



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Succession Cause 594 of 1986**

**IN THE MATTER OF THE ESTATE OF J.G.K (DECEASED)**

**F.W.G.....APPLICANT**

**VERSUS**

**S.M.K.....1<sup>ST</sup> RESPONDENT**

**ALICE MUTHONI MAINA.....2<sup>ND</sup> RESPONDENT**

**I.M.G.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The deceased herein died on 18<sup>th</sup> May 1978 and in the Petition filed on 26<sup>th</sup> August 1986 for a grant of Letters of Administration intestate, the Petitioners, I.M.G and S.W.G stated that the deceased had only one asset i.e Land parcel L.R. [...] and his survivors were the two of them and their minor brother, F.W.G aged six (6) years.

2. A grant was made on 22<sup>nd</sup> October 1986 and the same was confirmed on 3<sup>rd</sup> December 1986 with the following module of distribution of the above parcel of Land;

<b><u>“Name Heirs</u></b>	<b><u>Property Description</u></b>	<b><u>Share of</u></b>
<b>I. M.G</b>	<b>[...]</b>	
<b>3 Acres</b>		
<b>S.W.G</b>	<b>[...]</b>	
<b>2 ½ Acres</b>		
<b>I.M.G</b>	<b>[...]</b>	

***1 ½ Acres-{To Hold the same in trust for the Minor child-F.W.G}***

3. On 5<sup>th</sup> March 1996, the Administrators were granted leave to sell ¼ acre out of the land “for the education and maintenance of the minor child F.W.G.”
4. Before me now is a Summons premised on the provisions of **Sections 2, 3(1)(2), 56(1) and (3), 57, 58 and 62** of the **Trustees Act** for Orders that;
  - a) ***The registration of one half share of L.R.No.[...] in the name of Samuel Maina Kingeru without any known deed of transfer on the 15<sup>th</sup> October 1993, and without leave of Court or consent of the relevant land Control Board be declared null and void and the Land Registrar Nairobi be directed to cancel this registration.***
  - b) ***A declaration that the registration of the other 1 ½ share of L.R.No.Dagoretti/Riruta/3533 in the name of Samuel Maina Kingeru without leave of the Court on the 13<sup>th</sup> day of March 1996, was null and void.***
  - c) ***This Court do issue an order prohibiting disposition by way of sale, mortgage, charge, subdivision, lease, alienation, demolition, transfer or conveyance of all that piece of land known as LR.No.[...] registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein until the final determination of this Application or further Orders of the Court.***
  - d) ***The appointment of I.M.G as a trustee for the Applicant be terminated with immediate effect and the Land Registrar, Nairobi do register the Applicant as the proprietor of L.R.No.[...]***
5. In his Affidavit sworn on 18<sup>th</sup> November 2010 in support of the Summons, the Applicant, F.W.G after tracing the history of this Cause depones that after the grant was confirmed and although his inheritance was less than both his elder brothers, later his land was sub-divided into two parcels – L.R.No.[...] and [...] The two parcels were registered in the names of I.M.G as trustee for the Applicant and Parcel No. [...] which was on the upper sloppy area of the original parcel of land measured 0.5 acres while No.[...] which was situated on the lower part adjoining the river measured 1.10 acres.
6. The Applicant has no problem with all the actions taken by his trustee until the point of creation of the two parcels of land but that sometime thereafter, one Samuel Maina Kingeru was registered as proprietor of ¼ acre of parcel No.[...]. According to him, there is no record of how the registration was obtained and there is no reason why his trustee transferred the land without any Order of the Court.
7. That subsequently the part purchased by Kingeru aforesaid was jointly registered in his names and those of his wife, Alice Muthoni Maina in a bid to consolidate his ownership and that all the dealings with regard to the land should be nullified.
8. In a further Affidavit sworn on 30<sup>th</sup> November 2010, the Applicant has exhibited a copy of his National identity Card showing that he is now thirty (30) years old.
9. Before the above Application could be determined the Applicant filed another Summons on 16<sup>th</sup> December 2010 seeking to be appointed a Co-Administrator of the estate for reasons that were advanced in the previous Summons and which I have reproduced above.
10. I.M.G, by his Replying Affidavit sworn on 1<sup>st</sup> January 2011 depones that the Application has no merit and the remedy available to the Applicant is proceedings in a separate suit because the land in dispute is no longer part of the estate. In any event, that the sale of the land was for the good of the Applicant as the proceeds were used to educate him to Secondary School level.
11. He admits that when he sold the initial 0.25 acres, he did not seek the leave of court to do so as under

**Section 56** of the **Trustees Act**, he was not bound to seek such consent. That as trustee, he transferred a clean title to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and he title cannot now be challenged.

