



**MMK ((Through his Father and Next Friend FKM)) v Liberty Life Assurance Kenya Ltd (Miscellaneous Civil Application 16 of 2022) [2023] KEHC 19998 (KLR) (Family) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19998 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**MISCELLANEOUS CIVIL APPLICATION 16 OF 2022**

**PM NYAUNDI, J**

**JUNE 15, 2023**

**IN THE MATTER OF: AN APPLICATION BY MMK  
(SUING THROUGH THE FATHER AND NEXT  
FRIEND FKM ) SEEKING FOR APPOINTMENT  
AS LEGAL REPRESENTATIVE/ GUARDIAN**

**AND**

**IN THE MATTER OF: THE ESTATE OF RKK**

**AND**

**IN THE MATTER OF: SECTION 111 OF THE INSURANCE ACT, CAP 487**

**BETWEEN**

**MMK ..... APPLICANT  
(THROUGH HIS FATHER AND NEXT FRIEND FKM)**

**AND**

**LIBERTY LIFE ASSURANCE KENYA LTD ..... RESPONDENT**

**RULING**

1. The chamber summons application dated July 28, 2022 is presented under section 111 of the *Insurance Act* cap 487, sections 1A, 1B and 3A of the *Civil Procedure Act*, cap 21, order 32 rule 1, 4,5 & 6 of the *Civil Procedure Rules, 2010*. The minor applicant, through his father and next friend seeks the following orders: -

a. Spent



- b. Spent
  - c. Spent
  - d. That Mr FKM to provide account of the expenditure of the disbursed funds as at and when required by the court during the course of hearing this application
  - e. That this court be pleased to issue a declaration appointing FKM under section 111 of *Insurance Act* cap 487, for purpose of accessing and receiving the funds secured in the Liberty Assurance Group Life Assurance Policy on behalf and in trust for MMK , the minor nominee
  - f. Costs be in the cause
2. The application is supported by affidavit sworn on July 27, 2022. The respondent opposes the application through affidavit sworn on March 13, 2023 by Stephen Kinyua, who is a legal manager.

### **Summary Of The Applicants Case**

3. The minor applicant is the son of RKK (deceased). The application is presented on his behalf by his father and next friend. The marriage between his parents was solemnized in 2002 as evidenced by marriage certificate serial number 27xxx. There are 2 children of the union, LMK (deceased) and MMK (the minor applicant in these proceedings).
4. The deceased died on August 23, 2021 as per death certificate serial number 120xxx. At the time of her death the deceased mother of the minor applicant, was an employee of Liberty Life Assurance Kenya Limited and had taken out a Group Life Assurance with her employer.
5. The deceased nominated the minor and his deceased sister as beneficiaries. The applicant sought to access 40 per cent of the fund pending the hearing of the application so as to cater for the minor's educational requirements and subsistence. The parties however opted to hear the substantive application and therefore this prayer was dispensed with. The application is presented through the father as next friend as the child is yet to attain the age of 18.

### **Summary Of Respondent's Case**

6. The respondent contends that the application is fatally defective and incurable on the basis that the father of the minor seeks to bequeath the estate of a deceased in a manner not recognised under the law. It is argued that in the absence of substantive succession proceedings the applicant cannot make this application.
7. The respondent further argues that the applicant lacks *locus standi* as he has not demonstrated that he is the father of the minor.
8. The respondent further contends that the special circumstances have not been established to warrant the granting of the order as there is no evidence placed before court to show that the minor is in school.
9. It is further argued that since life insurance policy is not subject to probate and succession proceedings, the court lacks jurisdiction to determine the matter. The respondent avers that the deceased had nominated her 2 children as beneficiaries and that therefore the money cannot be paid to the father and that the minor will get the money upon attaining the age of 18 years.
10. The parties agreed to canvas the application by way of written submissions



## **Applicant's Submissions**

11. The applicant submits that it is common ground that there is a life policy taken out by the deceased with the minor applicant of these proceedings nominated as a beneficiary.
12. The applicant further submits that the respondents have misapprehended the application and thus the opposition to it. The applicant is emphatic that the application is not presented under the [Law of Succession Act](#) but rather under the relevant provisions of the [Insurance Act](#). It is submitted that the minor is the applicant and has presented this application through his father and next friend.
13. For the afore reason the applicant avers that the application is not defective as has been set forth by the respondent. It is further submitted that the minor as the applicant has the *locus standi* to present the application through his father and next friend.
14. It is the applicants submission that the terms of the policy do not require him to establish special circumstances but rather once death has been established the payment under the policy should be made. The applicant relies on the decision in [Re Estate of Faith Muiita \(Deceased\)](#) [2016] eKLR
15. The applicant concedes that life insurance is not subject to probate and indicates that the application had not been brought under the provisions governing transmission of estates under probate. It is contended that the refusal to release the funds on the basis they only become payable upon the minor attaining the age of 18 years is not based on any law or internal rules of the policy and in any event would contradict the very essence of a life insurance policy. It is submitted the refusal to pay constitutes an infringement on the child's rights to inheritance.

