



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Succession Cause 117 of 1996**

**IN THE MATTER OF THE ESTATE OF SAWE CHEPKWONY (DECEASED)**

**JOSEPH MALAKWEN SAWE ..... APPLICANT**

**VERSUS**

**JOHN KONGWALEI SAWE ..... RESPONDENT**

**RULING**

The Application is dated 11th March, 2011 filed by the Applicant John Malakwen. It is brought under Sections 83 and 95 of the Law of Succession Act Cap 160, Laws of Kenya and any other enabling law. The main prayers are as follows:-

(a) That this Honourable Court be pleased to restrain the Administrator/Respondent herein by way of an injunction from intermeddling with the Estate of the late **SAWE CHEPKWONY**

(b) That this Honourable Court be pleased to discharge forthwith the Respondent herein or performing any other duties of administration in the said Estate.

(c) That this Honourable court be pleased to appoint **JOSEPH MALAKWEN SAWE** as an administrator to complete the administration and distribution of the Estate of the late **SAWE CHEPKWONY** in place of **JOHN KONGWALEI SAWE**.

(d) That this Honourable Court be pleased to declare unlawful and thereafter proceed to cancel any sale or transactions or dealings or instruments touching and concerning the Estate of the late Sawe Chepkwony on the parcel of land known as Uasin Gishu/Kimumu/349 done by the said John Kongwalei Sawe as an administrator of the Estate.

(e) That this Honourable Court be pleased to issue summons to Respondent to appear before this court to show cause why he should not be punished by way of imprisonment for intermeddling with the Estate of the late Sawe Chepkwony and subjecting its assets to loss and damage.

(f) That the Respondent John Kongwalei Sawe be condemned to pay costs of this application and any damages caused to the Estate of the late Sawe Chepkwony.

(g) Any other orders or relieves that may be necessary for proper administration and completion of the administration process of the Estate of the late Sawe Chepkwony.

It is premised on the following grounds:-

(i) That the late Sawe Chepkwony died on the 21st day of June, 1990, the widow Jepkoech Chesang took over the administration of the Estate but died before confirmation was made.

(ii) That John Kongwalei Sawe was appointed an administrator and confirmation of grant was issued on the 27th day of March, 2003.

(iii) That the Respondent has willingly failed to administer the Estate and is instead intermeddling with the estate of the deceased.

(iv) That currently the said Respondent is hatching a scheme to evict the creditors/purchasers from the land, so that he can resell to other people.

(v) That the Respondent is depleting the Estate of the Late Sawe Chepkwony and subjecting it to loss and damage.

(vi) That unless the respondent is restrained by way of injunction from intermeddling with the Estate, then the Estate shall be subject to loss and damage and its beneficiaries and creditors shall suffer irreparable damages.

(vii) That this application is made in good faith and in the interests of all the beneficiaries and creditors of the Estate of the late Sawe Chepkwony.

It is further supported by the affidavit of the Applicant sworn on 18th March, 2011. In summary the Applicant depones that, he and the Respondent who is his brother were jointly issued with Grant of Letters of Administration of the Estate of the late Mr. Sawe Chepkwony. The said grant was confirmed to both of them in equal shares. That there were about six (6) purchasers of the land, all of whom were entitled to their respective portions. That instead of facilitating the process of transferring these portions to the respective purchasers, the Respondent has caused the whole parcel of land to be registered in his own name, thus dispossessing the Applicant and the Purchasers. That further, the Respondent is intent on selling the land to third parties who are not the original buyers.

The Applicant further depones that the original purchasers have lived on the land for over 20 years and that it is only fair if they are allowed to have their right shares. That the Respondent's deeds have amounted to intermeddling with estate of the deceased. He prays that any sale made of the estate of the deceased be cancelled forthwith, that the Respondent be discharged from administering the estate and be replaced with the Applicant and that the grant be rectified and distribution be done afresh so as to provide for the purchasers.

