



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 115 OF 1996

IN THE MATTER OF THE ESTATE OF SOTI KIGEN

KIPROTICH KIGENAPPLICANT

VERSUS

SAMSON KIGEN RESPONDENT

J U D G E M E N T

The proceedings herein related to the Estate of Soti Kigen who died on 3.7.1994 at the age of 66 years. They were commenced by Samson Kigen a son of the deceased . It was filed in pursuance to form P & A 78 with a written will annexed. The same was gazetted vide gazette notice no. 3625 of 28.6.1996. The petition was filed on 23.5.1996. It is noted from the file that objection was filed on 18.6.1999 by Kiprotich Kigen. The first grant was issued by Deputy Registrar on 29.8.1996 to Samson Kigen. The confirmation order was made on 25.3.1997.

Summons for revocation of the grant were filed on 15.7.1997 seeking revocation or annulment of the grant on the grounds that the grant was obtained fraudulently by false representation of facts and or by concealment from the court of some material facts, that 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. The application was accompanied by supporting affidavits. The respondents also filed replying affidavits and grounds of objection. Directions were taken on 30.10.97 and the matter proceeded by way of viva voce evidence.

A total of 11 witnesses gave evidence for the objector namely PW 1 Cheboswon Sorte (Chebaskwony) Soti father of Jane Kigen, PW 2 Jane Kigen, PW3 Sokome Kiptoo, PW 4 Cheruiyot Kapeno, a neighbour, PW 5 Kipkosgei Arap Koime who alleges to have been present during the engagement, PW 6 Christopher Cheboi an assistant chief in the area Kimamet sublocation Kamwosor, PW 7 Elijah Barsai Chief of Murel Location, PW 8 Micah Tarus assistant chief of Kamwosar Location, PW 9 Michael Malakwen Chebaskwony brother to Jane Kigen PW 10 Kiprotich Kigen the applicant and PW 11 Kimutai Kigen and PW 12 a court clerk Henry Kibiego Rotich who produced a file.

The defence called six witnesses who are DW 1 Samson Kipkoech Kigen, shakwel Kiproop owner of plot no. 106 a neighbour of plot 107 DW 4 Moses Kibwalel Arap Bunel a brother of Kigen Sitienei, DW 5 Benjamin Kipkosgei Latabal a brother of Soti Kigen the deceased DW 6 John Kipkosgei Arap Bunel a brother of Kigen Sitienei and DW 3 the central figure in the proceedings Kigen Sitienei.

An over view picture of the case is to the effect that one Kigen Sitienei DW 3 married the deceased subject of these proceeding in the 1950's in accordance with keiyo customary law. They had 10 children between them. He went for engagement and he was given the wife Soti. After residing together they

under went a traditional wedding and then he paid dowry for her. The brother of Soti DW 5 Benjamin Kipkosgei latabai told the court that dowry for Soti was paid in 1966. The two resided in the rural home at a place called Kapkonga just across the river to the disputed plot.

All the witnesses for both sides agreed that as at the time events herein started Soti was residing in the reserve with 4 of her children who had been born then. DW 3 Kigen Sitienei has stated this reserve land is not his ancestral land but it belonged to his grand mother who gave it to Soti because Soti looked after her well in old age. That it is not his ancestral land. That he was not given land by his father, his father said that the land was for his younger children.

At some point in the mid 1960's around 1965 or there about a settlement scheme called Saita was started and people started acquiring plots. It is the evidence of Sitienei DW 3 and his brothers DW 6 John Kipkosgei Arap Bunel and Moses Kibwalel Arap Bunel that Sitienei had no money and had no interest in acquiring land because he had no money. He had tried to do business of a butchery and stock trading but it did not flourish. It is then that his wife Soti went back to her home and sought help from her father to enable her acquire land in the schemes. It is the evidence of her brother DW 5 that at first the father said they could not assist but when she came a second time the father gave out two native bulls to go and sell and pay for the land. She came with her brother in law DW 6 John Kipkosgei Arap Bunel and took them and then went to sell them. According to DW 6 they fetched 1,400/= and he lent them 1,340/= which was refunded later by Sitienei and then she went and paid for the land and she was allotted the same. DW 6 however stated in cross-examination that he does not know how much the bulls fetched and yet he alleges that he is the one who accompanied Soti to go and Market them. DW 5 did not accompany the sister and the brother in law and he does not know how much was paid for the land or how much the bulls fetched.

