**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 2641 OF 1982**

**E.M.Y.....PLAINTIFF**

**VERSUS**

**1.M.Y**

**2.N.Y.....RESPONDENTS**

**RULING**

The plaintiff is the step-mother of the first defendant and the mother of the second defendant. On April 14, 1982, her husband (and their father) died in a motor accident. He was the holder of life and accident policies with the American Life Insurance Company worth Kshs 2,000,000. By a deed of family arrangement (hereinafter referred to as "the Deed") entered into between the parties and also including K Y, the younger and minor daughter of the deceased and the plaintiff, the sum of Kshs 2,000,000 was apportioned as follows -

(1) Kshs 1,000,000 to the plaintiff,

(2) Kshs 416,666/66 to each of the defendants to be utilized for purpose of financing their immediate further education abroad in USA, and

(3) Kshs 166,666/68 to K Yto be held in trust for her by the plaintiff until she attains the age of 18 years.

It is common ground that K was born on August 8, 1967, and is still a minor.

According to paragraph 5 of the plaint the Deed was "entered into and executed by the plaintiff both for herself and on behalf of her minor daughter K Y" but the Deed itself shows that K executed it herself and she was described therein as "a minor acting on her own behalf in so far as may be possible and in any event by her next friend and guardian the widow aforesaid" (the plaintiff).

It is common ground that subsequent to the execution of the deed each of the defendants refused to pay Kshs 250,000 as stipulated in the deed to the plaintiff, and the plaintiff has instituted this action for recovery of the sum of Kshs 250,000 from each of them as agreed to under the Deed.

Before the commencement of the hearing of this suit, the parties produced before us, by consent, the Deed as exhibit 1, a bundle of correspondence as exhibit 2 and yet another bundle of correspondence with the Chief Kadhi as exhibit 3. The parties also agreed on 15 issues (except with reservations on the 2nd issue), and the 10th issue is as follows -

"Further or in the alternative, is the said Agreement invalid by reason of any of the reasons set out in

paragraph 16D of the Amended Defence."

It is necessary to set out in full paragraph 16D of the amended defence which avers as follows -

"16D. Further or in the alternative the said family agreement is not valid or enforceable in that:

a. All the parties to the agreement required to be *sui juris* were not *sui juris* and all the parties to it or affected by it did not adopt the agreement as is by law required;

b. It was signed by a party without capacity;

c. It was not validly signed by any party with capacity on behalf of the infant;

d. The sanction of the court was not sought or obtained in respect of the arrangements regarding the infant whose rights were affected and dealt in."

In view of this defence and the issue framed upon it, I drew the attention of the learned counsel to order XIV, rule 2 of the Civil Procedure Rules, and it was agreed that the 10th issue be determined as preliminary issue by the court. In support of this defence Mr Nowrojee (with Mr I Kapila for the defendants) referred me to various passages in *The Encyclopaedia of Forms and Precedents*, 4th edition volume 9 and *Halsbury's Laws of England*, 4th edition, volume 18, the substance of which is that a transaction in the nature of a family arrangement cannot be entered into without the sanction of the court where one of the parties is an infant. I will not at this stage deal with Mr Nowrojee's submissions at any length because, with respect, I am in substantial agreement with all that he has stated.

Mr Malik for the plaintiff contended that the Deed was valid and enforceable. He also relied on the same authorities as aforesaid, but attempted to give them a different interpretation. It is correct that family arrangements are normally upheld by courts but certain formalities in respect of them must be complied with. Mr Nowrojee had cited paragraph 308 of the *Encyclopaedia* -

"Subject to any express or implied provision to the contrary, a family arrangement come to by persons who have executed the instrument embodying the arrangement without the knowledge, or in the absence, of one member of the family intended to be affected by it is regarded as having been entered into on the assumption that the absentee will in due time join in the transaction. His concurrence, therefore, either by execution of the document or by adoptive acts, is an implied condition of the validity of the arrangement, and if such concurrence is not obtained the arrangement is not binding even on those parties who executed the document. The execution of the arrangement or acts adopting it will be ineffective if the person concerned is not *sui juris*."

Mr Malik submitted that the above was distinguishable because none of the parties was a trustee and, therefore, not in a fiduciary position. He appears to have overlooked the provisions of section 3 and 5 of the Guardianship of Infants Act, chapter 144, that on the death of the father the mother becomes the guardian of an infant subject to the provisions of that Act, and that such a guardian has the same powers over the estate of an infant as a guardian appointed by will or otherwise under the law for the time being in force in England. The Deed dealt with inheritance of a part of the estate of the infant's father and the mother was clearly acting as her statutory guardian. Even on general principles, where a parent enters into an arrangement on behalf of an infant, he must be deemed to do so in a fiduciary capacity.