The application is opposed vide a Replying Affidavit sworn by the Respondent on 29th March, 2011. He avers that all the issues the Applicant has raised in he application have been fully determined by the court. That no purchaser has laid a claim on the subject land in their individual capacities, and so the Applicant has no locus standi to speak for them. He further mentioned of a dispute between himself on the one hand and Ephantus Mihingo and Tito Kenya Jumba which was concluded by court on 9th July, 2007 upon dismissal of the latter's application. That the Applicant has no beneficial interest in the land and that his capacity as an administrator of the estate was purely for purposes of distribution of the estate. That the Applicant sold his entitlement of 2½ acres from the estate and can claim no more and in any event, he (Respondent) has administered the estate to its logical conclusion.

In a Supplementary Affidavit sworn on 13th June, 2011, the Applicant reiterates that it is the Respondent who has been selling land to third parties and has refused to transfer portions of it to the bona fide purchasers. He states that he has never sold his portion. He further states that sometime on 10th September, 2008 he (Respondent) fraudulently transferred a portion of the land to an advocate by the name John Kipkoech Chebii.

In a further affidavit sworn by the Respondent, on 6th July, 2011, he states that the Applicant sold

his land to persons named as Mrs. Omete, Godfrey Oguk, Zipporah Nzioka and William Rono. That his claim in the application is driven by the desire to also claim the Respondent's portion. That none of the initial purchasers have come to court to lodge a complaint and the Applicant has no authority to come to court on their behalf. That the land he sold to Mr. John Chebii advocate was out of his legal entitlement of 2½ acres from the larger land.

In submissions, Counsel for the Applicant states that this application was brought so as to stop the Respondent with further intermeddling of the estate of the deceased. The Respondent on the other hand submits that the Applicant is not entitled to the orders as he has no beneficial interest in the land and in any case, he has no authority to represent the interests of the purchasers.

After appraising myself with applications, supporting affidavits, affidavits in opposition thereto and the submissions made by the respective Counsel, I narrow down the issues I need to address myself to as follows:-

- Whether this Court is seized of jurisdiction to handle this application.
- Whether the Applicant can represent the interests of the purchasers.
- Whether, after the confirmation of the grant, the property was registered in the sole name of the Respondent or in the joint names of both the Applicant and the Respondent.
- whether the Respondent, if he transmitted the estate to himself, distributed it in the terms agreed upon in the confirmed grant.
- whether any of the parties has fraudulently administered the estate.
- whether the Applicant is entitled to the orders he seeks.

With regard to the jurisdiction of this court, it is submitted by the Respondent's Counsel, that the issues raised in the application are of a criminal nature and so this cause being of a civil nature, court cannot grant the orders sought. This application is brought under Sections 83 and 95 of the Law of Succession Act. Section 83 spells out the duties of a personal representative (administrator) whereas Section 95 spells out the offences which can be committed by a personal representative. The provisions are only applicable in a succession cause. My view is that if a Court presiding over a succession cause makes a finding that a personal representative has committed any of the offences, the law empowers it to impose the penalty as provided by the law. That would not be interpreted that the Court has converted itself into a criminal court as it would be acting within the powers bestowed on it. In this regard, I hold that this Court has jurisdiction to hear and determine this application.

All the other issues I have identified for determination can be dealt with simultaneously. This is in view of the fact that the gist of this application is pegged on the assertion that the Respondent caused the subject land to be registered in his name solely against the terms of the confirmed grant.

The grant herein was confirmed on 27th March, 2003 in the terms that both **JOHN KONGWALEI SAWE** (Respondent) and **JOSEPH MALAKWEN SAWE** (Applicant) were “to get Land Parcel No. **UG/KIMUMU/349** in equal shares”.

A copy of the title to **L.R. NO. UASIN GISHU/KIMUMU/349** annexed to the Supporting Affidavit of this application marked 'H' is in the sole name of **JOHN KONGWALEI SAWE** (Respondent). The description of the land in the copy of the title is one as that annexed in the certificate of the confirmed grant. This title was issued on 8th April, 2003, which was about eleven days after the confirmation. What the Applicant failed to disclose to the court is, a document particularly the Green Card, that would show the previous registered owner of the land.