It was further stated that at the time women could not be allocated land in their names because they had no ID cards. It is on that basis that the deceased Soti was allocated plot 107 through the husband Sitienei. This was confirmed by DW 2 Shakwei Kiprof who is owner of plot no. 106. Her husband had died in 1960 and she was allocated land, through an ID card belonging to a brother in law Arap Arusel and when she acquired her own ID card is when she changed the title into her name. It is the evidence of Sitienei that after the land had been acquired he moved to reside on this land with the grade cattle they had been given on loan. He put up a house and then resided here while his wife Soti resided across in the reserve but cattle used to come and graze on this land and then go back and she also cultivated and went back to the reserve.

In the year 1970 Sitienei DW 3 allegedly told his wife Soti that he wished to marry another wife but she was not for it but since he was a man he went ahead to get himself one. It is on record from the evidence of PW 1 Chebaskwony Sorte the father of Jane, PW 2 Jane Kigen herself and PW 5 Kipkosgei Arap Kolma and DW 3 Sitienei that him his father and another mzee went to engage Jane from her fathers home. He DW 3 did not know that she was pregnant. PW 5 said he DW 3 paid 20/= for paraffin or oil and then they were smeared with oil and they became engaged. He took her to the scheme as his wife and they allegedly resided in one house with Soti but later on DW 3 put up other houses. It is the testimony of PW 1, 2, 5 and 9 that from that date Jane became wife of DW 3. They went to reside together and had children. It is on record that when she came Jane had no children and all children 3-4 of them were born in the home on plot 107 PW 3 Sokome Kiptoo stated that she was the mid wife of Jane when she was delivering and she assisted her deliver 4 of the children.

They PW 1, 2,3,4,5,6,7,8,9,10 and 11 agree with one accord that they are aware Sitienei had two wives Soti was the elder and Jane the second one. Even his own brothers DW 4 Moses Kibiney and DW 6 John Kipkosgei remember seeing Jane on plot 107. There are some witnesses who stated that they did not attend the engagement but know the two were married. It is also agreed from the evidence of PW 1,2,3,4,5,6,7,8, and 9 that under Keiyo customary law dowry is not paid immediately. The girl is engaged and then taken away and after she has given birth to 1-2 children a traditional wedding is performed and then dowry is paid. It is not disputed that in the case of Jane only engagement was done and no wedding done and so no dowry was paid.

They stayed till about 1977-78 when trouble started. It is stated by PW 2, PW 10 and 11 that the elder

wife and her children started mistreating them. They removed grass from her house.

(ii) Grazed animals on her crops.

(iii) Over worked the children.

(iv) Beat them up.

(v) Poured milk milked by her.

When Jane could not withstand it any longer she took her children and went away to her people. There after an attempt was made through the provincial administration to resolve or reconcile them by among them PW 6 Christopher Cheboi assistant Chief, PW 7 Elijah Barsai Chief and PW 8 Micah Tanui also an assistant chief but no resolution was found as DW 3 failed to turn up for the meetings and at one time he denied before the church that he does not know Kiprotich PW 10. They were sent by PW 8 to go and call witnesses and bring them before PW 8 but they never came back. It is the evidence of Jane that the children were small and she could not leave them behind. She used to go and come back and in 1980 or there about she went for good and she did not come back.

The evidence of the boys is that they stayed peacefully for a while with Samson DW 1 and then the mistreatment started and since they could not stand it they went with their mother and when they became of age is when they came back to put up houses. Both PW 10 and 11 are married and they are settled on this land. It is their testimony that they had no problem with their father Sitienei DW 3 but for some un explained reasons he never intervened in the mistreatment between his elder wife and her children on one hand and then Jane and her children on the other hand. He just stood by and watched as they were mistreated. They further added that the elder wife and her children had an upper hand over their father who had no voice even now. The evidence of Sitienei himself is that Jane misbehaved and refused to milk a certain cow and she also used to go away and then come back and he decided he will have nothing to do with her and her children. According to him she came with a pregnancy and gave birth to a boy and then had one other only 2 he recalls and not the others. He was firm that he never took Janes children to school and he never maintained them in any way and he does not want them because they are as bad as their mother and they came to settle on the land by force.

As concerns the change of the title name from the name of their father, to that of the deceased they contend that it was done knowing that the deceased was sickly and she could die and it was calculated to deprive them of their inheritance. It is their evidence that the will was prepared by Samson calculated to shut them out of their fathers land.

The testimony of Sitienei is that the land belonged to his deceased wife because she paid for the land. His name was only used as Soti had no ID Card. That when the wife requested the land to be transferred to her he did so voluntarily. He executed the documents voluntarily and he has no complaint. Concerning the succession proceedings he said he was not aware that the same had been filed in court or that a will had been written and he came to learn of it when he was called to give evidence in these proceedings.

