



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 193 OF 2003

SAMSON KIGEN..... APPELLANT

AND

KIPROTICH KIGEN RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Eldoret (Nambuye, J.) dated 21st February, 2003 in

H.C. SUCC. CAUSE NO. 115 OF 1996

JUDGMENT OF BOSIRE, J.A

I have had the advantage of reading in draft form the judgment of O’Kubasu, J.A, and I agree with all that he has said in that judgment and the order he has proposed. I wish, however, to add the following:

The appellant **Kiprotich Kigen** was the step son of the deceased **Soti Kigen**. The deceased was the first wife of **Kigen Sitienei**, who is still alive. **Jane Kigen** who is the mother of the appellant was his second wife. It was conceded that all the assets listed in the schedule to the petition for grant of probate of the last will and testament of the deceased are registered in her name.

The application for revocation of grant was made on amongst other grounds, that Kigen Sitienei had fraudulently transferred several parcels of land into the deceased’s name, to defeat the claim by Jane Kigen and her children over those parcels.

In her judgment, Nambuye, J. proceeded as though the deceased was the father of both the appellant and the respondent and their respective siblings, by one mother. The appellant by making the application for revocation was in effect complaining that he was a dependant of the deceased who was entitled to but was not provided for in the written will of the deceased. **Section 29** of the Law of Succession Act, Cap 160 Laws of Kenya, gives the meaning of the term dependant, as used in the Act. A co-wife is not included as dependant of her co-wife. The definition includes a step-child. However, there is a rider added. It must be one **“whom the deceased had taken into his family as his own.”**

Jane Kigen is still alive. She swore an affidavit in support of the application for revocation of grant in addition to one which was sworn by the respondent. As material to this appeal she deposed as follows:

“(2) That the deceased (Soti Kigen) was my co-wife.

(3) My husband Kigen Sitienei married both of us in Keiyo customary law.

(4) That sometimes in 1979 my husband became hostile towards me and later chased me out of our matrimonial home.

(5)

(6) That sometime in 1991 my husband and co-wife conspired with a view to dis-inherit me and my children by trying to change the title of family’s land from my husband’s name to my deceased’s co-wife.

I then registered a caution with the Registrar of Lands.

(7) *That given chance I am ready to call evidence to prove that the purported change of title was done fraudulently.*

So it is quite clear that neither the respondent nor his mother were dependants of the deceased nor were they beneficiaries of her estate as to be entitled to apply for revocation of the grant of probate of Soti Kigen's will. They were not "**interested**" parties within the meaning of **section 76** of the Law of Succession Act. Besides whatever Kigen Sitienei might have done to his property was within his power to do, as Jane says he was the registered owner thereof.

I would too allow the appeal on the terms proposed by O'Kubasu J.A

As this and the judgment of O'Kubasu J.A, are being delivered pursuant to **rule 32 (3)** of the Court's Rules, Deverell J.A. who heard the appeal with us having retired, the order shall be as proposed by O'Kubasu J.A

Dated and delivered at Eldoret this 30th day of May 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR