



REPUBLIC OF KENYA



**In re HM & EM (children in need of care and attention) (Miscellaneous Application E009 of 2022) [2022] KEHC 503 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 503 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
MISCELLANEOUS APPLICATION E009 OF 2022**

**LW GITARI, J**

**APRIL 28, 2022**

**IN THE MATTER OF: THE SAFEGUARDS FOR THE RIGHTS  
AND WELFARE OF THE CHILD UNDER SECTION 6(1), 7(1), 9,  
AND 17 OF THE CHILDREN ACT (CAP 141 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF: ARTICLE 53(1)(C) AND  
(2) OF THE CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF THE CHILDREN'S RIGHTS  
UNDER SECTION 22 OF THE CHILDREN'S ACT (CAP 141 LAWS OF KENYA)**

**RULING**

1. Before this court is the summons application dated 7<sup>th</sup> March 2022 brought under certificate of urgency. It seeks for the following orders:
  - i. Spent.
  - ii. That this Honourable Court be pleased to certify the minors HM and EM as children in need of care and attention in that their father died and are presently under the care of their peasant mother.
  - iii. That this Honourable Court be pleased to grant leave for the Applicant to dispose a portion of land measuring 0.15 Acres or thereabout from her interest contained on L.R. MAGUMONI/RUBATE/XXXX so as to facilitate the Applicant to construct a dwelling house for her children and payment of her children's school fees and other necessities.
  - iv. That the District Land Registrar Meru South be directed to register the Mutation document in respect of L.R. MAGUMONI/RUBATE/XXXX so as to facilitate the disposal of 0.15 Acres for the upkeep and payment of the school fees for the applicant's children.



- v. That this Honourable Court do grant such further orders expedient in the interest of justice and for the best interest of the Applicant's children.
  - vi. That the cost of this application be in cause.
2. The application is based on the grounds on the face of it and is supported by the affidavit sworn by the Applicant on 7<sup>th</sup> March 2022 which basically reiterates the above grounds.
  3. The Applicant deposed that the mentioned minor are her biological children and are in need of care and attention. Her husband, HMK, died on 22<sup>nd</sup> November 2016 when the minors were still in school. It is the Applicant's averment that she has no constant source of income and relies on well-wishers to provide for herself and her children who are presently schooling at [Particulars withheld] Primary School.
  4. It is further her averment that she is the registered proprietor of L.R. Magumoni/Rubate/xxxx (hereinafter "suit land") measuring 1.40 Acres or thereabout and the same was registered as such for her own benefit and for her to hold in trust of the children of her late husband. The Applicant deposed that she intends to dispose a portion of the land measuring 0.15 Acres or thereabout from suit land so as to pay school fees for her children and the balance to construct a dwelling house for her children. She explains that the dwelling house in which her late husband left her in occupation was burnt down by unknown arsonists and that she is presently being housed by her parents.
  5. It is her contention that disposing 0.15 Acres or thereabout from her interest contained on the greater suit land will not prejudice her children who are listed as the beneficiaries on the suit land.

#### **Issue for determination**

6. From the pleadings filed and the submissions of the Applicant, the main issue for determination is whether this court should approve the sale of a portion of the suit land herein which is trust property.

#### **Analysis**

7. The application was brought pursuant to articles 47(1), 50(1), 53(1)(c) and (2) and 159(1) and (2)(a), (b), (d) and (e) of *the Constitution* of Kenya 2010 as well as sections 6(1), 7(1), 9, 17, and 22 of the *Children Act* (hereinafter referred to as the 'Act').
8. While article 53(2) of *the Constitution* is explicit that a child's best interests are of paramount importance in every matter concerning the child. Section 22 of the Act stipulates that:

- “(1) Subject to subsection (2), if any person alleges that any of the provisions of sections 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the child.
- (2) The High Court shall hear and determine an application made by a person in pursuance of subsection (1) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 19 (inclusive).
- (3) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it



or under this section including rules with respect to the time within which applications may be brought and references shall be made to the High Court.”

9. Section 22 of the Act is limited to breaches of sections 4 to 19 of the Act.
10. Section 6(1) of the Act provides that:

“ A child shall have a right to live with and to be cared for by his parents.”
11. Section 7(1) of the Act provides that:

“ Every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents.”
12. Section 9 of the Act provides that:

“ Every child shall have a right to health and medical care the provision of which shall be the responsibility of the parents and the Government.”
13. Section 17 of the Act provides that:

“ A child shall be entitled to leisure, play and participation in cultural and artistic activities.”
14. Annexed to the supporting affidavit are the minors’ birth certificates, the death certificate of the minors’ father, letter by the headteacher of [particulars withheld] Primary School, copies of the green card and mutation document for the suit land, and a copy of the Occurrence Book (OB) No xx for 28/11/2021 when a report of arson was made at Chera Police Post.
15. Having given due consideration to the application, the grounds in support and the averments set out in the affidavit in support of the application, it is clear that the applicant is the mother of the subject minors. She is therefore obligated to facilitate the provision of education to the minors.
16. As per the green card annexed to the supporting affidavit, the Applicant is the registered proprietor of the suit land which she holds in trust for herself and her two children, HM and EM as well as MK and MM.
17. The suit land is trust property. Section 56 of the *Trustee Act*, read together with order 37, rules 1 and 3 of the *Civil Procedure Rules*, 2010 empowers the court to approve a sale of trust property. Section 56 of the *Trustee Act* states as follows:

“(1) Where, in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but cannot be effected by reason of the absence of a power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees either generally or in any particular instance the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.”



18. The applicant has demonstrated that the sale of 0.1 acres of the suit property is in the best interest of the minors for purposes of article 53(2) of *the Constitution* and section 22 of the *Children Act*. The court has discretion to make such orders as may be necessary in the best interests of the child.

**In conclusion**

I find that the application has merits. The applicant is allowed to dispose off a portion of 0.15 Acres from her interest in LR No Magumoni/Rubate/1936 to raise funds to construct a dwelling house for her children and for payment of their school fees and other necessities as prayed under paragraph 3 of the application. The District Land Registrar Meru South be directed to register the Mutation Document in respect of the said land parcel that is Magumoni/Rubate/1936 so as to facilitate the disposal of 0.15 acres.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

**LW GITARI**

**JUDGE**

