

4. A/C No 1129994945 Kenya Commercial Bank Ltd to the 2nd appellant absolutely.

By summons dated 14th May 2024, the appellants applied to have the orders of confirmation of grant reviewed to the extent that parcel of land known as Thika Municipality Block 21/263 (hereinafter referred to as ‘the first property’) be sold and proceeds therefrom be utilized to complete development of parcel known as Bewan Developers Ltd certificate number 353, plot number 013 Ruiru/Ruiru East Block 2/937 (hereinafter referred to as ‘the second property’) in order to give the minor beneficiaries and the 1st appellant a home and generate rental income therefrom for the benefit of the minor beneficiaries.

The appellants averred that after confirmation of the grant, they started developing the 2nd property with intentions of having a home for the minors and the 1st appellant but they had run out of funds which caused the development to stall. They annexed photographs and some tabulations of the estimated cost of completion of the construction. It was the appellant’s further averments that the minors and the 1st appellant were living under the roof of the 2nd appellant’s home for lack of their own and the proposed sale was to the best interest of the children as the 1st appellant did not have a stable income.

The Honourable Magistrate in her impugned ruling identified the main issue of determination as whether continuing trust ought to be terminated prematurely and disallowed the application stating that there was no provision that allowed the court to exercise such discretion hence this appeal in which the appellants have raised the following grounds;

1. *That the learned Honourable Principal Magistrate erred in law and in fact in failing to consider the affidavit evidence, and the supporting documents in support of the applicants' prayer.*
2. *The learned Honourable Principal Magistrate erred in law and in fact, having appreciated that the orders sought were to have the property Thika Municipality Block 21/263 held by the applicants in trust for the minors sold to raise funds to enable the applicants to complete the commercial development undertaken on plot Bewan Developers Ltd Certificate No. 353 plot number 013, Ruiru/Ruiru East Block 2/937 which is also held in trust for the two minors, and other grounds in support and yet failed to grant the prayers of the applicants.*
3. *The learned Principal Magistrate erred in law and in fact in the circumstances of the case, in holding that the applicants were seeking to terminate a continuing trust prematurely.*
4. *The learned Principal Magistrate erred in law and in fact in failing to exercise his discretion to grant the prayers sought by the applicant while the facts of the case called for exercise of discretion to grant the application.*
5. *The learned Principal Magistrate erred in law and in fact in following the decision of Elizabeth Wanjiku Njoki vs Joseph Njuguna and 3 others (2016) eKLR which decision was based on different facts which included non-disclosure of material facts, which were at variance with the facts and circumstances in the applicants' application.*

6. *The learned Principal Magistrate erred in law and fact in reaching a decision to deny the applicants the prayers they sought for the reasons that he gave and thereby reached an erroneous decision.*
7. *In his overall approach to the matter of a continuing trust, the learned Principal Magistrate misapprehended the law and denied the applicants and the minors justice and the order due to them under the law.*

This is a first appeal and like in any other, this court has an obligation to review the evidence produced before the lower court and come to its own independent conclusion. It is notable that the appeal does not arise from a normal hearing where the trial court took evidence of witnesses which this court would be required to evaluate and analyse. What this court is bound to do in this matter is to analyse and re-look at the application for review and make its own independent decision on whether the same merited granting.

At the center of the matter is whether the court can review a continuing trust as in this matter. The continuing trust created in this matter by the confirmation of the grant required the appellants to hold the properties in trust of the minors until they attain the age of majority. The trust is not expected or supposed to be terminated prematurely or in other words before the minor beneficiaries are of age.

The purpose of a continuing trust is to ensure that the property distributed to the minor beneficiaries is not wasted by the trustees and to protect the share of the minors. In ***Onjoro & another v Ekaka (Suing as the Administrator of the Estate of Edisa Nasirumbi, Deceased) (2023) KEHC 20051 (KLR)***, Honourable Justice WM Musyoka held that;

‘A continuing trust arises where a deceased person is survived by minors, and, to a limited extent, surviving spouses. At distribution of the estate, the shares due to a minor are not devolved to the minor during his minority, but are held by the administrators or personal representatives, during the minority of the minor, in trust. The effect of it is that the share of a minor falls into a trust, taken care of by the administrator or personal representative or trustees, from the date their offices become operational, until the minor attains majority age. The trust exists during the minority regardless of whether the grant has been confirmed or not.’

The trustees are supposed to hold the property on terms directed by the court which must ensure that the property is safe and within the control and reach of the court and available to the minors once they are of age. Justice D Musinga as he then was held in ***Re The Estate of Lameck Onwoyo (Deceased) (2008) KEHC 559 (KLR)*** that;

‘The underlying objective of this provision is to safeguard the interests of minor beneficiaries of the estate.’

To the above extent, this court agrees with the holding of the Honourable Magistrate that a continuing trust cannot be terminated prematurely.

In my view, there must be a difference between termination of the continuing trust and change of the nature or character of the property held in trust. In this matter, the appellant were seeking to change the nature of the property by getting the minors a home and investing their share in an income generating venture. The court in such cases should in my view, be concerned whether the trustees will actually be wasting the property instead of improving or investing the same. I do

not think that the sale and utilization of the proceeds therefrom in developing 2nd property amounted to termination of the trust. The trustees will remain the same with the same responsibilities of accountability.

Having said the above, I do believe that the court erred in interpreting the proposal as a termination of the continuing trust. What the court should have evaluated was whether the proposed transactions were safeguarding the interest of the children.

I now turn to the issue of whether the proposal would have served, advanced or protected the best interest of the minors. I have looked at the supporting affidavit dated 14th May 2024 and the annexures thereto. The exhibited tabulations described as the estimates of cost of construction are in my view not reliable as evidence of the cost of completion. It is not indicated who made the calculations and tabulations. It is not clear whether the same will be adequate to develop the property as proposed by the appellants. Estimates for constructions can only be credible if done by a professional such as a quantity surveyor, architect or engineer.

The appellants also attached photographs in proof of their averments that they had started developing the 2nd property. There is nothing in the photographs that would convince the court that the same were connected to or represented the actual status of the property. The appellants should have supplied more credible information such as county government approvals or certificates from appropriate professionals.

There should also have been proposed mechanism which would ensure that the court remained in control of movement of the money from the purchasers to the

construction so that the proceeds are not misapplied. Once the first property is sold and liquidated, there would be no assurance that the proceeds will go to the development of the 2nd property.

One more reason for my refusal to grant the application is that the appellant did not produce evidence that the property they intended to sell was worth the sum they indicated in their supporting affidavit. There is no valuation report or an offer to buy from a prospective buyer.

Without the above information, this court would not allow the application. In the circumstances, I in the best interest of the minor beneficiaries and in order to protect their share make the following orders;

1. The orders of the Honourable Magistrate dated 24th October 2024 dismissing the appellant's application dated 14th May 2024 are set aside.
2. For avoidance of doubt, order (1) above does not amount to granting or allowing of the appellants' said application.
3. The appellant's application dated 14th May 2024 shall remain open for prosecution with directions that the trial court must consider and impose conditions, directives and mechanisms as it may be necessary to ensure it retains the control of the minor's share and the appellant's accountability to the estate.
4. There shall be no orders as to costs.

Dated, signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Kimwali holding brief for Miss Maira for the appellants.