



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CIVIL CASE NO. 1302 OF 1998**

**JAMES THOGO MWAI.....PLAINTIFF**

**VERSUS**

**GEORGE KARIO.....DEFENDANT**

**RULING**

This is an application for an eviction order against the Defendant to vacate Plot Number 57 LIMURU MARKET (hereinafter the suit property) and for the Defendant to pay rent for the period he has been in occupation.

The application is brought under Order 39 Rule 1 of the Civil Procedure Rules, and Section 3 and 3A of the Civil Procedure Act.

The application is grounded on the grounds that the purported sale of the suit property before the grant of Letters of Administration was illegal and contravened Section 45 of the Law of Succession Act Cap. 160 of the Laws of Kenya and was therefore null and void abinitio and that the Defendant has since the said sale been in occupation.

James Mwai Thogo (deceased) is the registered proprietor of the suit property. Grant of Letters of Administration in respect of the deceased's estate were issued on the 29th October, 1996.

By a resolution of some of the beneficiaries of the deceased's estate it was decided to sell the suit property to the Defendant, The Plaintiff was not one of those who made the decision but it seems that after he wrote a letter dated the 6th February, 1995 he was included in the Transfer Agreement between the beneficiaries and the Defendant.

Section 45 of the Law of Succession Act provides that:-

“45 (1) Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession, or dispose of or otherwise intermeddle with any free property of a deceased person.”

By this provision, it is clear that there is no way the free property of a deceased person can be sold or in any other way disposed of without grant of Letters of Administration. The plaintiff and his Co-administrators therefore had no capacity to sell the suit property. The purported sale was therefore null and void. Accordingly, the application succeeds. The applicants shall have the costs of the application.

**Delivered and dated at Nairobi this 7th day of March, 2001.**

**KASANGA MULWA**

**JUDGE**