



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**MISC. APP. NO. 126 OF 2014.**

**IN THE MATTER OF THE LAND ACT 2012.**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF THE ENVIRONMENT & LAND COURT ACT, 2011**

**AND**

**IN THE MATTER OF THE LAND CONTROL ACT CAP 302 LAWS OF KENYA.**

**AND**

**IN THE MATTER OF L.R.NOS. [PARTICULARS WITHHELD] IN THE NAMES OF T W M, D M, K M, D M (MINOR) & D K (MINOR).**

**AND**

**IN THE MATTER OF CHARGE OVER L.R.NOS. [PARTICULARS WITHHELD]**

**AND**

**IN THE MATTER OF T W M & K M W-**

**BORROWERS.**

**AND**

**AND IN THE MATTER OF AN APPLICATION**

**BY T W M, D M & K M ..... APPLICANTS.**

**R U L I N G.**

This ruling relates to the exparte application through the notice of motion dated 14<sup>th</sup> October, 2014 filed by T W M, D M and K M , thereafter referred to as 1<sup>st</sup> and 3<sup>rd</sup> Applicants through M/S. Maloba & co. Advocates . The application is based on the following five grounds on the face of the application:

“a) L.R.NO. [ particulars withheld] registered in joint names of 1<sup>st</sup> Applicant and 2<sup>nd</sup> (two) minors, namely D M and D K.

b) The 1<sup>st</sup> Applicant is the biological parent /mother of the minor children.

c) The applicant wish to use titles to the above land parcels as collateral to obtain a loan of Kshs.7,000,000/= from the Kenya Women Micro Finance Bank Limited to boost their business which business they use to sustain their family.

d) Due to the age of the children, they cannot give consent to charge as required by the law hence the need to seek for leave from this court.

e) The applicants will properly apply the money.”

The application is also supported by the supporting and further affidavits of T W M sworn on 14<sup>th</sup> and 22<sup>nd</sup> October, 2014 respectively in which she among others depones to the following;

- a. That the deponent and K M W who are husband and wife, are the parents to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants and the two minors namely, D M and D K.
- b. That Land parcels [particulars withheld] were transferred by K M W to the Applicants and the two minors in the year 2010.
- c. That the deponent and K M W are desirous of borrowing Kshs.7,000,000/= from Kenya Women Micro Finance Bank Limited.
- d. That the deponent and her husband desires to charge the three parcels of land as collateral for the loan in (c) above and have obtained the consent of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants who are of majority age.
- e. That the applicants pray for this court to give the consent on behalf of the two minors to charge the three properties.
- f. That the 1<sup>st</sup> Applicant and her husband as the borrowers have under taken to **“apply the loan wisely for the benefit of our business and our children as a whole.”**

The application is indicated to be brought under sections 3A of the Civil Procedure Act, 13 of the Environment and Land Court Act, 2011, 47 of the Land Registration Act 2012 and sections 78 and 80 of the Land Act 2012.

The court has carefully considered the grounds on the application, submission by counsel, contents of the supporting and further affidavits and find as follows:

1. That none of the sections of the law upon which this application is brought, confers upon this court the power to give consent on behalf of minors to the charging of the immovable properties registered in their names as collateral for loans. The provision of section 3A of the Civil Procedure Act restates the inherent powers of the court for the ends of justice and to prevent abuse of courts process while section 78 and 80 of the Land Act deals with the application of Part VII of the Act to the charges and the matters that must be set out in a charge among others. The provisions of section 13 of the Environment and Land Court Act set out the jurisdiction of this court is pursuant to Article 162 (2) (b) of the Constitution. The powers set out under section 13 above does not include giving consent to charge on behalf of minors. The provision of section 47 of the Land Registration Act deals with the Registration of minors in land. It states as follows;

**“Minors.**

**47. 1) The name of a person under the age of eighteen years may be entered in the register to enable the minor’s interest to be held in trust and shall be registered under the names of the guardian either on first registration or as a transferee or on transmission.**

**2) Nothing in this section enables a person under eighteen and if the Registrar years of age to deal with land or any interest in land by virtue of such registration and if the Registrar knows a child has been registered, the Registrar shall enter a restriction accordingly.**

**3) If a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, that disposition may not be set aside only on the grounds of minority.”**

2. That the transfer of the three suit land to the minors and the three others can only be taken as a gift by K M W who is their father and husband. The provisions of section 48 and 49 of the Land Registration Act provide on how land interests in land registered in the names of persons with legal incapacity like two minors herein can be dealt with.
3. That as the titles of the minors to the suit lands is not through a guardian, any person wishing to have a dealing over the minors interest would need to make an application in the appropriate court to be appointed as such first and thereafter have such appointment registered in the title. The Applicants herein are not registered on the three titles as trustees of the minors
4. That had the registration of the minors with the three parcels of land been through an order of the court, like through Probate proceedings, then the court would have retained jurisdiction to have a say on the disposition of the properties as provided for example under section 37 of the Law of Succession Act Chapter 160 of Laws of Kenya.
5. That from the foregoing, the court finds no merit in the exparte application and the same is dismissed.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 30<sup>TH</sup> DAY OF OCTOBER, 2014.**

**IN THE PRESENCE OF;- NONE.**

**JUDGE.**