

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO 533 OF 2008

IN THE MATTER OF THE ESTATE OF NATHAN DICK MOLE (DECEASED)

GASTEL OCHEMO MOLE-----
PETITIONER

AND

VALERIA OLWANDE WESONGGA----- 1ST
ADMINISTRATOR

AND LOICE NAFULA MOLE----- 2ND
ADMINISTRATOR

AND

SETH AMUKANGA-----INTERESTED
PARTY

JUDGMENT

1. The matter refers to the estate of the late Nathan Mole Jairo, who died intestate on 29th October 2005. The petitioner herein applied for the grant of letters of Administration intestate, which was issued on 10th March 2009. On 23rd March 2009, the petitioners 'stepmother, Valaria Olwanda, applied for a summons of revocation of the grant, stating that the administrator had failed to inform the family that he was instituting the succession proceedings and further that he failed to list the deceased estate being.

- a) W/ Bunyore/ Embali/2559
- b) W/ Bunyore/ Embali/2449
- c) W/Bunyore/ Embali/2285
- d) Plot No. KAK/MUN/63

2. She further stated that the deceased had two families. The first house comprised;

- a) Loise Nafula Mole--- widow
- b) Jane Mole----- daughter
- c) Lillian Beatrice Mole---- daughter
- d) Ronnie Opicho----- son
- e) Anne Mole----- daughter
- f) Agneta Mole----- daughter
- g) Nancy Mole ---- daughter

2nd House

- a) Valeria Olwanda Wesonga---- widow
- b) Mercy Mole- daughter

3. According to the objector, Valeria Olwanda, the petitioner, who was the deceased son born out of wedlock, instituted the succession proceedings excluding the other family members and had secretly disposed of the deceased's plot No Kakamega/ Municipality/63 to a third party before the grant was confirmed.

4. On 28th October 2009, a fresh grant of letters of administration was issued by Justice Chitembwe to one Valeria Olwanda Wesonga and Loise Nafula Mole. At the same time, on 25th June 2009, the court enjoined Seth Amukanga, who had purchased plot no Kakamega/Municipality/63 from the petitioner and issued an order restraining him from disposing of, selling or collecting rent from the said plot until the grant was confirmed.

5. On 16th June 2015, the 1st administrator applied for a summons for confirmation of the grant with a proposed mode of distribution,

which was protested by the 2nd administrator, stating that the administrator had failed to include all the deceased beneficiaries, including his two nephews, Taplin Nabakwe and Elvis Nabakwe, who depended on the deceased during his lifetime.

6. The case proceeded by way of a viva voce hearing
7. PW1 was Valeria Wesonga Olwanda. She relied on her witness statement and further produced exhibits 1 to 7.
8. During cross-examination, she testified that she was the deceased's 2nd wife and they had one daughter, while the 1st wife, Loice Nafula Mole, had 5 children with the deceased. She claimed that she wants a fair distribution of the estate. She claimed that her co-wife lived in Tongaren, Bungoma, Plot No. 138, which she claimed the deceased bought for her co-wife and children, although she had no supporting evidence. She admitted that the deceased took in his sister's children, Taplin and Elvis, after the demise of his sister. However, he took them to a children home and did not stay with them. She admitted that he daughter, Mercy Mole, was born in 1990 and admitted selling plot No. 19, Ishibinga market in 2014 to pay off her daughter's school fees. However, she did not have the court's authority or order.
9. On cross-examination by Mr. Manyoni, she claimed that the petitioner, Castel, was the deceased son born out of wedlock and that he lived on plot no 63, Kakamega and that he sold the property before relocating to Nairobi.

10. Pw 2 was Loice Nafula Mole. She testified that she was the deceased's 1st wife and together they had 6 children and 3 adopted children. She adopted her affidavit, sworn on 7/5/2018, as her evidence in chief. She stated that she took her sister's in-laws' children, Taplin and Elvis, after their mother died and their father's whereabouts were unknown. Her father stated that she, the 1st administrator, sold off plot no 19 at Eshibueye. She produced the search of the deceased's properties, including Bungoma/Tongaren/138.
11. During cross-examination, she admitted that the 1st administrator was her co-wife, although the deceased did not build her a home in Bunyonyi, although she could not name the deceased's parcels of land, stating that they had planted trees and farmed in the land in Bunyonyi. She denied trying to deny her co-wife the land, claiming that she did not know the land parcels, although she knew that the petitioner, Gastel, had started the succession process and was selling off some of the deceased properties.
12. She stated that all her children were adults, and at that time, the co-wife's daughter was in class 8, and she never opposed her selling off part of the estate to pay off the child's school fees.
13. She claimed that she stayed in plot no 138, which her mother gifted her in 1999 and denied the allegation that her mother lived on the land.

