



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Succession Cause 115 of 1996

IN THE MATTER OF THE ESTATE OF SOTI KIGEN

KIPROTICH KIGEN
OBJECTOR/APPLICANT

VERSUS

SAMSON KIGEN PETITIONER/RESPONDENT

RULING

I have considered the Preliminary Objection raised. Even before Counsel for the Applicant completed his response, the Court stopped him.

As a result, I do make this decision herein suo moto, at the Court's instance.

I do find that the application dated 14-07-1997 had the following prayers:-

1. The Grant was obtained fraudulently by false representation of facts and/or by concealment from the Court of some material facts.
2. The Grant was obtained by reasons of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

The application was heard viva voce with 17 witnesses testifying. Justice Nambuye found in favour of the Applicants. On appeal by the Respondent, the Court of Appeal set aside the Judgment and made findings of fact and law.

The applicant has now brought this application seeking an order that:-

“1. The Grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or in advertently.”

This relief is the same in words, meaning and effect as prayer 2 in the 1997 application.

The Court of Appeal having decided on the case, this Court has no jurisdiction to entertain the same question decided by the Court of Appeal. This is an issue that goes beyond res judicata.

I find that the application is an abuse of the Court's process as the Court is being asked to grant orders

which will be inconsistent and in conflict with the decision of the Court of Appeal. There was no order for retrial and I cannot re-open the case.

I hereby therefore strike out the Summons dated 6/06/2008 with costs to the Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF JULY, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:-

Mr. Chemoyai for the Applicant/Objector

Mr. Gicheru for the Respondent/Petitioner