



In re Trusteeship for JMG & SMG (Minors) (Environmental and Land Originating Summons E004 of 2023) [2023] KEELC 21721 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21721 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023**

LN GACHERU, J

NOVEMBER 23, 2023

**IN THE MATTER OF SECTIONS 4, 13, 17, 33, 34, 41, 56
&59 OF THE TRUSTEES ACT, CAP 167 LAWS OF KENYA**

AND

IN THE MATTER OF: SECTION 27 OF THE LAND ACT, 2012

AND

IN THE MATTER OF: ORDER 37 RULE 1(F) OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF: LEAVE TO SELL AND TRANSFER OVER L.R.
NO LOC10/WANJENGI /1520 & L.R NO. LOC 10 /WANJENGI/ 1521**

IN THE MATTER OF

NNM EXPARTE APPLICANT

JUDGMENT

(In the matter of the property held for the benefit of JMG & SMG (Minors) and in the matter of Land Reference No. Loc.10/ Wanjengi/ 1520 and Land Reference No. Loc 10/ Wanjengi/1521)

1. The Exparte Applicant herein NNM, brought this Originating Summons dated 18th July 2023, and sought for the following orders;
 - a. That leave be granted to the Applicant to sell and transfer land parcels No. Loc No 10/ Wanjengi/15XX and 15XX, currently registered in trust for JMG & SMG(Minors).
2. The Originating Summons is supported by the Affidavit of the Applicant, NNM, and the annexures thereto.



3. In her Supporting Affidavit, of 18th July 2023, the Applicant averred that she is the registered as a trustee over the two parcels of Land Reference No. Loc 10/ Wanjengi/ 15XX & 15XX, to hold in trust for JMG and SMG, who are minors. She annexed NNM1, which are copies of title deeds and official searches to confirm the said position.
4. It was her further averment that the said JMG and SMG, are both her children with her late husband KGM, who died on 13th May 2016, as is evident from annexure NNM2 & NNM3 (Copies of birth certificates).
5. That after the demise of her husband, the succession proceedings were conducted in Murang'a Chief Magistrates Succession Cause No 3 of 2019; Estate of KGM, and a Certificate of Confirmed Grant was issued on 4th June 2021. The same was marked as annexure NNM4.
6. It was also her contention that there was never any Appeal emanating from the said Confirmed Grant from Muranga Chief Magistrate's Succession Cause No 3 of 2019; - the Estate of KGM, and neither is there any pending application in the matter. She also contended that from the Confirmed Grant dated 4th June 2021, she was bequeathed Land Parcel No. Loc 10/ Wanjengi/10XX, to hold it absolutely.
7. She also contended that her relatives who are related to her late husband, KGM, have been hostile to her to such a point that she cannot cultivate or utilize the above referenced parcels of land. For that reasons, she has commenced purchase of another parcel of land in Euasonyiro Suguroi Block IX/ 9X6, measuring 1.736 Hectares, and that she has already found a buyer for her parcels of land in Wanjengi being Loc 10/Wanjengi/15XX, 15XX and 10XX, which makes a total of 0. 90 hectares as per annexure NNM5, which is a copy of Sale Agreement.
8. It was her further contention that that she wants peace for her family and children and thus the reasons why it is necessary to dispose off the properties that she is holding in trust and then purchase a bigger one. Further, that she is willing to file a return in Court of the copy of the new title deed for the new land being L.R Euasonyiro- Suguroi Block IX/ 9X6.
9. She also deposed that the two parcels of land that she is holding in trust never formed part of the succession proceedings since the larger property had been in the names of her father in law, and had not been transmitted into the name of her late husband. She also contended that she lives with her children in a property registered in her name and hence the leave to sell the properties as sought will not leave the children as destitutes. She annexed her certificate of title for her Muthaiga North property as NNM8, together with discharge of charge.
10. She urged the Court to allow her application, since no prejudice will be suffered by her children who are minors, as the said children will benefit from avoiding conflicts with their cousins, who have prevented her from tilling the land and the said minors will also fully utilize the new property which she is purchasing for them without fear.
11. The Applicant canvassed the Originating Summons through written submissions filed on 26th September 2023, by S.N. Thuku & Associates Advocates.
12. It was submitted that the Application is brought under Order 37 Rule 1(f) and Rules 3 and 14 of the [Civil Procedure Rules](#) which states:

“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 creditors, 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 chamber for such relief of 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---

.....

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

13. It was further submitted that Order 37 Rule 4, provides as follows;

“any mortgagee or mortgagor , whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge , or any person having the right to foreclose or redeem any mortgage , whether legal or equitable, may take out as of course an originating summons or kind following as may be by the summons specified , and as the circumstances of the case may require; that is to say, sale , foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee”

14. It was further submitted that by dint of the above provisions of law, then this Court has jurisdiction to determine this matter. It was also the Applicant’s further submissions that the Trustee Act Cap 167, Laws of Kenya makes provisions for a trustee to exercise any powers on investment including, sale or raising money through sale, maintenance of property and its income, application of income, vesting of property once sold. Further, that the Court has authority vested on it by dint of Section 56 of the Trustee Act to authorise any dealings with the trust property.