Turning to the evidence of the sole petitioner DW 1 Samson Kigen he says he recalls moving to plot 107 with his father while his mother resided in the reserve. He also recalls having stayed with Jane on plot 107 and he recalls going to the same school Kamwosor Primary School with Kigen but he left shortly there after. Jane never mistreated him when he stayed with her but he does not recognize Kiprotich as his step brother. He DW 1 agreed that before they went away they had resided together in one house. That the land was properly transferred to their mother and the will was properly made witnessed by the advocate who drew it and witnessed by one of his sisters. DW 1 agrees that PW 10 and 11 came to the land wanting to settle on the land by force in 1995 and that is when he came to file the succession proceedings, that he did not disclose to court that there were other people on the land who were claiming the land. Further that Jane and her children have never been dependants of the deceased Soti and so they cannot be provided for.

At the close of the wholesale both counsels filed written submissions. Counsel for the objector stressed the following points.

1. That the application is brought under section 76 of the law of succession Act which empowers a party who has an interest subject of the petition to bring an application for annulment or revocation of a grant whether confirmed or not.
2. That the grant in question was confirmed in March after the applicant had filed objection to making a grant pursuant so section 68 of the laws of succession act. This notice was served on to the petitioners lawyers which fact they have not denied and when they appeared before this court in March 1997 they knew that there was objection filed but they chose to conceal this fact more so when there is an un dated notice of objection issued to Kalyas office notifying them of a notice of objection having been filed and so a grant issued under such circumstances should be revoked.
3. The respondents are further guilty of concealment from this honourable court a material fact that his father was still alive and well at the time of the petition. In cross examination his father DW 3 admitted that he was un aware of the petition by the applicant Samson Kigen his son. DW 3 is also a beneficiary but he was not named as a beneficiary. The father did not apply for revocation but that should not over shadow the fact that the petitioner did all he could to conceal the existence of the father.
4. The petitioner did all he could to over shadow the objector evidenced by the fact that prior to the filing of the petition filed a suit in the lower court Eldoret SPMCCC 932/95 seeking to evict the applicant as a trespasser or from the suit land and named the applicant as Kiprotich Chebaskwony and not Kigen because he wanted to mislead the court into believing that the applicant was a stranger to the petitioner and conceal the fact that he was his step brother. That suit is still pending in the lower court and this fact was concealed from this court when the petitioners came before this court for confirmation of the grant.
5. That the suit filed in the lower court Eldoret SPMCC 932/95 deals with ownership of the disputed plot and when an application for an injunction in the said suit was refused is when the petition herein was filed whose sole purpose is to short circuit the lower court case.
6. That the petitioner did all he could to conceal material facts from the court and the petition was filed in bad faith and the witnesses called exhibited a high degree of insincerity particularly the main witness who is the father of the Respondents DW 3 who denied obvious points, refused to answer questions and even became hostile.
7. The witnesses called by the applicant were straight forward and they assisted the court in establishing important facts which are:-
 - (i) DW 3 went to the home of PW 2 Jane Kigen for engagement with a view to marrying her and the witnesses PW 1, 2 and 3 all who were elderly people confirmed that engagement was properly done in accordance with Keiyo customary laws and Jane was allowed to go and live with Kigen Sitienei as man and wife. When asked about dowry they said that dowry is not material to marriage and it can be paid much later when the couple is settled. The view of the respondents that there was no customary marriage between Jane and Kigen because dowry was not paid has no customary or legal basis. It is a misleading contention and this court should disregard it.
 - (ii) It was established that Jane was the first one to move and go to live on the disputed plot 107. If it is true that Soti is the one who purchased the said plot then why did she allow a co wife to go and stay on her plot and Kigen Sitienei cannot be believed when he says he has no land of his own to live on as he has not shown why he married two wives and where he contemplated they would be settled. This is a futile attempt on his part to mislead the court.
 - (iii) There is evidence that Jane Kigen got children while living with Kigen Sitienei as was confirmed by PW 3 who said she was midwife of Jane on 3 occasions and this gives rise to a presumption of marriage between Jane Kigen and Kigen Sitienei. This was confirmed by the

assistant chief Elijah Barsai who said that he knew them as man and wife and when he was a teacher at Kamwosar Primary School Jane Kigen and Kigen Sitenel brought Kiprotich for standard 1 admission. This was an independent witness and he should be believed.

8. That DW 3 Kigen sitenel pretended to be a pauper for convenience of ejecting his own children from the land. He denied ownership of the land in Keiyo reserve when his brothers said that it belongs to him. What seem to have happened is that he transferred the reserve plot plus that of the scheme plot 107 in order to shut out his own children from Jane. They submit Kigen Sitenel is the true owner of land parcel number Uasin Gishui Ainabkoi East/107. The alleged transfer to Soti was fraudulently done to shut out the applicants. It is further their case that the loan was paid for from the proceeds of sale of milk from the cows which Jane looked after and the sell of wattle trees which Jane tended and so she contributed to the payment of the loan to the settlement fund trustees. This means that the objector has every right to the property Ainabkoi East/107.

