrators)***

***Motor Vehicle KMD 395 Mercedes Benz"***

8. Having considered the evidence and the various proposals put forward by the beneficiaries of the estate as to the mode of distribution of the free estate of the deceased, the learned trial judge determined that the estate should be distributed in the following manner:

*“ (a) Mohammed Komen*

*LR NO. 10013/4, Njoro 318 acres*

*Nakuru Municipality block 4/25*

*LR NO. 9038/36 Karbarnet Municipality*

*(b) Grace Samson (To hold in trust for herself and the children of the late Samson Komen)*

*L.R. NO. 10684 Njoro – 450 acres*

*L.R. NO. 9038/2 (Already transferred by the deceased)*

*Motor vehicle KMD 395 Mercedes Benz*

*(c) William Komen and Michael Komen*

*L.R. NO. 1331/2 Menengai farm – measuring approximately 2619 acres (transferred by the deceased in his life time)*

*L.R. NO. 1331/2 Karbanet Municipality Plot 113 Seguton*

*(d) Sote Komen (To hold in trust for herself and Stephen Kiptui Komen)*

*150 Acres to be exercised from L.R. NO. 10684 Njoro*

*L.R. NO. 9413/5 (Already transferred by the deceased to Stephen)*

*Rongai Commercial Plot*

*(e) Children of the late Reuben Chepkonga*

*L.R. NO. 10013/2 Njoro 4.5 Acres (to hold in trust for all the children)*

*(f) Rachael Komen (Transferred to herself and in trust of her children)*

*L.R. NO. 10013/5 Njoro 172 acres*

*L.R. NO. 10013/6 180 acres (the 50% share out of the joint tenancy transmits to Rachael in trust of her children)*

*L.R. NO. 9033/3 and 9038/4 in Kabarnet Municipality (Already transferred by the deceased during his life time)*

*(g) Abdulghani Komen, Abdul Khadir Kiplagat Komen and Abul Khalid Kipkemei Komen (as tenants in common)*

*100 Acres to be excised from L.R. NO.10013/4 Nakuru*

*(h) Peter Komen*

*Plot No. 18 Seguton 20 acres*

*Zone 58 Kabarnet Municipality*

(i) *Administrators of the Estate*

*66 Acres to be excised from L.R. NO10684 Njoro Keringet Farm 100 Acres*

*Shares at Nairobi Stock Exchange KLZ 213 – Peugeot*

*KAB 556A – Massey Ferguson KQZ 227 - Flat*

*Shares East Africa Breweries Ltd”*

9. It is against that background that the appellant has taken issue with items (d) and (i) above under which the learned judge allocated 150 acres of L.R. No. 10684 Njoro to the second widow, Sote Komen and 66 acres to the administrators for sale for purposes of defraying the estate liabilities. She contends that the entire property L.R. No. 10684 should have been allocated to her. In that regard, the learned judge pronounced that:

***“The 2<sup>nd</sup> house will have 150 acres to be exercised from LR NO. 10684 Njoro (sic) which is approximately 666 acres and a further 66 acres will be exercised from the (sic) same title for sale, this is the portion earmarked or occupied by Grace Samson who will be entitled to 450 acres.”***

10. On her part, the second widow, Sote Komen considers that the 150 acres allocated to her is insufficient. She contends in her cross appeal that the learned trial judge discriminated against her and failed to consider the totality of the evidence; that the just allocation to her should not be less than two-thirds of L.R. No. 10684 Njoro. She accordingly prays that an additional 294 acres be excised for her from L.R. No. 10684 to bring her entitlement to 444 acres.

**The appeal and submissions by counsel**

11. At the hearing of the appeal before us, the parties were represented by learned counsel. Mr. H. M. Kabiru appeared for the appellant. Mr. Waiganjo Mwangi appeared for the second widow, Sote Komen. Mr. E. Masika appeared for Agrisup Limited, a creditor. Mr. Steve Biko Osur appeared for Mohammed Komen, the third respondent.

12. For the appellant, Mr. Kabiru submitted that the learned judge erred in considering LR No. 10684 as the only property available for distribution; that the status of Sote Komen as a widow of the deceased was not established and the judge was wrong to regard her as being entitled to provision from the estate; that of over 1200 acres of land the judge found to be free property available for distribution, there is no reason why the only property that was occupied and used by the appellant was considered available for excision to make provision for creditors and for the second widow.

13. Counsel referred us to the appellant’s affidavit sworn on 17<sup>th</sup> November 1997 in which the appellant deposed that she and her late husband (son of the deceased) moved into LR No. 10684 in 1967 and that prior to the death of the deceased he made it clear that that land belonged to the appellant and even took steps to subdivide it into four portions for each of the appellant’s four sons; that the learned judge treated the appellant discriminately in that LR No. 10013/4 which was occupied by Mohammed and allocated to him and his children by the judge was not subjected to excision and that the appellant should have been treated the same way.

