



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 1 OF 2021 (O.S.)

IN THE MATTER OF: SECTION 56 AND 57 OF THE TRUSTEE ACT (CAP. 167) LAWS OF KENYA

AND

IN THE MATTER OF: LAND PORTION NUMBER xxxx (ORIGINAL NO. xxxx/x) MALINDI

BETWEEN

DKK.....PLAINTIFF/APPLICANT

VERSUS

DKK (as Trustee of SBN).....DEFENDANT/RESPONDENT

Coram: Hon. Justice Reuben Nyakundi

Muli & Ole Kina Advocates for the Applicant

RULING

By Originating Summons filed on 20th January 2021 in terms of **Order 37 Rules 1, 2, 12, 13, 14 & 16 of the Civil Procedure Rules; Sections 12 (1), 17, 33 (1) (a), 34, 45 (g), 49 (a), 54 (c), 56, 57 (1) & 59 of the Trustee Act (Cap. 167) Laws of Kenya; Sections 1A, 1B & 3A of the Civil Procedure Act** and all enabling provisions of the law.

The Orders sought in the matter are that:

- 1. DKK, currently resident at Malindi of Post Office Box number xxxx Malindi 80200, be appointed Guardian ad litem in this suit.**
- 2. DKK be substituted as trustee of the minor in place of UN deceased who died on the 25th day of October 2016 in Montepulciano Italy.**
- 3. The Honourable Court be pleased to authorize the sub-letting or sale of the parcel of land known as LAND PORTION NUMBER xxxx (ORIGINAL NUMBER xxxx/x) MALINDI, herein after referred to as "the Suit Property" and the proceeds realized from the sub-letting or sale of the same be applied in the settlement of the following:**
 - a. The costs of and incidental to the valuation of the said Suit Property**
 - b. The costs of and incidental to the transfer of the Suit Property**
 - c. The payment of school fees for the minor in this suit.**
 - d. The investment of the balance of the sub-lease or sale in a call account for the purpose of future application for the education of the minor.**
- 4. The Honourable Court be pleased to issue directions on the service of the Originating Summons Application herein.**

5. The cost of and incidental to this Application be provided for.

The application was buttressed by the grounds espoused therein as well as in the affidavit of DKK filed on the 20th January 2021.

Grounds for the Application

The Applicant avers that she is the mother to the minor whom she sired with her late husband UN (deceased) who passed on in Italy on the 25th October 2016. That she has been appointed as the minor's trustee by the Court in Italy and produces an Order to this effect.

She states that together with her deceased husband, they had acquired the Suit Property sometime in the year 1999 in equal half shares. That later, the Late UN (deceased) transferred his share and interest in the Suit Property to their minor child SBN in joint proprietorship with the Applicant as an investment for the benefit of the minor's education.

It is further contended that the minor has hitherto attended and received her instructions at Licei Poliziani 2 ALS at Montepulciano Italy and that she and her mother have come to Kenya exclusively for the purposes of this application and a possible sale of the suit property. That the Plaintiff/Applicant who is the mother and trustee of the minor is in financial distress following the termination of her services by her erstwhile employer in the course of the Covid-19 pandemic and she has therefore decided to sell the suit property so that she is able to cater for her own and her daughter's basic needs of maintenance and education.

The case is made that the purpose for which the investment was made has now materialized and it is in the best interest of the child that the Court does authorize the sub-letting or sale of the suit property. In this regard, it is contended that the suit property has been valued and the Applicant has secured a competitive price and it would therefore be advantageous to the minor that the proceeds of the sale be applied to her education and any balance not immediately paid out, be invested in a call account or in any other manner as the Honourable court shall direct with leave to the Applicant to cash in and apply the same towards the education and upkeep of the minor.

Finally, it is averred that it is just and equitable that all the costs associated with the valuation, transfer and the advocates costs and fees as necessary to facilitate this application and the resultant transaction be charged on the proceeds of sale of the subject property.

Analysis and Determinations

In my reading of the instant application, I find it is a non-contentious matter and only requires of the Court, in my summation, to answer the following questions:

a. Whether the Applicant should be substituted as the trustee of the minor in place of UN (deceased) who passed on in Italy on the 25th October 2016

b. whether this court should approve the sale or subletting of the suit property and the proceeds realized thereon applied to the costs of and incidental to the valuation of the said Suit Property, the transfer of the Suit Property, the payment of school fees for the minor in this suit and the investment of the balance of the sub-lease or sale in a call account for the purpose of future application for the education of the minor.

c. Whether costs ought to be provided for.

The Constitution of Kenya under Article 53(2) and **Section 4(1) (2) of the Children's Act** enjoins the court to consider the best interests of the child as a factor in decisions affecting minors. This shall be the guiding principle upon which I shall base my determinations herein.

Order 37 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:

“1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions.

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;

(b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;

(c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;

(d) the payment into court of any money in the hands of the executors, administrators or trustees;

(e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;

(f) the approval of a sale, purchase, compromise or other transaction;

(g) the determination of any question arising directly out of the administration of the estate or trust.”

Trustees are, through **Section 12 of the Trustee Act**, given the power to deposit money at bank and to pay calls in the following manner:

“(1) Trustees may, pending the negotiation and preparation of any mortgage or charge, or during any other time while an investment is being sought for, pay any trust money into a bank to a deposit or other account and all interest, if any, payable in respect thereof shall be applied as income.”

The power to sell trust property is conferred upon an Applicant as a trustee by **Section 13 of the Trustee Act** which provides as follows:

“(1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

(2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof.”

Trustees are empowered by **Section 17** of the Act to raise money by sales as outlined below:

“(1) Where trustees are authorized by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession.

(2) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes.”