14. On cross-examination by Mr. Munyano, she admitted knowing Gastel as the deceased son, claiming that he was allocated some property, which he stayed with the deceased in town. She denied he had been given plot no 63 and claimed she did not know if the same was already sold.
15. On reexamination by Sigile, she denied knowing when the plot No. 19 (Eshibiya market) was sold. She claimed that Gastel was born out of wedlock, and her husband took him in after his mother died and denied knowing his current whereabouts.
16. She claimed that they purchased land plot 63 jointly with the deceased while she worked as a nurse, and they started building it in 1979 and began using it in 1981, which they rented out and stated that she did not know if it had been sold.
17. The interested party, Seth Kakai Amukenga, adopted his affidavit dated 26/4/2021, which she adopted as his evidence in chief.
18. On cross-examination by Mr. Nyakuli, he claimed that he bought plot No. 63 in 2008 from the deceased son, who sold him the property before the grant was issued and denied having any relation to the family.
19. The court directed that the parties file submissions in support of its case.
20. The 2nd administrator filled their submissions dated 22nd February 2025.

21. The 2nd administrator submitted that she was the deceased's 1st widow, and the 1st administrator was the 2nd wife, while the petitioner was her son, born out of wedlock, and the interested party had purchased the property from the petitioner.
22. She stated that the 1st administrator had one child while she had six children with the deceased, and that the deceased left several properties which the 1st administrator had failed to include in her application for confirmation, and sought that they be in her name.
23. She proceeded to file an affidavit of protest on 8th May 2018, disputing the mode of distribution by the 1st administrator. She avers that the matter proceeded viva voce, although the petitioner, after selling the property in Kakamega Town site and service scheme 63 to the interested party.
24. On the issues raised, she admitted that the deceased had two wives and that the distribution ought to be in accordance with section 40 of the Law of Succession Act and the case of *Rahab Njeri Kariuki vs. Joyce Waruguru Kariuki & 2 others (2016) eKLR* and *Scolastica Ndululu Suva vs. Agnes Nthenya Suva (2019) eKLR*.
25. They submitted that the court should first declare the sale of the deceased properties as illegal and void, being Kakamega Town Site and service Scheme 63 and Plot 19 Eshibinga Market, which were immovable properties and were sold off before the grant was confirmed.

26. She asserts that her proposed mode of distribution was fair and meets the mandate under section 40, and further that the 2nd administrator stated that the land title Bungoma /Tongaren/138 was inherited from her mother, and there was no evidence that it was part of the deceased estate.

27. The cause was canvassed by way of a written submission.

1st administrator's submission

28. In her submissions dated 3rd December 2024, the 1st administrator avers that she protested the mode of distribution by the 2nd administrator, who sought to distribute the deceased estate to her self-excluding the 1st house. She gave a proposed mode of distribution, which was disapproved by the 2nd administrator, who avers that plot no.19 was already sold to pay for her daughter's school fees, who was a minor at that time, and further plot no 63 Kakamega was proposed to be allocated to her daughter, although the petitioner had already sold it to the interested party.

29. She avers that Taplin and Elvis Nabakwe are not the deceased dependants as they grew up in a children's home, and the 2nd administrator did not know the details of the beneficiaries, and the inclusion of the two said dependents was a scheme to disinherit her and her daughter, and proposes that the court adopt her mode of distribution.

2nd administrator's submissions

30. According to the 2nd administrator, the deceased died intestate, survived by 2 wives and hence his estate ought to be

distributed in accordance with section 40 of the Law of Succession Act.

31. She relied on the case of Rahab Njeri Kariuki vs. Joyce Waruguru Kariuki & 2 others (2016) eKLR. She opines that the sale of the two properties, Kakamega Town site & service scheme 63 and plot 16 Eshibinga Market, which are immovable properties by the 1st administrator and petitioner, was illegal as they had not yet been distributed.

32. They quoted the case of Re estate of Paul M'Maria (2017) eKLR and submit that the sold immovable properties should be declared part of the estate and made available for distribution, and pray that the court distribute the estate in accordance with her mode of distribution.

Interested party submissions.