14. As to whether Sote Komen was a widow of the deceased and entitled to provision from the estate, counsel submitted that the judge wrongly concluded that she is the widow of the deceased merely on account of their having sired a child together without more; that the judge wrongly rejected the evidence from the children of the deceased and from Justice Serگون who testified before the court that Sote Komen was not married to the deceased; that it was the fact of having a child that influenced the court to determine that she was a widow when no evidence was adduced as to her getting married; that notwithstanding that she shared in the cash in the bank and her son was given land by the deceased, it is noteworthy that she was not considered for appointment as one of the administrators whilst the other widows were granted administration and there was no letter from the chief to show her status as a widow.

15. As regards the excision of 66 acres from the property for sale to settle creditors, counsel submitted that all houses of the deceased should have been made to contribute towards those liabilities. Counsel concluded by urging us to set aside the judgment of the court as relates to the property and substitute the same with an order allocating it to the appellant exclusively.

16. On behalf of Sote Komen, Mr. Waiganjo Mwangi submitted that all assets of the deceased, except the property LR 10684 have been distributed; that that property is being sought by Sote Komen, her son Kiptui Komen and the deceased's daughter in law, the appellant; that the complaint that Sote Komen is not a widow of the deceased is not part of the grounds set out in the memorandum of appeal and the issue of Sote not being a widow is being taken from the bar; that in the affidavit in support of petition for letters of administration in respect to the estate of the deceased presented to the High Court by William Kiprop Komen, son of the first widow clearly indicates that Sote Komen is a widow of the deceased and the appellant cannot now be heard to say that Sote is not a widow; that in her affidavit in support of the petition by way of cross application, the third widow Rachel Chepng'eno Komen clearly acknowledges Sote Komen as a widow and the question whether she is a widow or not is settled.

17. According to counsel, the evidence tendered demonstrated that the property was not given to the appellant exclusively as it is clear from her affidavit that the deceased himself continued to cultivate the land; that there is also evidence that prior to his death the deceased intended to sell part of the property and entered into a sale agreement for a portion of the property with Agrisup Ltd and it cannot therefore be correct that the deceased had given the land to the appellant exclusively.

18. Turning to the cross appeal, counsel submitted that the just thing to do is to distribute the property equally between the appellant, her son and Sote Komen after removing the 66 acres to be sold by the administrators to defray creditors. With that Mr. Waiganjo urged us to dismiss the appeal and to allow the cross appeal.

19. Counsel for the 3<sup>rd</sup> respondent Mr. Ogur submitted that the judgment of the lower court is just and urged us to affirm it saying that the 418 acres of land being LR NO. 10013/4 allocated to his client was reduced to accommodate the grand children of the deceased; that the judge took into account the contribution by Mohammed Komen to the estate in addition to his relationship with the deceased and his allocation is therefore justifiably larger. Counsel urged us to dismiss the appeal with costs.

### **Determination**

20. We have considered the appeal and the submissions by counsel. There are two issues arising from the appeal and the cross appeal. The first is whether the learned judge erred in distributing LR 10684 in the manner that she did or whether it should have been allocated exclusively to the appellant. The second issue is whether the status of Sote Komen as a widow of the deceased was proved and whether her provision out of LR 10684 should be increased.

21. In addressing those issues, we are mindful of our duty, consistently with the principles pronounced by this Court in many decisions including **Selle v Associated Motor Boat Co. Ltd, [1968] EA 123** and **Williamson Diamond Ltd v Brown, [1970] EA 1** to review and re-evaluate the evidence and to draw our own conclusions. Furthermore the distribution of an intestate estate by the court under the Law of Succession Act entails a degree of exercise of discretion by the court. This Court does not interfere with exercise of discretion unless satisfied that the lower court misdirected itself on some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of the discretion and that as a result, injustice has occurred.

### **See Mbogo & Another vs. Shah, [1968] E.A. 93.**

22. As already mentioned, the appellant would like this Court to interfere with the judgment of the High court in three respects. First, she wishes to have the finding that Sote Komen is a widow of the deceased, reversed. Secondly, and flowing from the first, she would like the allocation of 150 acres from LR No. 10684 to Sote Komen revoked. Third, the order for excision and sale of 66 acres from the property for purposes of settlement of liabilities of the estate should also be reversed. In effect, the appellant contends

that LR No. 10684 should be allocated to her and her children exclusively as, according to her, the deceased gave it to her and her sons during his lifetime. For the same reasons, the appellant says that the burden to shoulder liabilities of the estate should not be placed on her property but should be borne by all the houses.