9. That they rely on the case of **Milka Nyambura Mubea CA no. 76/90** where the court of appeal ruled that the deceaseds wife used her closeness to the husband to try and bastardise and in effect disinherit her step children (the copy was not annexed to the submissions) on that basis they submit that the circumstances here all show that Jane Kigen seems to have follow out of favour with her husband Kigen Sitenel and the co-wife capitalized on it and made use of her children who were older and more informed than the father and attempted to disinherit her step children plus the co-wife by transferring to herself all the property registered in the husbands name. This court should further note that the alleged transfer was done when the deceased was very sick and the purported will was also made when she was sick and it was witnessed by her daughter Salome Kiprop. This shows that the daughter Salome Kiprop used the opportunity she had to transfer the property and to make the will. That she did not come to court to give evidence and they will summon her in the lower court to show how everything was done.

On the basis of the foregoing counsel urged the court to hold that the applicants have satisfied the ingredients under section 76 of the law of succession Act cap 160 Laws of Kenya in order to warrant this court to annul and or revoke the grant.

The respondents petitioners on the other hand have raised the following points in their submissions after reviewing the evidence adduced by both sides as follows:-

1. That in order to succeed the applicants objectors have to establish that:-

(i) They have a cause of action against Kigen Sitenel and or the deceaseds estate.

(ii) They are competent and persons interested in the deceaseds estate within the contemplation of section 76 of the law of succession Act and Rule 44 of the Probate and Administration Rules.

2. On the issue of the cause of action it appears that the objectors claim was based on the allegation that the suit property was the property of Kigen Sitenel. It is after establishing such an interest that the objector could by extention claim interest in the deceaseds estate. The claim was thus cemented upon Kigen Sitenel proprietary interest in the suit property. It is their submissions that the law on the rights of wives and children over their husbands or fathers was set out in the **case of Muriuki Marigi versus Richard Marigi Nyeri CA No. 189/1996** where the holding was that "It is however note worthy that the law of succession Act cap 160 Laws of Kenya does not recognize the rights of wives and children over their husbands or fathers estate as the case may be. Those rights accrue after death. Otherwise the rights remain inchoate and are not legally enforceable in any court of law or otherwise whenever they accrue the Estate is shared according to the personal laws of the deceased in case of agricultural land or as provided in the relevant provisions of the law of succession Act. The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally decides to subdivide and distribute it among them. He may not be urged, directed or ordered to do it against his own will. In the result and for the foregoing reasons to the

extend that the respondents wanted the superior court to compel the appellant to share the suit property during his life time in a particular manner and in designated shares they did not have a cause of action in law respecting which the court could aid them to enforce.” On the basis of the foregoing authority it is the submissions of learned counsel that Kigen Sitenel on whose property the objectors claim is expressed to be based is still alive and testified in court and being still alive no right has accrued to the applicants over the suit property and none will possibly accrue unless the property is re-conveyed to Kigen Sitenel in any manner prescribed by the registered land Act and he decides to maintain it to the time of his death so that it forms part of his Estate at his death. That being alive it means that kigen Sitenel could still deal with the property earlier registered in his name as he deemed fit and could convey it in any manner prescribed under section 85 of the registered land Act cap 300 Laws of Kenya which confers upon a registered proprietor of any land the power to transfer his land to any person including himself with or without consideration.

Further being alive it means that it is only Kigen Sitenel who can sue to enforce recovery of any portion of this land if there was fraud alleged and then thereafter and in his sole discretion distribute to the applicants either as his beneficiaries as alleged or as strangers and it is also the same Kigen Sitenel who should have been sued for determination of any interest alleged the objectors have in the suit property.

Further that the land if indeed fraudulently transferred can only revert to DW 3 in whom it was initially registered and not the applicants subdividing and giving it to the objectors which would amount to giving the land to 3rd parties. In the absence of any interest in Sitenel estate the objectors cannot claim any from the deceased.

3. The objectors did not establish any interest that could confer them with a right under the provisions of section 76 and rule 44 as that right is conferred on to person interested in the deceaseds estate. That non of the applicants depended on the deceased person during her life time and neither does any of them have proprietary interest in the deceaseds property as non of them is listed in exhibit 3 as a beneficiary. That the interest that was sought to be established and which was not was that of Kigen Sitenel.