Be that as it may, it is automatically assumed that the land was prior to 8th April, 2003 registered in

the name of the deceased. After all, this was the only property subject of this succession cause. Accordingly, the transfer of the land to only one of the beneficiaries was irregular.

There are allegations and counter allegations between the parties against each other on subsequent sale of part of the subject land. According to the Applicant, a good portion of the land had been sold to some purchasers to whom the Respondent failed to transfer their entitlement. He avers that he and the Respondent had agreed to transfer the entitlements to the seven (7) purchasers, and that indeed mutation was done in this respect. That himself and the Respondent were only entitled to 0.34 hectares of the larger parcel.

However, they were to sell this portion shown as Plot number 3184 to the adjacent purchaser, who in turn would buy them land elsewhere. That instead of abiding with this arrangement, the (Respondent) mutated the land further so as to create more portions for more purchasers.

The Respondent on the other hand contends he administered the estate of his deceased father to its logical conclusion. He avers the Applicant was only entitled to 2½ acres of land which was half of the subject land. That he sold his portion long before the Respondent grew up and that it is not true that some of the people he names as purchasers are bona fide purchasers.

Annexed to the Supporting Affidavit are copies of what the Applicant described as mutation forms, ostensibly detailing the mutations for purposes of sale to the buyers. Against this background, it is apparent that many things have happened since the grant was confirmed. It is difficult to appreciate the elasticity of each of the parties case. For instance, an application dated 9th July, 2003 filed by two Purchasers namely Ephantus Mihingo and Tito Kenya Jumba against the Respondent herein for revocation of grant was dismissed for want of prosecution on 16th July, 2007. The Applicants therein filed an application dated 21st December, 2007 seeking orders to reinstate the application that was dismissed. Nothing on record shows that the application of 21st December, 2007 was disposed of.

The latter was an application filed by interested parties, the Purchasers. They are the parties on whose behalf the Applicant herein speaks. Whereas it is true the confirmed grant bequeathed to him an equal share as the Respondent, he has not demonstrated what authority has been bestowed on him to bring this application on behalf of the purchasers. Some of these purchasers are the parties who have not pursued the application for revocation of the grant. Indeed any bona fide purchaser has a right, to claim his/her interest in an estate. I am taken aback by the silence of the purchasers herein. To the extent that the Applicant speaks for them, I find that he has no such locus standi.

There is then, his portion which he claims the Respondent too has sold. Whereas sufficient evidence has not been produced to prove what has been actually sold, I am of the view that, upon confirmation of the grant, the land ought to have been registered in the joint names of the Applicant and the Respondent. In the alternative each party ought have taken their equal share and two titles registered in this regard, unless for good reasons, the contrary is demonstrated.

Nothing has shed light as to why the Respondent became the sole proprietor of the whole parcel of land. In the considered view of the court, this amounts to intermeddling with the estate of the deceased.

Be that as it may, the reasons for which the Applicant asks this court that he be appointed the sole administrator of the estate is so as to ensure the purchasers, whom he refers to as creditors get their rightful shares. In this respect, it is only fair that the so called creditors present their case before court in their individual capacities.

As for the Applicant's case, he has not categorically insinuated that the Respondent acquired the title in his name through fraudulent means, save to say his move was actuated by malice, selfishness and corruption. In this regard, if he strongly feels that this title was acquired through fraudulent means, the law provides for the necessary redress to seek.

However on the part of the court, it has the onerous duty of preserving the estate of a deceased and

in particular to avoid any wastage. It is in this regard, that court orders him, in the capacity as the current registered owner of all that parcel of land comprising the deceased estate, to file before this court a full and accurate inventory of how he has dealt with the property since grant was issued as stipulated under S. 83 of the Law Succession Act. This would shed more light on the issues each party has raised before a drastic action is taken. The said inventory shall be filed within ninety (90) days. Each party shall bear its own costs of this application.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 27th day of February, 2013.

**G. W. NGENYE – MACHARIA**  
**JUDGE**

No appearance for the Applicant

Barasa holding brief for Komen for the Respondent