23. We begin with the question of whether Sote Komen is a widow, as the other two issues hinge on that. Mohammed Tanui Komen testified that the deceased had only two wives namely his mother, the first widow and Rachel Chepng'eno Komen the third widow; that Sote Komen was married to another person (known as Chesire Kibarake) despite which the deceased and Sote sired a child (Kiptui) together; that he persuaded his father to look after that child and his father agreed to do so; that his father gave Kiptui a piece of land; that as Sote was married to someone else, she could not, under Tugen customs be married to the deceased or any other person; that the deceased never paid dowry for Sote and never recognized her as a wife. According to Mohammed Tanui Komen, it was a mistake for his brother William Komen to recognize Sote Komen as a wife of the deceased. He confirmed that the deceased's cash in the bank was shared equally between the three widows.

24. In her testimony before the court, Sote Komen stated that *"I am the wife of the late Kibowen Komen"* having married him in 1964 and a co wife to the 1<sup>st</sup> and 3<sup>rd</sup> widows; that together with the deceased they have one child Stephen Kiptui Kibowen Komen and that they live on the deceased's farm in Kabarnet; that she has other children that do not belong to the deceased who were not claiming anything from the deceased; that she was not married to the father of those children (known as Chelangat) and she left him in 1961 and that he died a long time ago; that the deceased's money was distributed amongst the three widows.

25. Stephen Kiptui Kibowen Komen, the son of Sote Komen stated in his evidence that he is the son of the deceased and was recognized as such by other members of the deceased's family; that when the deceased's cash in bank was shared equally between the widows of the deceased, there was no opposition to his mother getting an equal share as the other widows.

26. The third widow, Rachel Chemngeno Komen stated in her evidence that: *"I married the deceased in 1975 in April. I found the deceased had the 1<sup>st</sup> wife called Magdalene Komen and Sote Komen. These are the two I found so I was the 3<sup>rd</sup> wife."* She was even more categorical under cross-examination stating that *"Sote is the wife of the deceased and Stephen Kiptui is the son of the deceased."*

27. The first respondent in this appeal, William Kiprop son of the deceased with the first widow who described Sote Komen as the widow of the deceased in the affidavit in support of the petition for letters of administration, stated in his evidence that Sote and the deceased *"never lived as husband and wife."*

28. The testimony of Hon. Justice Joseph Kiplagat Sergon, who had known the deceased for more than 10 years and was: *"I am familiar with his family. I knew a few of his family. Officially I knew the deceased had two wives."* He stated that he met Sote Komen but did *"not know whether they were married."*

29. Upon considering the evidence the learned judge had this to say:

***"It is common ground that the deceased was polygamous, Mohammed and William Komen gave evidence to suggest that Sote Komen was not a wife of the of the deceased. Indeed Mohammed gave a long story of how he rescued the son of Sote Komen from poverty and pleaded with the deceased to support Stephen and that is how he and his mother were settled at Kabarnet farm. He went on to allege that Sote was married to another man. With respect this evidence lacks credibility. Firstly, these two are the children of the deceased and it is questionable how they were able to know their father's relationship with Sote Komen. Secondly, they do not dispute that the son of Sote is the deceased's child. Thirdly, all other witnesses especially Rachael, who is the 3<sup>rd</sup> wife of the deceased confirmed that Sote was the 2<sup>nd</sup> widow of the deceased. Lastly immediately the deceased passed away, all the money that was in is bank account was shared equally among the three widows following a consent order issued through the court."***

30. Clearly, the learned judge did not consider the testimony of Mohammed Tanui Komen regarding the status of Sote Komen to be credible. The learned judge was satisfied, as we are, that on a balance of probabilities it was established that Sote Komen was indeed a widow of the deceased. Where findings of a trial court are based on credibility of a witness, this court is slow to interfere. The holding by this Court in **Republic vs. Oyier, [1985] KLR 355** in the context of a criminal appeal that an appellate court should not interfere with findings by the lower court which are based on credibility of witnesses unless no reasonable tribunal could make such findings or it is shown that there existed errors of law, applies also to

a civil appeal.

