



REPUBLIC OF KENYA



In re Estate of Daniel Gacheru Ndiang’ui (Deceased) (Succession Cause 115 of 2017) [2022] KEHC 3204 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEHC 3204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 115 OF 2017
MM KASANGO, J
JUNE 30, 2022**

IN THE MATTER OF THE ESTATE OF DANIEL GACHERU NDIANG’UI (DECEASED)

RULING

1. The deceased died intestate on 3rd August, 2015. He left a vast estate whose value seems to have been undervalued, when the present petition was filed. Its estimate value was given in the petition as Kshs.30 million. It becomes clear to me that the said value was inaccurate because in the applications I am considering in this ruling, whose details I shall give here below, one of the properties is offered to be purchased at Kshs.59,572,000.
2. The Chief of Gikumari location wrote a letter dated 30th June, 2017 and gave the names of the beneficiaries of this estate as:-
 1. Susan Wanjiku Gacheru – Wife.
 2. Fiona Wacuka Gacheru – Adult daughter.
 3. ENG – Minor daughter.and
 1. Beth Wairimu Gacheru – Wife
 2. David Ndiangui Gacheru – Adult son
 3. Joel Kaburi Gacheru – Adult son
 4. Peter Wambugu Gacheru – Adult son
3. When the petition for grant of letters of administration was filed by David Ndiangui (david) And Fiona Wacuka Gacheru(Fiona) on 24th August, 2017, in the list of beneficiaries, there was additional names listed as beneficiaries. The additional beneficiaries to the petition are:-
 1. Faith Gathigia – daughter



2. GN
3. EM
4. It will be noted that the additional list of beneficiaries there above does not indicate whether those beneficiaries are minors or adults.
5. A grant was issued to the beneficiaries on 18th December, 2017. By the petitioner's summons dated 12th March, 2019, the petitioners for the first time revealed that three of the beneficiaries, ENG, GNG and EMG were minors. A certificate of partial confirmation of grant was issued by the court on 30th May, 2019.
6. There are two applications dated 7th and 11th March, 2022. Both applications seek leave of the court to sell properties held in trust for the beneficiaries who are minors. I wish first to begin by stating that I am expected to bear the best interest of the minors in determining those applications because such determination will affect the rights of the minors. Article 53(2) of *the Constitution* provides:-

“A child's best interests are of paramount importance in every matter concerning the child.”

7. The interest of the minors will indeed be the guiding principle in this ruling.
8. The application dated 7th March, 2022 seeks the following prayer:-

“That leave be granted to Agnes Njanja Makunyi, Fiona Wacuka Gacheru and David Ndiangu Gacheru who hold a portion of the property known as Ruiru Kiu Block 2 (githunguri)/xxxx as trustees of GN – (a minor) to subdivide the said portion of the property, and deal with it and any resultant subdivisions thereof in a manner as they deem fit for the benefit in the interest of the minor.”

9. What appears very clear from the above prayer is that the trustee seek to arrogate themselves wide powers without restrain in dealing with the minor's property. Although in further affidavit sworn by Agnes Njanja Makumi sworn on 24th May, 2022 it is disposed that the intention of the trustees is to subdivide the subject property held in trust for two minors into eleven portions plots 1 to 5 being registered in the name of a minor called Faith Gathigia and in what is indeed very confusing the deponent proceeded to dispose in her said affidavit.

“That as seen in the sketch attached ... resultant plots 1, 2, 3, 4 and 5 registered in the name of Faith.

That plot 6 will be held by two siblings in equal share wherein the minor's share will be held by the trustees.

That it is proposed that resultant plots 1 and 2 will continue being held by the trustees in trust for the minor while the minor's plots 3, 4 and 5 will be sold at the prevailing market price of Kshs.1,300,000 each.

That the minor's sister Faith has also arranged to retain resultant plots 11 and 10 and sell 7, 8 and 9.

That a sum of Kshs.1,000,000 out of the proceeds of the sale shall be retained to cater for school fees, school related expenses, and general maintenance of the minor while the balance is to be pooled together with the proceeds of sale from Faith while plots 7, 8 and 9 to develop 6 rental units on the remaining plot 233456, of which one will be used as a home.”