4. That the deceased person died while she was registered as the proprietor of land parcel number uasin Gishu/Ainbko East/107, that the deceaseds rights and her Estate upon her death are clearly protected by the provision of section 27 and 28 of the Registered land Act which state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register and an overriding interests none of which were claimed or proved at the hearing.

5. That the objectors claim was not proved as they failed to prove marriage between Kigen Sitenel and Jane Kigen as they did not tender to court witnesses who witnessed the marriage and tendered evidence on the nature of the ceremony performed the amount and mode of payment of dowry.

(ii) They objectors did not prove DW 3’s ownership of the reserve land as no documentary evidence was given to disprove DW 3s allegation that he has never owned the said land at any one time and so there is no evidence to shown when or how the said land was conveyed to the deceased if any.

(iii) Their evidence did not address the real issue in dispute namely by whom was the suit property acquired while the petitioner fully explained how the suit land was acquired by whom and out of what money it was purchased. The objectors did not dispute this evidence but only based their case on the allegation that DW 3s name had initially been contained in the certified abstract of title. No receipt or any other evidence was produced. In any event there was clear evidence that this land had been acquired before PW 2 and DW 3 had met. On the basis of the foregoing counsel urged the court to dismiss the objection because:-

(i) The objectors have no cause of action against Kigen Sitenel and the deceaseds estate.

(ii) The objectors have no interest in the deceased's estate.

(iii) The transfer of the suit property was effected in the manner prescribed by law and more particularly section 85 of the registered land act and the rights conferred upon the deceased clearly protected under section 27 and 28 of the registered Land Act.

(iv) The objectors did not tender evidence of ownership of the reserve land.

(v) The evidence tendered clearly established that the suit property was entirely the property of the deceased.

In this court's assessment of the evidence herein it will take an overall picture of the entire evidence and when that is done I find that there are 3 aspects of this case. The first one is that there is a pending lower court case namely Eldoret SPMCC 932/95 between Samson Kigen and Kiprotich Chebaskwony. Counsel for the objector has submitted that the issue of ownership of the land no. Ainabkoi East/107 will be determined in those proceedings. The petitioners' counsel mentioned very little about the case. The question this court has to ask itself at the outset is whether these proceedings are to be treated as an inquest into the rights of the parties and then allow the parties to go and have those rights finally adjudicated in the lower court? The court's answer is that there are complaints raised by the applicants and objectors and it is the duty of this court to finally adjudicate on these complaints and rule on the same judiciously without giving directions to the lower court on how to handle that matter as this court is not exercising appellate jurisdiction over the lower court proceedings.

The lower court file was produced as an exhibit in these proceedings and so I have had an occasion to peruse the pleadings therein. It is evident that the plaint was filed on 31.3.1995 paragraph 3 of the plaint aver that the plaintiff Samson Kigen was an executor of the Estate of the late Soti Kigen having been appointed through a will. Paragraph 4 states that early the previous week the defendant and his family moved into the deceased's land parcel no. Ainabkoi East/107 and on that basis he prayed for an eviction. It follows that the plaintiff in the lower court case was championing the interests of the Estate of the deceased. There is no mention that he had been given the grant of representation to that Estate. It is this court's finding that as at the time that case was filed no grant of representation to the estate sought to be protected had been obtained as the grant herein was issued on 29.8.96 and confirmed on 25.3.97. It follows that as at the time the lower court case was filed the plaintiff therein lacked capacity to act to purport to protect the estate of the deceased and so the entire proceedings in Eldoret SPMCCC 932/95 are null and void ab initio. There is nothing awaiting trial in that matter and so there are no proceedings pending in the lower court that this court can refer issues to for determination. Everything has to be finally adjudicated here. I must say at the start that the issues are indeed intricate and have no doubt put both the law of succession under the Successions Act cap 160 Laws of Kenya and the law on proprietorship of registered property under the registered land Act cap 300 Laws of Kenya as well as the wisdom of the court to the test. But the court will do its best to resolve the issues on the basis of the law and evidence adduced by each side.

It is clear that the petitioner Samson Kigen came to court seeking a grant of representation with the will annexed and he was issued with the initial grant and the confirmation. The objector applicants have come here seeking revocation. I must say that what they want the court to do for them after the said revocation and annulment was not very clear. Perhaps this was because of the counsels' belief that the issue of ownership will be gone into during the lower court proceedings which this court has now ruled they are a non-starter and void ab initio. Section 76 of the Law of succession Act cap 160 lays down 5 ingredients for revocation. The applicants herein rely on (b) and c which are that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

(c) That the grant was obtained by means of an untrue allegation of a fact essential on a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. Rule 44 of the probate and administration rules was also cited but this simply gives the procedure to be followed.

