

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 266 OF 2017

IN THE MATTER OF THE ESTATE OF EKK (DECEASED)

JKM.....APPLICANT

RULING

1. The deceased EKK died intestate on 17th January 2016. She was survived by her husband JKM (the applicant) and children BMK and GGK. GGK is a minor aged about 10 ½ years. BMK is aged about 30 years. He (B) is totally blind and has severe encephalopathy. He is totally dependent in activities of daily living.

2. On 6th March 2017 the applicant petitioned for grant of letters of administration. The grant was issued to him on 16th June 2016. On 29th January 2018 the same was rectified to include Stella Wanja Manyara as a co-administrator. On 25th November 2019 the grant was confirmed. The applicant got investments account jointly held by him and the deceased at CDSC A/C No. [Particulars withheld] absolutely. He also got LR. No. Nairobi/Block XXXX and 200 shares at [particulars withheld] Bank of Kenya Limited absolutely. GGK was given Donyo Sabuk Komarok Block XXXX which was to be held in trust for her by the applicant and DK, and BMK was given Kiirua/Nkando/XXX which was to be held in trust for him by the applicant.

3. The present application dated 18th November 2020 by the applicant seeks that he be allowed to sell Kiirua/Nkando/XXX that he is holding in trust for BMK. His case is that he will apply the proceeds to take care of BMK. BMK is presently enrolled at the [particulars withheld] Unit For the Deaf and Blind which the applicant states is a very expensive school. The applicant states that he has taken care of BMK since his birth, and has to provide him with medical care and clinic visits. He states that he still has GGK to take care of. He is a retiree. He wants to apply some of the proceeds to complete a housing project on plot No. 153/536 to be getting rental income to help BMK.

4. The application was made under **section 47** of the **Law of Succession Act**. Under **Order 37(1)(f)** of the **Civil Procedure Rules** the applicant was required to move the court by way of originating summons to seek the approval of the sale of Kiirua/Nkando/XXX that he is holding in trust for BMK. He has instead filed the instant application in the concluded succession cause. Secondly, it was expected that he annexes the title deed showing his registration as trustee, and also annex a copy of the agreement of sale. I am aware that **section 17(1)** of the **Trust Act (Cap 167)** allows the court to confer on a trustee the power to sell trust property and apply the proceeds as may be indicated in the power (**In Re Eunice Wanjeri Njenga [2013]eKLR**).

5. The application is not competent.

6. In case I am wrong, I recall that the applicant has a fiduciary responsibility over Boniface. His duty as a trustee is to safeguard the parcel of land which is a trust property. He is supposed to grow and develop the trust property for the benefit of the trustee. He can ask for power to sell the land and invest the proceeds as he applies them for the benefit of Boniface.

7. Boniface is severely physically and mentally impaired. The parcel of land is the only inheritance he got from his late mother. The applicant received more benefit. It is evident he has his own property, on top of that. He seeks to develop his property. Why can't he sell some of his property to develop the rental property he is working on. Why should he seek to attack and dispose of the only property his son was left with? I find that what he seeks to achieve through this application is not in the best interest of Boniface, and is not the prudent way to exercise his fiduciary power over the trust property under his charge.

8. In conclusion, I dismiss the application.

DATED AND DELIVERED NAIROBI THIS 3RD DAY OF MAY 2021.

A.O. MUCHELULE

JUDGE