10. The totality of that deposition is that it amounts to double speak and it is also confusing on what is the exact intentions of the trustees. There is also the lingering question that keep coming up as I consider the applications: that is, who are the real parents of the two minors? Certainly, it is not Agnes Njanja Mukunyi. In the list of beneficiaries, there are two ladies identified as wives. Presumably they are wives of the deceased. If wives of deceased are mothers of the two properties are sought to be sold by the trustees.
11. It is also a concern that my careful perusal of the partial certificate of confirmation of grant does not contain in the schedule, the property trustees seek leave of the court to sell. In other words, the property Ruiru Kiu Block 2 (githunguri) 2076 is not amongst the properties listed as belonging to deceased in the petition and in the application for confirmation of grant.
12. The second application under consideration is dated 11th March, 2022. The prayers sought in that application are:-

“That honourable court be pleased to allow the sale of property parcel Number Donyo Sabuk/koma Rock/1/9287.

That the proceeds of sales be shared among Joel Kaburi, Peter Wambugu Gacheru and EMG (Minor) who are beneficiaries to parcel number Donyo Sabuk/koma Rock/1/9287 as per the ratio in partial confirmed grant.

That the share of EMG (The minor) be held in trust in a joint Bank Account between Caroline Nduta Murithi, Fiona Wacuka Gacheru and David Ndiang’ui Gacheru.”

13. The application is supported by an affidavit of Fiona Wacuka Gacheru. She disposed that the subject property is registered in three persons one of whom is a minor. That those beneficiaries had agreed to sell the property and to share the proceeds thereof. There is a draft agreement of sale of land attached to the affidavit. That it is in the interest of the estate the property be sold. That latter statement is very unfortunate because the deponent failed to state how the sale would benefit the minor. I think this is an appropriate moment for me to remind the trustees, in both applications under consideration of their duties, which were well articulated by Justice W. Musyoka in the case *In re The Estate of TNN (Deceased)* [2014] eKLR in this manner:-

“ 17. A trustee stands in a fiduciary position with regard to trust property and the beneficiaries. He holds the property for the benefit of the beneficiaries rather than for his own benefit. He should not act in a manner which prejudices the interest of the beneficiaries.”

14. I am willing to concede to the prayer in the second application because the subject property is registered in the joint names of two adults and the minor. It would seem that the two adults desire to sell the land and the existence of the trust should not impede that. But even in that sale, the rights of the minor will need to be protected.

Disposition

15. In respect to the application dated 7th March, 2022 I order as follows:-
 - (a) Leave sought will not be granted until the trustees confirm the following:-
 - (i) Whether property Ruiru Kiu Block 2 (githunguri) xxxx is part of the estate of deceased.



- (ii) The mother of the minor GN be revealed and she does attend open court session to give her consent orally.
 - (iii) The trustees do clarify which of the sub-divided plots are intended to be sold and the price offered and they further clarify of those plots not being sold the persons in those names they will be registered in.
 - (iv) Whether a Trustee's Bank account has been opened in respect to the minor GN, if not such account be immediately opened and the evidence of such account be provided to the court.
- (b) On the above being satisfactorily responded to, the court will give final orders to the application dated 7th March, 2022.

16. In respect to the application dated 11th March, 2022, I make the following orders:-

- (a) Leave is hereby granted to David Ndiang'ui Gacheru and Fiona Wacuka Gacheru to sell to Serenade Properties Limited Parcel Donyo Sabuk Koma Rock Block 1/xxxx on the following conditions:-
 - (i) That David Ndiang'ui Gacheru and Fiona Wacuka Gacheru shall open a trustee bank account for EMG minor where the said minor's share of the proceeds of sale of Donyo Sabuk/koma Rock 1/xxxx shall be deposited.
 - (ii) Any withdrawal from that trustees account which shall be opened as ordered in (i) above shall only be done with authorization of this Court.
 - (iii) An affidavit shall be filed in this Court by David Ndiang'ui Gacheru and Fiona Wacuka Gacheru setting out the exact share the minor EMG shall get from the sale of Donyo Sabuk/koma Rock 1/xxxx.
 - (iv) Within 90 days David Ndiang'ui Gacheru and Fiona Wacuka Gacheru shall give an account of their handling of the trustee account which they shall file in court.
 - (v) A mention date will be fixed at the reading of this Ruling for the court to consider the fulfilment of the orders above.

RULING DATED AND DELIVERED AT KIAMBU THIS 30TH DAY OF JUNE, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For Trustees of GN (Minor): - N/A

For Trustees of Ethan Muriithi Gacheru:- Ms. Chemtai H/B Mr. Kiarie**

Ruling delivered virtually.

MARY KASANGO

JUDGE