Section 56 of the Trustee Act, grants the court with the jurisdiction to make appropriate orders in the following terms:

“56. Power of court to authorize dealings with trust property

(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.

(2) The court may, from time to time, rescind or vary an order made under this section, or may make any new or further order.

(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.”

In the present application the Applicant seeks to be substituted as a Trustee of the minor in place of her deceased father. While I note that she has already been made a Trustee by the Court in Italy, this Court, through **Section 42 of the Trustee Act** also has the power to substitute the Applicant as a Trustee. Since the Applicant has indeed shown that she is the mother of the minor, I have no difficulty in declaring her a trustee of the minor in this suit.

The Applicant also seeks that she be allowed to sell the Suit Property for the reason that it has become necessary to do so to cater for the upkeep and education of the minor, the precise reason for which the suit property was entrusted to the minor. **Section 17 (1) of the Trustee Act** allows trustees to raise the money required to pay or apply capital money subject to the trust by the sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession. In my view, and pursuant to the powers accorded to this Court by virtue of **Section 56 of the Trustee Act**, the Applicant has satisfactorily explained the need to sell the property. She has demonstrated ownership of the suit property by the minor in trust of her deceased father. She has shown, and has further been confirmed as a Trustee on behalf of the minor by both this Court in the preceding, and by a competent Court in Italy. She has also confirmed that the funds realized by the sale of the suit property are to be used for the upbringing and education of the minor.

In Re Eunice Wanjeri Njenga ELC Miscellaneous Civil Suit 62 of 2013 [2013] eKLR it was stated:

“In summary the general duties of trustees in relation to the trust property are to safeguard the assets of the trust, to invest any trust money in his or her hands, and to distribute the assets to the beneficiaries and satisfy any claims of the beneficiaries. With relation to the beneficiaries, trustees are under a duty to maintain equality between beneficiaries and to provide accounts and information to the beneficiaries. Section 56 of the Trustees Act cited in the foregoing also gives this court power to authorize specific investments upon application by a trustee, and together with section 59 permits this court to order that costs of a sale and application to the

court be met from the proceeds of sale of a trust property.

The Applicant has averred that she intends to use the proceeds of the sale to invest in the remaining portion of the trust property, to pay for the beneficiaries' school fees and to buy a larger portion of land. Section 4(1) of the Trustees Act allows a trustee to invest any trust funds in the purchase of immoveable property in Kenya and provides for certain conditions as to the tenure of the land to be purchased.

It is my view that the proposed investments by the Applicant are prudent and in the interests of the beneficiaries. I have also noted that Applicant has duly informed the beneficiaries of the same, who have no objection. I therefore see no reason why the approval and orders sought by the Applicant should not be granted by the court, subject to such conditions as may be necessary."

On the issue at hand, the Court in **In the Matter of GW & another (Minors) [2016] eKLR** had this to say:

"The power to sell trust property is conferred upon the Applicants as trustees by **section 13** and of the **Trustee Act. Section 13** provides as follows:

"(1). Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

(2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof."

Section 17 (1) of the Trustees Act in addition allows trustees to raise the money required to pay or apply capital money subject to the trust by the sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession. Lastly, the locus of the Applicants and jurisdiction of the court to grant the prayers sought is also provided by section 56 of the Trustees Act which empowers the court to authorize dealings with trust property 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.

(2) The court may, from time to time, rescind or vary an order made under this section, or may make any new or further order.

(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust."

I therefore find that the Applicants have properly brought this Application under the provisions of **Order 37 Rule 1 of the Civil Procedure Rules, 2010 and sections 13, 17 and 56 of the Trustees Act**, and that the Application is competently before the court. In summary the general duties of trustees in relation to the trust property are to safeguard the assets of the trust, to invest any trust money in his or her hands, and to distribute the assets to the beneficiaries and satisfy any claims of the beneficiaries. With relation to the beneficiaries, trustees are under a duty to maintain equality between beneficiaries and to provide accounts and information to the beneficiaries. Section 56 of the Trustees Act cited in the foregoing also gives this court power to authorize specific investments upon application by a trustee, and together with section 59 permits this court to order that costs of a sale and application to the court be met from the proceeds of sale of a trust property. The Applicants have averred that they intend to use the proceeds of the sale to establish a fund to be used to pay the minors' school fees and medical expenses, especially for the infant minor. It is my view that the plan to establish this fund for the minors is in their interest."

The Applicant further urged the court to give orders that the costs of and incidental to the valuation and transfer of the suit property as well as costs of and incidental to the instant application be realized from the sale of the trust property in question. **Section 59** of the Act empowers the Court to grant such orders. It provides:

"59. Power to charge costs on trust estate

The court may order the costs and expenses of and incidental to an application for an order appointing a new trustee, or for a vesting order, or of and incidental to any such order, or any conveyance or transfer in pursuance thereof, to be raised and paid out of the property in respect whereof it is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just."

Based on the foregoing, I find that it is in the best interests of the minor herein that the Applicant's Originating Summons dated 20th January 2021 is allowed in the following terms:

a. That the Applicant be and is hereby permitted and empowered by this Court to sell or sublet the property known as LAND PORTION NUMBER xxxx (ORIGINAL NUMBER xxxx/x) MALINDI.

b. That the Applicant shall, with leave of this court, apply the balance of the sale proceeds thereof to any authorized investment within the meaning of the Trustee Act for the benefit of the minor and her future education.

c. That the costs of and incidental to the valuation of the said unit, the costs of and incidental to the transfer and the costs of and incidental to this application be realized from the proceeds of the sale thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF JANUARY, 2021.

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R NYAKUNDI

JUDGE

This Ruling has been dispatched electronically to the respective email of the advocate in the matter

(olekina@muliandolekinaadvocates.com)