15. It was also submitted that a trustee is given power to sell property held in trust by virtue of Section 13 of the Trustee Act, which provides that;

“where a trust for sale or a power of sale of property is vested on 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 or sale, and to buy in any auction or to rescind any contract for sale and the resell, without being answerable for any loss”

16. Further that Section 17 of the Trustee Act gives a trustee power to raise money via sale or mortgage and that the Court is conferred with power to determine application for leave to sell property or any other dealings on property subject to trust on Section 56 of the said Act.

17. The Applicant submitted that she holds the two parcels of land in trust for her children, and she now wants to sell them for purposes of purchasing another property being Euasonyiro Suguroi Block IX/9X6. She relied on the case of DKK vs DKK (as Trustee of SBN) 2021 eKLR, where the Court held;

“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."

18. She also relied on the case of *Re-Eunice Wanjeri Njenga* ELC Misc Civil Suit No. 62 of 2013 (2013) eKLR, where the Court held;

"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."

19. 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.
20. 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.
21. In conclusion, the Applicant submitted that the application herein is made in the best interest of the minors herein and within the confines of the law and therefore, it should be allowed as prayed.
22. The Court has carefully considered the instant Originating Summons and the annexures thereto and finds as follows;
23. The Originating Summons is premised to be brought under the provision of Order 37 Rule 1 of the *Civil Procedure Rules* which provides;

1. Who may take out Originating Summons and in respect of what matters;

The executor or administrator of a deceased person or any of them and the trustees under any deed or instrument or any of them and any person to be interested in the relief sought as a creditor, devisee, legatee, heir or legal representative of a deceased person or as a 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 aforesaid, may take out as of course, on 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 in trust of any of the following questions;

a)

a.



- b.
- c.
- d.
- f) The approval of a Sale purchase, compromise or other transactions.

24. This Originating Summons is thus brought under Order 37 Rule 1(f) quoted above.

25. Further the application is anchored under Section 13 of the *Trustee Act*, which provides that

“ 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..... subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit.....”

26. The Applicant herein has averred that she is the biological mother of the two named minors and she attached their birth certificates to the summons. She also contended that her husband KGM passed on 13th May 2016, as per the Death Certificate annexed thereto. That after the death of her husband, she filed a Succession Cause No. 3 of 2019 at Murang’a CMs Court. A Certificate of Confirmed Grant was attached to the Summons. She also contended that land parcels No. Loc.10/Wanjengi/15XX and 15XX, were registered in her name to hold them in trust for the two minors JMG and SMG, as per the attached copies of the title deeds. That she now wants to sell the two parcels of land, so that she can buy a bigger portion at Euasonyiro - Suguroi area as per the annexed Sale Agreement, and which land will be away from her toxic family members. She also availed evidence that she lives with the two minors at Muthaiga North Estate – Nairobi on a parcel of land owned by herself and therefore the sale of these two parcels of land will not leave the two minors destitutes.

27. There is no doubt that the Applicant herein is the biological mother to the two minors, and she also inherited several properties from her deceased husband, as is evident from the Confirmed Grant. She also averred that she lives in Muthaiga North Estate with the two minors herein and she attached a certificate of title to that effect.

28. There is also no doubt that the Applicant has entered into a sale agreement with Crane Hardware Ltd to sell to it the two parcels of land Loc.10/Wanjengi/15XX &15XX, which she holds in trust for the two minors herein for Kshs. 1,500,000/=. There is no doubt too that the Applicant also has entered into a Sale agreement with one Nickson Wanjohi Kamore, to purchase from him land parcel No. Euasonyiro Suguroi Block IX/9X6, measuring 1.736 Ha. She averred that she intends to use the proceeds from the sale of the minors two parcels of land to purchase the Euasonyiro land. It is her contention that this Euasonyiro land is big and that she will also be away from her toxic family members, who have been hostile to her since the demise of her husband.

29. Order 37 Rule 1(f) of the *Civil Procedure Rules*, grants the Applicant a leeway via an Originating Summons to apply for sale of such land held in trust. It is evident that Section 56(1) and (3) of the *Trustee Act* allows the Applicant to file such an application in Court. It states as follows; -

“ 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.

(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.”

30. From the above quoted provisions of law, the Court has discretionary power to allow a trustee to deal with the property held in trust such as the two parcels of land herein, in a manner that would be beneficial to the minors.
31. The Applicant herein is holding the two parcels of land in trust for the two minors and she needs to take care of them and their needs and also ensuring that whatever she does is for their best interest. The Applicant has alleged that she lives with the minors and that she is only selling the two parcels of land to move the minors from a toxic environment, so that they can live peacefully. She has averred that she will not allow the two minors to be destitutes.
32. The Applicant has given plausible reason which has necessitated her to sell the two parcels of land. There is evidence that she is also in the process of purchasing another bigger parcel of land at Euasonyiro area. There is evidence that the Applicant owns a piece of land in Nairobi, Muthaiga North Estate where she lives with the two Minors.
33. For the above reasons, the Court finds and holds that the instant Originating Summons is merited and is allowed entirely with costs being in the cause.
34. The Applicant herein is only a trustee and she must act in the best interest of the two minors herein who are her children with the late KGM. Therefore, the Applicant is directed to deposit a copy of the purchased property being Euasonyiro – Sugurio Block IX/9X6, in Court after the said transaction has been finalised.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF NOVEMBER, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Thuku for the Exparte/Applicant

Joel Njonjo - Court Assistant