Taking an over view picture of the evidence and the submissions of the applicant objectors the grounds they rely on are:-

1. The petitioner failed to disclose that there were people who were claiming an interest in the property subject of the petition more so when the petitioner was aware that he had filed a suit seeking to evict the objectors from the suit land.
2. The petitioner failed to disclose that there is a spouse still living and who was not disclosed in the proceedings and who admitted that he was not aware of the will or the fact that his son Samson Kigen had filed succession proceedings to the deceaseds estate.
3. The proceedings were meant to short circuit the lower court case shut out the interest of the objectors.

The courts findings on these complaints is that although the succession proceedings were meant to short circuit the lower court proceedings in SPMCC 932/95 this was the correct step to take as the earlier proceedings were a non starter as they were commenced by a person without locus standi and therefore void abinitio. However the petitioner should have deponed in his affidavit that he intends to protect the estate from intruders and that there are proceedings pending in the lower court. He petitioner should also have disclosed in his affidavit that these are 3rd parties who are claiming the properties of the Estate. And lastly the existence of a surviving spouse should have been disclosed and if he has no objection then indicate that he has no objection to the property going to the beneficiaries named in the will and no objection to the grant being issued to the applicant. Lastly citations should have been taken out and served on the spouse and the so called intruders. This is so because it is only through the process of law that disputes such as this have to be resolved. The foregoing goes to show that the petitioner applicant failed to disclose material facts as set out above.

There was also complaint that the petitioner when he came to be issued with the grant failed to disclose to the court that an objection had been filed to the issuance of the grant and the confirmation. Indeed notice of objection was filed before the initial grant was issued and confirmed. This fact was not brought to the notice of the court neither did the court on its own check the record before issuing of the initial grant which was initially erroneously issued by a Deputy Registrar but that notwithstanding the same was confirmed at a later stage. The petitioners counsel has countered that by saying that they were obligated to proceed with confirmation as there was no answer to petition and cross petition filed. In deed there is no answer to petition and cross petition filed. The court is a ware that such processes of a cross petition and answer to petition are to be filed if the party objecting claims a right to administer the Estate. The objectors herein have not deponed that they have a right to administer the estate of the deceased. All they are saying is that if the process of succession commenced is carried through it will infringe their interests. A party who is only seeking to have his or her interest recognized by a petitioner need not apply for a cross petition and answer to petition. It is enough for him to establish that interest and then the court will call upon the petitioner to honour it during distribution.

2. The second aspect of this case is the claim of an interest by the objectors in the property of the deceased subject of these proceedings. There is no doubt that this claim of PW 2, 10 and 11 is hinged on their relationship with DW 3 Kigen Sitienei based on a claim of existence of marriage of PW 2 Jane Kigen DW 3 Sitienei and a claim of paternity of Sitienei DW 3 to PW 10 and 11. It is the stand of the petitioners that the claim of marriage has not been established secondly the claim of interest was not also established.

On marriage of PW 2 and DW 3 there was evidence of there having been an engagement between the two. DW 3 himself stated in his evidence that he told his elder wife Soti that he wanted to take another wife. She objected but because he is a man he decided to go for an engagement accompanied by his own father and another mzee but not PW 5. He agreed engagement was done and they went to stay with Jane on the disputed plot. That she came while pregnant it was further shown as per the evidence that according to keiyo custom a wedding had to be done before dowry can be paid. Further that a wedding can be held at any time and dowry paid at any time of the marriage. This fact was conceded by DW 3

himself and it is shown by the evidence of the brother of Soti the deceased that Soti (DW 5) was married in the 1950's but it was not until 1966 that dowry was paid for her. Applying that to Janes case it is evident that there was a marriage under Keiyo customary law save that the same was frustrated by the events that transpired later on and it was not sealed following disagreements between Jane PW 2 and her co-wife and her cowifes children on the other hand. It is on record that Jane thereafter stayed in the home of DW 3 and had 3 children according to PW 3. Even the brothers of DW 3 state that they saw Jane on the disputed plot with 2 boys who were naked. But they DW 4 and 6 state that they never frequented DW3's home and so they do not know much about the children between DW 3 and Jane. In the absence of a wedding and payment of dowry the only relationship that exists between DW 3 and PW 2 is an engagement or betrothal. I have had occasion to peruse the Text on restatement of African law by Eugene contran on the law of marriage and divorce chapter 12 paragraph 3 on marriage consideration at page 29 item seven titled effect of non payment of marriage consideration. It states **non payment of marriage consideration does not in validate a marriage.**

Further there need not be an agreement to pay it. However if there is agreement to pay marriage consideration the wifes father may sue the husband for it or any balance outstanding. Any balance unpaid at the husbands death becomes the responsibility of the successor. In the same book paragraph II on the formation of marriage at page 127 **item (e) titled. Effects on children of termination of betrothal.** Children born or conceived during betrothal are regarded as children of the natural father and not of the wifes father or future husband. The natural father is under a duty to maintain such children even if in the custody of the mother which they may be whilst young.”