## **Respondent's Submissions**

16. The respondent identifies the following as the issues for determination: -
  - a. Whether the applicant has *locus standi* to file proceedings
  - b. Whether the application is fatally defective and incurable in law
  - c. Whom should the costs be awarded
17. On the first issue, it is submitted that in the absence of a birth certificate or other evidence of paternity there is nothing to show that the father and next friend of the minor has the capacity to present the application. The respondent relies on the decision in [Joachim Ndaire Macharia v Mary Wangare & Anor](#) [2008] eKLR on the assertion that a birth certificate is sufficient proof of paternity.
18. The respondent avers that absent *locus standi*, the applicant cannot be heard and relies on the decision in [Alfred Njau & 5 others v City Council of Nairobi](#) [1983] eKLR.
19. On the 2<sup>nd</sup> issue, the respondent submits that the application is couched as a limited grant and in so doing the applicant is seeking to bequeath the estate of a deceased in a manner not prescribed by law.
20. The respondent relies on the decision in [Re the Matter of the Estate of Morarji Bhanji Dhanak \(Deceased\)](#) [2000] eKLR, [Re Estate of Daniel A. Korir Kipkurui \(Deceased\)](#) [2021], [Re Estate of Mary Syokiwa Kyalili](#) [2015] eKLR and [Mary Waitibera Ndegwa & Anor](#) [2014] eKLR.
21. Finally, it is submitted that special circumstances have not been shown to warrant the release of funds. It is contended that the trustees are bound to make payments only to the beneficiaries and in this instance as the beneficiary is a minor and the deceased had not appointed any person to receive the money, the beneficiary will only be able to access the funds upon the age of majority.



22. The respondent cites the decision in *Re Estate of Carolyn Acheng Wagah (Deceased)* [2015] eKLR wherein the court disallowed an application of an administrator of the deceased estate to access funds under a staff retirements benefit scheme, holding that they do not constitute part of the estate available for distribution.
23. The respondent seeks cost and relies on the decision in *Universal Engineering Works v Mohedali Suleiman Essaji* [1951] 2 LRKN 99 where it was held that a successful litigant is entitled to costs unless there are good reasons for depriving him of costs.

### **Analysis And Determination**

24. Upon considering the pleadings herein and the respective submissions of the parties, I frame the following as the issues for determination
  - a. Whether the application as presented is competent
  - b. If a) is answered in the affirmative whether the applicant has met the threshold for the grant of the orders sought
  - c. Who should pay costs of the suit

### **Whether the application as presented is competent under this head there are two issues to be considered what is the nature of the application that is presented?**

25. The respondents contend that the application as is presented runs afoul of the provisions of the *Law Of Succession Act* as the benefits under the policy are not transmittable under the *law of Succession Act*, and that for this reason the jurisdiction of this court is ousted. in response the applicant avers that the application is presented under section 111 of the *Insurance Act*.
26. In the title of the matter reference is made to “Estate of Rosemary Kavete Kiumbi”. The application is presented under section 111 of the *Insurance Act*, sections 1A, 1B and 3A of the *Civil procedure Act* and order 32 rule 1, 4, 5 and 6 of *Civil Procedure Rules*. The remedies sought are as set out in paragraph 1 above.
27. The respondent does not say and therefore I do not think that they are relying on the reference made to the Estate of RKK for the assertion that this is an application under section 54 of the *law of succession Act*. I have reviewed the orders sought and the next friend does not seek to be appointed as a guardian ad litem to the estate of the deceased rosemary Kavete Kiumbi.
28. Upon reviewing the application and supporting affidavit I find that there is nothing to suggest that the applicant herein intended to bring this application within the purview of the *law of Succession Act*. The application is presented under section 111 of the *Insurance Act*.