Mr Malik also contended that the minor is not complaining that the Deed is to her detriment. However, how can she complain directly to the court when she is not *sui juris* and can only come to the court through an adult acting on her behalf?

It is true that it is possible to enter into family arrangements even in the absence of one or more members but only on the assumption that the absent members would rectify the same and that if they fail to do so, such arrangements would become invalid. Again, it is true that occasionally such arrangements are completed, so far as possible, when one of the parties is an infant of nearly full age but only on the

express provision, or assumption, that he will rectify the Deed upon attaining the age of majority, and if he fails or refuses to do so the Deed becomes invalid against all the signatories to it. K was about fifteen years old when the Deed was executed. She is now just sixteen. Whether or not that can be termed "near the age of majority" is a moot point, but the fact remains that she is still far from becoming *sui juris* and consequently in a position to express her independent stand upon the Deed.

Mr Nowrojee relied on *Bolathe vs Hillyar* [1865] reported in the English Reports, volume 55 at page 603 wherein Sir John Remily MR ruled -

"I am of the opinion that the agreement of 1821 is not binding upon the interests of any of the parties to it. It was decided in *Peto v Peto* (16 Sim, 990), that when persons entered into a mutual contract, the consideration for which is, that all the parties shall be bound by it, then if one cannot be or is not bound, as a whole and entire, and the court cannot make the parties to it enter into another contract. If, in this case, Mrs Penfound's interest is not bound it is clear that the court would be making a new contract, if it were to enforce it between the remaining parties, omitting her share that as though she had not been a party to it. If I were to do so I should in fact be ordering the contract to be performed *cy pres*, and thus give the party something different from what they contracted for."

I have underlined the significant words. Mr Malik attempted to distinguish it on the basis that this decision dealt with a married woman's then inability to enter into a binding contract. But, with respect, the underlying principle is the same: an infant is still under a similar disability to enter into a valid agreement.

Mr Nowrojee drew my attention to section 56 to 62 of the Trustee Act, chapter 167 which, in effect, give court, the jurisdiction to authorize dealings with trust property but with the important proviso in section 62 which lays down that "the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

It is common ground that the deceased's accident insurance policy was for Kshs 1.5 million and it was assigned to the plaintiff. His life insurance policy was for half a million shillings assigned equally to the plaintiff and the three children. When he purported to divorce the plaintiff he wrote to his insurance company that the benefit of his accident policy should go equally to his three children ie K's share would have been Kshs 500,000 if the purported assignment were valid plus Kshs 125,000 from the life insurance policy. I pointed out to the learned counsel that in these proceedings, I am not concerned with the validity of the purported divorce or the purported assignment to the children, but under the Deed K got only Kshs 166,666.68. This was, therefore, an eminently appropriate arrangement meeting the court's sanction to safeguard her interest having regard to all the circumstances. That such is the court's duty is also reinforced by section 17 of the Guardianship of Infants Act which provides for the infant's interest to be the paramount consideration. Mr Malik claimed that I have a discretion in the matter which I should exercise in favour of upholding the Deed. With respect I do not think that I have any such discretion. In any event, there exists no basis for the exercise of a discretion since I do not have sufficient facts before me to decide where K's interest lies. Mr Malik stated that since there is no time limit for seeking the court's approval to the transaction, it could be done at any time. However, he did not respond to my query whether he wished to take such a course of action.

Mr Malik also referred me to the history of the disputes between the parties regarding the estate of the deceased, that if the deed is held invalid there would be endless litigation which would serve no useful purpose, that this defence was raised at the last moment and appeared to be an afterthought and it was unconscionable. It is correct that this defence was raised for the first time when the trial was about to commence, but when I allowed the amendment to the defence Mr Malik was quite content to proceed without seeking an adjournment: if anything, he appeared anxious "to get on with it." Whether or not the defence is unconscionable or would lead to endless litigation and delays will depend upon how the parties approach the matter: the defendants, one of whom is a real sister of K, are at least clearly of the opinion now that it is not in their interest to pay to the plaintiff half a million shillings claimed by her under the deed. In any event, whether a defence is harsh or unconscionable or an engine of fraud - to use the words often applied to defences relying upon the failure to obtain consent of the Land Control Boards where

required - if it is tenable in law, there is nothing that the courts can do about it.

Following the principles of law set out in *Halsbury* and the *Encyclopedia*, I am of the view that as it stands the deed is unenforceable against any of the parties to it due to the failure of the court's sanction having been obtained in respect of the interest of the infant who is still in no legal position to rectify it personally. Since the plaintiff's claim is based upon the enforcement of the Deed, and cannot succeed now, it is dismissed with costs to both the defendants. I am open to argument as to any other reliefs and/or the counterclaim.

**Dated and Delivered at Nairobi this 24th day of August 1983.**

**S.K.SACHDEVA**

**JUDGE**