



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

IN THE MATTER OF THE ESTATE OF SAWE CHEPKWONY

SUCCESSION CAUSE NO 117 OF 1996

JOSEPH MALAKWEN SAWE.....APPLICANT

VERSUS

JOHN KONGWALEI SAWE.....RESPONDENT

RULING

1. By an application dated **18th March, 2011** under the provisions of Section **83 and 95** of the Law of Succession Act seeks that:

- a) Restraining orders issue against the respondent **JOHN KONGWALEI SAWE** who is said to be intermeddling with the estate of the late **SAWE CHEPKWONY**
- b) The respondent be discharged from performing any duties of administration in the said estate
- c) The in his place the applicant be appointed as an administrator to complete the administration and distribution of the estate
- d) The court declares unlawful and proceeds to cancel any sale or transaction or dealings touching and concerning the Estate of the late **SAWE CHEPKWONY** being parcel **No UASIN GISHU/KIMUMU/349** done by the said **JOHN KONGWALEI SAWE** in his capacity as the administrator of the estate
- e) Summons do issue to the respondent to appear before this court and show cause why he should not be punished by way of imprisonment for intermeddling with the estate and subjecting the assets to loss and damage
- f) The respondent be condemned to pay costs of this application

2. The application is premised on grounds that the respondent is hatching a scheme to evict the creditors/purchasers from the land, so as to resell it to other persons. Further, he is depleting the estate and subjecting it to loss and damage, and unless he is restrained, the beneficiaries and creditors will suffer irreparably.

3. The background to the matter is that the applicant and the respondent are the only sons of the late **SAWE CHEPKWONY** and the late **JEPKOECH CHESANG**, and following the demise of their father, their mother applied for and obtained grant for administration of the estate, but she passed on before the grant was confirmed. Later, the respondent applied and was appointed as the administrator on **20th February 2002**.

4. On **27th March 2003**, the grant was confirmed, and the court ordered that the land aforementioned be registered in the joint names of the two brothers, and the estate be shared equally among the two beneficiaries- meaning each was to get 2 and 1/2 acres from the said **Kimumu plot**. There were also 16 persons who had purchased land from the deceased during his lifetime and settled thereon, and who ought to have been included as creditors of the Estate yet they were left out in the succession proceedings.

5. Incidentally, after their father's demise, the purchasers had approached their late mother and requested her to pursue a succession cause so as to have their respective parcels transferred to them, and to this end, the said purchasers paid the legal fees for the filing of the succession cause. The respondent knew exactly what was to be done as regards the purchasers, and soon after confirmation, he even went ahead and subdivided the said parcel into 16 portions as shown in the consent, and the mutation forms marked D and E. That the two brothers had agreed among themselves regarding their portion of 0.34 acres which was to be disposed off to the adjacent purchaser who would in turn purchase for them land elsewhere.

6. The respondent transferred land to 7 of the purchasers, then suddenly unilaterally disposed off the applicant's share without his consent or authority. The respondent is accused of failing to comply with the orders of the court and instead registered the property in his sole name, and thereafter converted the whole estate into his own personal property, re-subdivided the applicant's portion into 24 portions so as to create more parcels for sale, in total disregard of the rights of the original owners. That although on paper it may appear as though the applicant was granted half the share of their father's estate, in reality, the respondent is selfishly acting like the sole heir.

7. In opposing the application, the respondent in a replying affidavit deposes that succession process of their late father's estate was completed on 16th July 2006 and only other issue which arose was the case which actually involved him and **EPHANTUS MIHINGO and TITO KENYA JUMBA**, where the applicant was not a party. The named individuals had sought orders of prohibition against the respondent herein, and prayed for revocation of the grant. The application was dismissed on **25th July 2007**, on orders issued by **Ibrahim (J)**, for want of prosecution with costs to the respondent.

8. The applicant is said to have no beneficial interest on the mentioned piece of land (a fact he had confirmed by the affidavit dated **29th September 2003**, which he swore, where he had stated that the only beneficial interest due to him and the respondent was **0.4 acres** and he had no beneficial interest in the remaining **4.6 acres**. The applicant and the purported purchasers are not creditors to the estate, and has come up with fictitious names of buyers, and in any event, the applicant sold his portion of 2 ½ to :

- **Mary Omete**
- **Godfrey Oguk**
- **Zipporah Nzioka**
- **William Rono**

9. The applicant in the written submissions repeats his depositions in the supporting affidavit, and urges this court to order that the succession begins afresh, yet when he was swearing the affidavit in **September 2003** denouncing any claims, he did not think it prudent to point out that even the **0.4 acres** was to be given to another purchaser. Why is he weeping louder than the bereaved purchasers who seem to be operating in the shadows? I concur with the respondent's counsel that the applicant is simply acting as a proxy for the shadowy purchasers. Further by dint of his earlier depositions denouncing any larger share, he is estopped under section **120 of the Evidence Act**, from alleging new matters

10. Indeed, as correctly pointed out by the respondent's counsel, if the creditors allege actions of fraud, or have a valid claim, then they ought to have appeared before this court and sought appropriate orders. I need not say more, the applicant is simply blowing hot vapour which cannot crystalize, and the application has no leg on which to stand. It is dismissed with costs to the respondent.

Delivered, Signed and Dated this 18th day of September 2019 at Eldoret

H. A. OMONDI

JUDGE