The foregoing restatement of the Keiyo customary law shows that since DW 3 conceded having come for Janes engagement taken her to plot 107 and resided with her and since children having been born in his home during the subsistence of that in law however short lived these children belong to DW 3. Although DW 3 said that Jane came with a pregnancy he has not stated that he disowned that pregnancy and the child and so the presumption of paternity prevails. Customary law prevails to require him DW 3 to provide for them and give them a home. It is on record from their evidence that they were forced to go to their uncles place because of the mistreatment and lack of protection from their father and they only came back when they were able to fight back as they were grown ups. This was confirmed by evidence of DW 3 who said Jane was bad and the children were also bad and they also came by force.

It is on record that as at the time they came in 1995 the land had already moved from their father to the name of Soti Sitenel.

It is the stand of the petitioners counsel that even if it was to be taken that DW 3 is the one who had paid for the land he was entitled under the law to give it to Soti as shown by the principle in the authority cited and the provisions of section 28 of the registered land Act.

(ii) That the objectors were not dependents of Soti and have never been and so they cannot ask to be provided for from her Estate.

(iii) That though they allege fraudulent transfer they have not given particulars of fraud sought to be relied upon .

The applicants have stated that there is conspiracy between the children of the deceased led by the petitioner and DW 3 to shut them from the only home they knew. Following this courts findings on the status of children born to a union of an engagement status and since under customary law a father is obligated to provide for his children inclusive of provisions of a home PW 10 and 11 were entitled to come back to the home where they were born to be provided for. They allege that if there is no conspiracy where DW 3 was involved then the conspiracy involved the children of the deceased and DW 3 may very well not be in a position to know what was going on revealed by his admission that he was not aware of the existence of the will and the succession proceedings under the law DW 3 as registered proprietor was entitled to deal with his property as he feels like save where issues of trust arise which is not the issue herein.

It has been stated that the objectors have not produced evidence of fraud and conspiracy. Indeed particulars of fraud and conspiracy were not given because the rules under which the application for revocation was made did not require such particulars to be made. It only requires an affidavit to be filed which was done. It is true the objectors did not produce documents to show what they were alleging. The petitioner produced a title deed and the objector produced a green card. They show that the land was transferred to the deceased. There is however no document produced by DW 1 showing the voluntary execution of the transfer documents by DW 3 like application for consent executed by both DW 3 and the deceased and the consent to that transaction. That obligation lay with the petitioner as he is the one who was alleging that title properly passed. There is also the issue of the will which is the basis of the succession proceedings. No evidence was adduced to show how the same was executed. The advocate who drew it did not come to testify that he saw the testator and confirm the land condition she was in when she came to draw the will. Even one of the witnesses to the will who is a beneficiary did not come to testify to shed light on how the testator reached the office of the advocate to make the will. In the absence of such evidence being available this court cannot rule out the possibility of a conspiracy to divest DW 3 of his proprietary interest in the suit land in order to shut him out of ownership of the same and through that shut out whoever would want to claim through him.

The courts finding is based on the fact that him DW 3 said he was not aware Samson had filed Eld SPMCCC 932/95 in the lower court.

(ii) He was not aware that succession proceedings had even been filed in relation to his wifes estate.

(iii) Neither was he aware that a will had been written disinheriting him. When asked how he was surviving at home he said he was being looked after by a school boy who cooks for him when he came from school and even gives him clothes. There is high possibility that he did not direct himself of that property and being at the mercy of his children he has no alternative but to sing and dance their tune.

It therefore follows that although objectors were not dependants of Soti they had an interest in the said land plot no. 107 Ainabkoi east because being children of DW 3 they were entitled to come back to their father and ask him to show them a place to put up shelter and a place to cultivate to earn livelihood.

The issue of the right of DW 3 as the then proprietor of plot no. 107 being absolute is not in issue here now as they were divested from him. The issue of forcing him to share out the land during his life time contrary to law and the authority cited does not arise as he has no land of his own now.