33. In his submission dated 24th February 2025, the interested party asserts that he entered into an agreement between himself and the petitioner and that he assisted him in filling the succession process and that he obtained the plot and house he purchased from the petitioner.

34. He claimed that the 1st administrator had proposed that the petitioner be allocated a plot in Bunyore West/Bunyore/Embali/2303, although the petitioner did not stay in the land and that he was allocated Kakamega site and service scheme plot 63, which he sold to the interested party.

35. He now prays that he be allocated the plot that belonged to the petitioner and further that the petitioner is a drug dealer and unable to protect his interest, and the court should use its inherent powers to allocate him his share of the estate as he is an innocent purchaser for value.

Analysis and determination

36. I have looked at the pleadings, the recorded evidence and the written submissions lodged by both sides. The issues that emerge for determination are the mode of distribution and the interested party's interest in the deceased estate.

37. It is not in dispute that the deceased, Nathan Dick Mole, died intestate on 29th October 2005. The evidence on records affirms that the deceased was survived by two wives, Loice Nafula Mole (1st house), with six children; and Valeria Olwanda Wesonga (2nd house), with one child.

38. The petitioner had applied for letters of administration, which were revoked as they failed to include all the deceased's assets and beneficiaries.

39. Afresh letters of grant of letters of administration were issued to both the deceased widows, who have now each proposed their own different mode of distribution, which they presented to the court seeking that the grant be confirmed.

40. In the first administrator's mode of distribution, she proposed that she and her daughter, Mercy Mole, be awarded the larger share of the estate. She further admitted selling plot No. 19 at Ishibangi Market, claiming that it was necessary to pay for her daughter's school fees, who was a minor when the deceased died.

41. She further avers that Taplin and Elvis, who were the deceased sister's children, were not entitled to inherit a share in the estate as they had lived in a children's home and further that the petitioner had sold off plot No 63 to an interested party.

42. The 2nd administrator also provided her mode of distribution, proposing that the estate should be distributed in accordance with section 40 of the Law of Succession Act and proposed that the properties that had already been sold be declared null and void, as the beneficiaries had intermeddled by selling off the properties without the grant being confirmed.

43. It is not in dispute that the deceased had two wives with several children. As he had died intestate, I am in agreement with the 2nd administrator that the ideal mode of distribution is in accordance with section 40 of the Law of Succession Act.

44. Section 40(1) of the Law of Succession Act provides that;

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also

adding any wife surviving him as an additional unit to the number of children.”

45. In Mary Rono v. Jane Rono & Another [2005] eKLR, the Court of Appeal held that in polygamous households, the estate should be divided equitably, taking into account the number of children in each house and the spouses' contributions.
46. From the court records and the evidence provided, the deceased's first wife, Loice Nafula Mole, was blessed with six children. She avers that she had adopted the deceased sisters' children, Taplin and Elvis Nabakwe, whose mother had died, a fact that was admitted by the 1st administrator, although she claimed that the children lived in a children's home. She, however, did not provide any evidence to prove her assertion, and the law under section 107 of the Evidence Act is very clear on a person who alleges, and as such, they will be admitted as the deceased's dependents.
47. It is not disputed that the 1st administrator was the deceased's 2nd widow and that they were blessed with one child, Mercy Mole.
48. The deceased had one other child being the petitioner, who was born out of wedlock. It has been established that the petitioner had sold off part of the deceased estate, being plot no 63 at Kakamega Municipality, to the interested party, who states that he is an innocent purchaser for value and his interest should be

considered as he bought the property from the deceased son, who had a share in the estate.

49. The Court of Appeal in **Cleopa Owino Omino v Jane Aoko Omino & 2 Others [2013] eKLR** authoritatively interpreted Section 40(2): The estate is first divided by households; Each household receives one unit for the surviving spouse (even if deceased, the unit is preserved for the house); The remaining units are distributed equally among the children of that house.
50. The Supreme Court in Succession Cause *No. 3 of 2015*, **In re Estate of James Ngengi Muigai (Deceased) [2020] eKLR** reaffirmed “Section 40(2) is not a mere guideline. It is a mandatory formula for polygamous intestate succession. Customary claims of ‘house ownership’ of land are subordinate unless proved by documentary or credible oral evidence of inter vivos apportionment ratified by the deceased.”
51. From the above analysis, I am inclined to agree with the 2nd administrator that the estate should be divided in accordance with section 40. As such, the administrators should identify all the deceased estates that are registered in the deceased's name and distribute them in accordance with section 40; each of the deceased children is a unit with the wife to be an additional unit.
52. The other issue for determination is part of the deceased's estate that had already been sold off.