12. In a further Affidavit sworn on 31<sup>st</sup> March 2011, the 2<sup>nd</sup> Respondent depones that the Applicant was not entitled to inherit the estate as he was not a biological son of the deceased having been born 2 ½ years after the deceased's demise. That since the administration of the estate is complete none of the prayers by the Applicant should be granted.

13. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed "*grounds of objection*" which I deem fit to reproduce. They are as follows;

***"i) That the Application has no merits and ought to be struck out.***

***ii) That the Application is incompetent and bad in Law.***

***iii) That the declaratory reliefs sought have no justification whatsoever and cannot be granted in an interlocutory Application.***

***iv) That title No.[...] belong to the Respondents as bona fide purchasers.***

***v) That the Applicant is non-situated as against the Respondents."***

14. In Submissions by the Advocates for the parties, the issue of the duties and power of a trustee were raised and I should state from the outset that a "**trust**" is defined as;

***"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settler) for the benefit of a third party (the beneficiary)." – see Black's Law Dictionary, 8<sup>th</sup> Edition.***

15. One of the fundamental principles of a trust is that the trustee owes the beneficiary a fiduciary duty not to waste the property but in fact to manage it to a fruitful end all geared towards benefitting the beneficiary.

16. In the instant case, it is obvious that when one looks at the Certificate of Confirmation of grant dated 3<sup>rd</sup> December 1986, the deceased's parcel of land originally measured 7 acres. Applying **Section 38** of the **Law of Succession Act**, the land should have been divided equally among the sons of the deceased and therefore each of them should have inherited 2.33 acres or thereabouts. Instead, the Respondent allocated to himself 3.0 acres and his other brother 2.5 acres and the Applicant who was a minor was allocated 1.5 acres and so from the beginning he had been short-changed and the Respondent has not given any reason why he did so. The claim that the Applicant was an illegitimate child is an afterthought.

17. As if the initial action was not enough, on 5<sup>th</sup> March 1996, the Respondent appeared before Juma, J. and the record shows as follows;

***"L.M.G we hold in trust 1 ½ acres of land for the Minor. We want authority to sell ¼ of an acre. This will enable us to pay fees and maintain him. I will get about Kshs.350,000/- in the plot. Out of that Kshs.250,000/- will be used to build a house for renting. Income for fees will be from that house.***

***S.W.G – I concur with what my brother says.***

**ORDER:**

***Application dated 16<sup>th</sup> February 1996 and filed on 22<sup>nd</sup> February 1996 granted as prayed.***

**SIGNED**  
**JUMA – JUDGE.”**

18. There is no evidence before me that as a trustee, the Respondent built rental houses and that the income would be used to pay fees for the Applicant. In his Replying Affidavit, the Respondent has deposed that he had to struggle to raise fees for the Applicant yet he received kshs.350,000/- which he has not todate accounted for.

19. Granted the sale of the initial ¼ acre was sanctioned by this Court for purposes of raising money for the benefit of the Applicant and perhaps there was justification for that since ultimately the Applicant finished Secondary School. **But where is the justification for transfer of half share of title No.3533 to the 1<sup>st</sup> Respondent? Who sanctioned that transaction to the detriment of the Applicant?** It is obvious that the Respondents also went further than is permissible by Law when on 16<sup>th</sup> November 1999, the 1<sup>st</sup> Respondent enjoined his wife in title No.3533 because of **“love and affection”** (*the actual words in the Land register*). Neither **Section 56** of the **Trustee Act, Cap.167** allowed such an action nor do I know any other Law that could be properly invoked.

20. To my mind, the 3<sup>rd</sup> Respondent failed in his duties as a trustee and save for the ¼ acre sold upon leave of the Court, he ought to have held 1.25 acres in trust until the Applicant became of age.

21. In the event, I have no choice but to agree with the Applicant and Prayers (b), (c) and (e) of the Application dated 18<sup>th</sup> November 2011 are hereby granted.

22. The 3<sup>rd</sup> Respondent shall pay the costs of this Application.

23. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2012.**

**10/2/2012**

**CORAM**

**BEFORE LENAOLA – JUDGE**

**MIRON – COURT CLERK**

**MRS RASHID FOR APPLICANT**

**MR. KAMANDE HOLD BRIEF FOR MR. WANDUGI FOR 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENT AND APPEARING FOR 3<sup>RD</sup> RESPONDENT**

**ORDER**

**RULING DULY DELIVERED.**

**ISAAC LENAOLA**

**JUDGE**