The foregoing evidence goes to show that mischief was involved in divesting the title of the plot 107 from DW 3 into the name of the deceased Soti and there after a will drawn shutting out even the deceaseds spouse DW 3. This court does not hesitate and is not afraid of saying that the sole purpose of shutting out DW 3 was solely to shut out the children born to Jane Kigen and DW3 so that they do not even come back to the home and land they were born on and forced but due to the mistreatment levelled against them by the deceased and her children. The subsequent events go to show clearly that the mistreatment were aimed at kicking out Jane and her children and the subsequent divesting of the land from DW 3 to the deceased and the eventual will was meant to put a seal to what had began earlier on. It is the finding of this court that once the succession proceedings are closed there is no other avenue through which the objector PW 10 and 11 can pursue their rights DW 3 is leaning on one side for reason already said and since DW 10 and 11 are now adults they can pursue their own rights independent of those of DW 3. Since Soti Kigen is dead there is no other way the title can be dealt with other than through succession proceedings. I am alive to the fact that there is no cross petition by objectors. They only sought to have the grant revoked perhaps because counsel for the applicants objectors thought that the issue could be settled in the lower court case which this court has ruled is null and void. Rights of the parties have to be finally determined here.

It is the finding of this court that failure to put in across petition and failure to ask for consequential reliefs does not bar this court from invoking rule 73 of the probate and administration rules to do all that is necessary for ends of justice to be met to both parties. It is the finding of this court that if revocation is

done and the matter is left at that the administration of the estate will be left in a vacuum and it means that beneficiaries and the objectors who have been found to be entitled to a share of the suit land will be put to great disadvantage as they will not be able to realize the fruits of litigation. Before finally determining the matter the court has to answer the question as to whether there was a valid reason to complain. The answer to this is in the affirmative because:-

(i) This court has already ruled that there was non disclosure of material facts being that there were intruders on the land who were claiming an interest in the land.

(ii) There was non disclosure that the petitioner had filed a case in the lower court seeking eviction of those who were claiming an interest in the land.

(iii) There was non disclosure that there was a surviving spouse even if he had no objection to the property going to his children.

(iv) No citations were taken out and served on the spouse and the objectors PW 10 and 11 who were on the land.

(v) No documentation has been exhibited to show that land voluntarily moved from DW 3 to the deceased. The admission of DW 3 that he did so voluntarily can not hold in view of the fact that he was kept out of knowledge of what was going on between the objectors and the petitioner and his brothers and sisters.

(vi) No evidence has been adduced on the writing of the will in order to satisfy the court of the condition in which the deceased was when she wrote it and secondly to confirm that she is the one who appeared before the advocate to give instructions to write the same. Further doubt on the writing of the will is confirmed by the fact that it was witnessed by one of the beneficiaries who did not come to testify. She should have appeared in court to show how the mother reached the advocates office and what transpired thereafter in order to rule out possibility of duress, coercion and manipulation. Failure to call this witness calls for an adverse inference to be drawn against the petitioner and his sibilings that they were up to some mischief.

(vii) From the evidence of DW 3 and his admission it is evidently clear that he was kept out of knowledge of what DW 1 the petitioner and his sibilings did in connection with the property registered in the name of the deceased and further that DW 3 finding himself in the situation in which he found himself there is likelihood of him being at the mercy of his children and being made to go by what they dictate to him.

The net result of the foregoing is that the will forming the basis of the petition herein has been faulted. In essence there was no will and the matter will be treated as an intestacy.

Secondly although the objectors PW 10 and 11 were not dependants of the deceased they were entitled to pursue their rights infringed by the mischief of divesting plot 107 Ainabkoi East scheme from DW 3 without his knowledge to the deceased for purposes of shutting out the children born to Jane and DW 3 and deny them from getting share of this land through DW 3 whether alive or dead.

A basis has therefore been made and shown for revocation of the grant issued to the petitioner Samson Kigen on 29.8.1996. Since that grant was the basis of the confirmation made by this court on 25.3.1997 that confirmation cannot stand and the same is set aside.

To finally adjudicate and determine the matter between the parties the matter will be treated as an intestacy. Fresh grant will issue in the names of:-

1. Samson Kigen representing the house of Soti Kigen.
2. PW 10 Kiprotich Kigen to represent his own interest and those of his brother PW 11 Wilson

Kimutai Kigen.

Distribution:

(A). 1. The land in the reserve at Kipkanga village Elgeyo District.

2. And 34 acres out of land parcel number Ainabkoi East/107 to go to:

A. Samson Kigen

B. Andrew Kigen

C. Kipkogei Kigen

D. Kibiwot Kigen

E. Kigen Sitienei.

(B). Kiprotich Kigen and Wilson Kimutai Kigen to get 16 acres out of land parcel no Ainabkoi East/107

3. The petitioner will pay costs of the proceedings to the objector.

Dated, read and delivered at Eldoret this 21st day of February, 2003.

R. NAMBUYE

JUDGE