53. The interested party submitted that he brought his share of the deceased estate from the petitioner, who is the deceased's son. The evidence before the Court reveals that Plot No. Kakamega/Municipality/63 was sold by the petitioner to the Interested Party before confirmation of the grant, and further that Plot No. 19 Eshibinga Market was sold by the 1st administrator without leave of Court.
54. Section 45 of the Law of Succession Act expressly prohibits any person from taking possession of, disposing of, or otherwise intermeddling with the free property of a deceased person before a grant is confirmed. The prohibition is absolute unless sanctioned by law.
55. In **Re Estate of Paul M'Maria (Deceased) [2017] eKLR**, the Court held that any sale of immovable property of a deceased person before confirmation of the grant amounts to intermeddling and is null and void, regardless of the intentions of the parties. Likewise, in Re Estate of M'Ngarithi M'Miriti (Deceased) [2017] eKLR, the Court observed that intermeddling cannot be cured by equity or sympathy.
56. The explanation advanced that the proceeds were used for school fees, though sympathetic, cannot sanitize an illegality. The law does not provide exceptions based on personal necessity unless the administrator was given express permission by the court. The Court therefore finds that both sales constituted unlawful intermeddling, rendering the transactions void ab initio.

57. The Interested Party admitted that he purchased Plot No. Kakamega/Municipality/63 from the petitioner in 2008, before the grant was confirmed. He further conceded that the petitioner had no authority under Section 40 or otherwise to alienate the estate property.

58. The doctrine of innocent purchaser for value does not apply in succession matters involving unadministered estates. *In **Virginia Edith Wambui Otieno v Joash Ochieng Ougo & Another [1987] eKLR***, the Court of Appeal categorically held that no valid interest can pass where a person purports to deal with estate property without authority.

59. The Interested Party's remedy, if any, lies against the petitioner personally and not against the estate of the deceased, and as such, he is at liberty to pursue an alternative suit against the petitioner. The Court therefore finds that the Interested Party has no enforceable proprietary interest in Plot No. Kakamega/Municipality/63.

60. On whether Taplin Nabakwe and Elvis Nabakwe are dependents under Section 29 of the Law of Succession Act, a dependant must be shown to have been maintained by the deceased immediately before his death. The evidence on record indicates that the deceased took in his sister's children after her demise and took care of them, a fact that was denied by the 2nd administrator, who alleges that they lived in a children's home, although she never provided any evidence to support her assertion.

The burden of proof is that he who alleges must prove, and it was up to the 2nd administrator to prove that the two were never maintained by the deceased. Consequently, unless otherwise proven, I find that they were defendants in the rightful sense for purposes of inheritance.

61. Having found that Section 40 applies as the appropriate mode of distribution, the Court reiterates that the estate must be distributed per house, taking into account:

- a) The number of children in each house; and
- b) The surviving widows as additional units

62. The Court further finds that Bungoma/Tongaren/138 was not proved as alleged by the 2nd administrator to be part of the deceased's estate and therefore excludes it from distribution.

63. All properties unlawfully sold, namely Plot No. Kakamega/Municipality/63 and Plot No. 19 Eshibinga Market are hereby restored to the estate for lawful distribution.

64. In light of the foregoing analysis, the Court makes the following orders:

- a) *The estate of the late Nathan Dick Mole shall be distributed strictly in accordance with Section 40 of the Law of Succession Act.*
- b) *The purported sale of Plot No. Kakamega/Municipality/63 and Plot No. 19 Eshibinga Market is declared illegal, null and void for want of authority and for constituting intermeddling with the estate.*
- c) *The said properties are hereby reinstated as part of the free property of the estate available for distribution.*
- d) *The Interested Party, Seth Amukanga, acquired no valid interest in the estate property and his claim is accordingly dismissed.*

- e) *The administrators shall, within sixty (60) days, file a fresh joint proposed mode of distribution compliant with Section 40 of the Law of Succession Act.*
- f) *Each party shall bear their own costs, this being a family dispute.*
- g) *mention 10.6.2026 to confirm compliance and for further orders.*
- h) *Right of Appeal 30 days.*
- i) *It is so ordered.*

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA
30th DAY OF APRIL, 2026.**

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a/Velma

Administrator absent.

The interested party Mr. Seth, present.