### **Whether the father of the minor has *locus standi* to present this application**

29. The respondents contend that the father is the applicant is in the application. This is not borne out by the pleadings as from the title of the matter the applicant is the minor and he presents this application through his father and next friend.
30. The respondent further submits that in the absence of proof of paternity, the father is not eligible to act as next friend for the minor herein.
31. Order 32 r.1 provides as follows



- (1). Every suit by a minor shall be instituted in his name by a person who in such suit shall be called next friend the minor.
- (2). Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and that authority shall be filed.

Order 32 rule 4 provides for who may act as next friend or be appointed guardian for the suit-

1. Any person who is sound mind and has attained majority may act as next friend of a minor or as his guardian *ad litem*. Provided that the interest of such person is not adverse to that of the minor, and that is not in the case of a next friend, a defendant, or , in the case of a guardian ad litem , a plaintiff
2. ...

32. From the above provisions, I find that the respondent's stance is not supported by the clear provisions of the law. It is clear that the role of acting as next friend is not limited to those that have parental connections with the minor and neither does the law require the next friend to disclose the relationship with the minor. The only condition provided that would disqualify a person from acting as next friend is when the interest of that person is adverse to that of the minor.
33. For that reason, I would hold that there is no requirement for the application to be supported by an evidence of paternity. The respondents sought to rely on the decision in [Joachim Ndaire Macharia v Mary Wangare & Anor](#) [2008] eKLR. That decision can be distinguished as in that case the issue was the probative value of a birth certificate as proof of paternity in the absence of a DNA test.
34. On the basis of the foregoing I find that the application is properly presented and complies with order 32 rule 1, 4, 5 and 6 of the [Civil Procedure rules](#).
35. Having answered the 1<sup>st</sup> issue in the affirmative the 2<sup>nd</sup> issue whether the applicant has met the threshold for the grant of the orders sought falls for determination

The application is presented under section 111 of the [Insurance Act](#), cap 487 of the Laws of Kenya which provides-

1. The holder of a policy of life assurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death:  
Provided that, where the nominee is a minor, the policyholder may appoint, in the manner prescribed, any person to receive the money secured by the policy in the event of his death during the minority of the nominee.
36. The application was necessitated by the failure of the deceased to appoint a person to receive the money secured by the policy upon her death during the minority of the nominee.
  37. The applicant through his father submits that he seeks to be paid the sum under the policy. The respondent's challenge to this application is two pronged. First that there is no evidence of the special circumstances and secondly the minor can only access the sum under the policy upon attainment of the age of majority.
  38. The respondent contends that the applicant must demonstrate that the minor is in school and also tabulate the subsistence requirements to facilitate payment.



39. In response the applicant argues that no rules or regulations of the policy have been presented to support the stance adopted by the respondents.
40. It is not disputed that the deceased held a policy with the respondent in which the minor applicant is the surviving nominee. It is also evident that the deceased did not nominate a person to receive the money on behalf of the minor.
41. A reading of the provision of section 111 reveals that as far as the Act is concerned the sum insured is payable to the nominee or the where the nominee is a minor to the appointed person upon the death of the person. Section 111 does not set out any preconditions as is suggested by the respondent.
42. In the absence of the appointment of a person to receive of the money on behalf of the minor and regulations to fill the lacuna, it falls within the jurisdiction of this court to actualise the desire of the deceased, which is that her son would receive this money upon her death.
43. I am bolstered in this position by the provisions of article 53(2) of the Constitution of Kenya which provides “A child’s best interests are of paramount importance in every matter concerning the child”
44. This constitutional provision is further expounded by section 8 of the Children Act, 2022 which provides

Section 8: Best interests of the child.

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
- (a) the best interests of the child shall be the primary consideration;
  - b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
- (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
- a. safeguard and promote the rights and welfare of the child;
  - b. conserve and promote the welfare of the child; and
  - c. secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
45. For the foregoing reasons I find that the applicant has met the threshold for the grant of the orders sought

**On who should pay costs of the suit?**

46. I find that in the instant case, costs will follow the event. For that reason, in allowing the application I award costs to the applicant.
47. In concluding I allow the application in its entirety and make the following orders
- a. FKK is hereby appointed under section 111 of the Insurance Act to receive the money secured by the policy taken out by RKK (deceased) for the benefit of MMK during his minority.



- b. A copy of the said policy to be made available to FKK within 7 days from the date of the ruling.
- c. That the entire sum under the policy be paid to FKK within 14 days from the date of the ruling.
- d. Pursuant to this order the FKK shall furnish the court with an account of the expenditure of the disbursed funds every 6 months until further directions.
- e. The matter will be mentioned on July 5, 2023 to confirm compliance.

**SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 15<sup>TH</sup> DAY OF JUNE, 2023.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