31. We are ourselves satisfied that the finding that Sote Komen proved that she is a widow of the deceased was well founded. Based on the record, Sote Komen was treated as the 2nd widow of the deceased by the family. The 3rd widow specifically identifies her as the 2nd widow as does William Komen. Further, by a consent recorded by all the parties on 14th April 2000 in court in Nakuru HCSC 500 of 1997 before D.M Rimita J, the parties agreed to share equally among the three widows all the money in the deceased's bank account. It is also clear from an affidavit sworn by William Komen on 9th May 2001, that all the parties involved treated Sote Komen as the 2nd widow of the deceased, as William Komen refers to a meeting between the 1st and 2nd houses. It would appear that the motivation behind the appellant's opposition to inclusion of Sote Komen as a widow of the deceased would be to exclude her as a beneficiary so as to justify the reversal of the allocation of 150 acres from LR No 10684 to her.

32. We therefore find and uphold the finding by the learned judge of the High Court that Sote Komen is a widow of the deceased.

33. The next issue is whether the learned judge erred in distributing LR 10684 in the manner that she did or whether it should have been allocated exclusively to the appellant.

34. The appellant argued that during his lifetime the deceased gave the property LR 10684 to her and her sons and that the deceased had even embarked on subdividing it into four portions for each of her sons. However, the appellant accepted that after the deceased allegedly gave the property to her and her children, he continued to cultivate that property. It is also instructive, we think, that the deceased intended to sell 185 acres of that very property that measures 666 acres and hardly two years before his death entered into an agreement for sale under which he agreed to sell 185 acres to Agrisup Ltd.

35. Those actions on the part of the deceased are, in our view, inconsistent with the contention by the appellant that the deceased gave the entire property to her and her children. Indeed, the order by the High Court for 66 acres to be excised from the property and sold off to cater for the liabilities of the estate respected and are consistent with the wishes of the deceased.

36. We think the learned judge was also right in making provision for Sote Komen from the same property. Guided by S. 40 Law of Succession Act, Koome J determined that though some of the beneficiaries had already settled on some of the properties, it was in the interest of justice to make some adjustments to the allocations of free properties of the deceased's estate since some beneficiaries had disproportionately big shares, in order to accommodate all the beneficiaries.

37. The learned judge carefully undertook a delicate exercise of balancing the competing interests and claims of all the beneficiaries respecting as much as possible, the wishes of the deceased to the extent that they were discernible from his actions during his lifetime. The learned judge took into account that the 3rd respondent contributed in management and acquisition of the deceased's properties; that the property LR No 10684 measures 666 acres in total; that after allocating 150 acres of that land to Sote Komen and 66 acres to the administrators to dispose for purposes of paying the creditors, the appellant would still be left with 450 acres.

38. The appellant suggested that the 66 acres that the judge directed to be sold to cater for liabilities or at least part of it should have been hived off LR 10013/4 that was allocated by the court to Mohammed Komen the 3<sup>rd</sup> respondent. In making provision for three of the 3<sup>rd</sup> respondents sons, who the court found to be dependants of the deceased, the court allocated 100 acres of LR 10013/4 to them with the result that the 3<sup>rd</sup> respondent is left with 318 acres of that property compared to 450 acres retained by the appellant.

39. The upshot of the foregoing is that we consider that the learned trial judge struck a fair and just balance between the competing claims by the beneficiaries and we see no basis for interfering with the decision reached by the court below. We accordingly reject the appeal.

40. On the cross-appeal, Sote Komen, has asked this Court to vary the judgment of lower court so that the property LR No. 10684 is divided equally among herself, her son Stephen Komen as well as the appellant. Sote Komen complained that the houses of the first and third widows were allocated and

received a much larger share of the estate than she did as the second house. The learned trial judge heeded the provisions of Section 40 of the Law of Succession Act that provides that:

***“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net estate shall, in the first instance be divided among the houses according to the number of the children in each house, but also adding any wife surviving him as an additional unit to the number of children.”***

41. The first widow of the deceased Magdalina Tapsiarkai Komen has five children. The second widow of the deceased, Sota Komen has one child for consideration. The third widow Rachel Chepng’eno Komen has 5 children. Therefore Sote Komen and her son constitute two units for purposes of section 40 of the Law of Succession Act. By reason of that provision the allocation between the houses cannot therefore be equal as between the second house on the one part and the first and third houses which have more units.

42. In the case of **Rono v Rono and another [2005] 1 EA 363** (Omolo, O’Kubasu & Waki JJA) Omolo JA stated that S. 40 of the Law of Succession Act does not require that the estate be divided equally between the houses as the provision calls for consideration of the number of children in each case. Relative to the number of units in each house, and the assets that were available for distribution by the court it seems to us that Sote Komen’s house received a fair share of the assets of the estate, if not more. For those reasons the cross appeal has no merit and is dismissed.

43. The appeal and cross appeal are therefore dismissed. As regards costs each party shall bear its own costs in the High Court and in this Court.

**Dated and delivered at Nairobi this 13th day of February, 2015.**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**

/ewm





