



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE 533 OF 2008

IN THE MATTER OF THE ESTATE OF NATHAN DICK MOLE ---- DECEASED

A N D

GSTEL OCHEMO MOLE.....PETITIONER/RESPONDENT

A N D

VALERIA OLWANDA WESONGA.....OBJECTOR/APPLICANT

R U L I N G

In her application dated 23rd June 2009, the applicant seek among other things orders to enjoin one **SETH AMUKANGA** as a respondent, committal of the petitioner to civil jail or payment of fine of KShs.10,000/=, rendering of an account by the petitioner and an order of injunction restraining the petitioner and the intended respondent from interfering with the estate of the deceased and specifically from taking possession or use of plot **No. KAKAMEGA/MUNICIPALITY/63**. The application is supported by the affidavit of the applicant/objector.

Mr. Khayumbi, counsel for the applicant submitted that the petitioner did not disclose some of the deceased's properties and that the petitioner has disposed some property yet the grant has not been confirmed. The intended respondent is the purchaser of one of the undisclosed property, plot **No.KAKAMEGA/MUNICIPALITY/63**. The applicant's counsel further submitted that the deceased had two wives and the widows and their children were not included in the succession. The sold property is located at Kakamega Town and family members were getting rent. Counsel urged the court to grant the orders prayed for as the petitioner has not discharged his duties as required by the law.

Mrs. Muleshe, counsel for the petitioner opposed the application. Counsel submitted that failure by the petitioner to include other properties was out of ignorance as the petitioner did not live with the deceased. The objector has already inherited other properties left by the deceased. The reason for selling the property was to provide the petitioner with a source of income and that does not amount to mismanagement of the estate.

Counsel for the petitioner further submitted that the intended respondent is a creditor under section 86 of the Succession Act and has invested all his income into the property. The objector can be enjoined to be a co-administrator. The interested party bought the property from a holder of a grant and is a purchaser for value without notice.

The applicant herein is one of the widows of the late Nathan Dick Mole. In her supporting affidavit she avers that the deceased was survived by two widows and children including the petitioner who was brought to the homestead at the time he was joining secondary school. The 1st widow has one son and five daughters, while the petitioner has one daughter who is 18 years old.

I have perused the documents filed herein in support of the application for grant of letters of administration. The petitioner presented the application as the son of the deceased. He indicated that the deceased died intestate and was survived by Gastel Ochemo Mole (the petitioner himself). The list of assets only indicate compensation claim and no single property is mentioned. Even plot **No. KAKAMEGA/MUNICIPALITY/63** is not mentioned in the application. The petitioner was issued with a letter dated 28th October, 2008 by the Shieywe location chief which indicate that the deceased left behind the petitioner as the survivor.

The grant herein was issued on 10th March, 2009. The same is yet to be confirmed. It is the process of confirmation that enables the court to distribute the estate of the deceased. Before then the administrator is expected to administer the estate in accordance with the law.

The petitioner submits that section 45 of the Law of Succession Act exempts him from the allegation that he is intermeddling with the estate of the deceased. I believe that contention is derived from the fact that a grant of letters of administration was issued to him.

The decision by the petitioner to dispose of the deceased's estate before the grant is confirmed is improper. Section 71 of the Succession Act has a proviso in the following terms:-

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

The petitioner contends that he sold the property to enable him get a source of income. The property itself was a source of income and the family used to get rent from the tenants.

I am satisfied that the petitioner herein is not administering the deceased's estate in accordance to the law. The application for grant of letters of administration left out the entire estate as well as the other beneficiaries except the petitioner. The petitioner knew the deceased had two widows and other children but elected to leave them out. The petitioner is not fit to administer the deceased's estate and the proceedings used to obtain the grant were defective. The petitioner concealed from the court material information and his action is unlawful. Section 51 of the Succession Act was not complied with.

I am not convinced that the intended respondent is a purchaser for value without notice or that he is a creditor. The notice to one of the tenants issued by the intended respondent is dated 25th March 2009. The grant herein was issued on 10th March, 2009. The notice to one of the tenants indicate that he bought the property in October, 2008. This Succession Cause was filed on 28th October, 2008. This was before the grant was issued. How did he buy the property without being shown a grant of letters of administration leave alone a confirmed grant? The intended respondent cannot claim to be a purchaser for value without notice as he knew the property belonged to a deceased person. The petitioner had nothing to prove ownership.

In the end, I do revoke the grant herein. The applicant and the other widow **LOISE NAFULA MOLE** shall be issued with a fresh grant as co-administrators. The application dated 23rd June, 2009 is hereby granted as prayed. The intended respondent to be enjoined in this Succession Cause and restraining orders are granted as prayed in prayer 5 and 6 of the application. I will not commit the petitioner to civil jail/or condemn him to pay a fine of KShs.10,000/= but for his unlimited greed, I will condemn him to meet the costs of this application.

Delivered, Dated and Signed at Kakamega this 15th day of October, 2009

SAID J. CHITEMBWE

J U D G E