



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO 486 OF 2014

IN THE MATTER OF CHARGE TO LAND REFERENCE NUMBER 209/10611/76 (I.R. 77328)
HELD BY JOSEPHINE WANGUI ITHONDEKA IN TRUST FOR HER CHILDREN

AND

IN THE MATTER OF AN APPLICATION BY JOSEPHINE WANGUI ITHONDEKA FOR
CONSENT TO CHARGE THE ABOVE PROPERTY TO HOUSING FINANCE COMPANY OF
KENYA LIMITED

RULING

1. The Applicant's Notice of Motion application dated and filed on 9th October 2014 was brought pursuant to the provisions of Section 3A of the Civil Procedure Act. Prayer (1) was spent. It sought the following remaining orders:-
 1. Spent.
 2. **THAT leave be granted to the Applicant to charge the land known as Land Reference Number 209/10611/76 (I.R. 77328) to guarantee the loan owned by Applicant's family company known as Visions Enterprises Limited.**
 3. **THAT upon granting of prayer (1) above, the Land Registrar be authorised to effect the registration of the charge.**
 4. **THAT the costs of this application be in the cause.**
2. The Applicant's case was that Visions Enterprises Limited (hereinafter referred to as "the Company") had two (2) shareholders, herself and her son Dennis Brian Waweru. The Company was to be advanced monies by Housing Finance Company of Kenya Limited, proceeds she wanted develop the company with a view to reaping more benefits which would help her children.
3. Her two (2) children who were adults had consented to the advancement of the said loan. However, the loan could not be advanced as Wairimu Waweru was a minor and could not give her consent. It was for that reason that she filed the application herein so as to be granted leave of the court to enable her charge the aforesaid property.
4. She referred the court Sections 17 and 56 of the Trustees Act Cap 167 (laws of Kenya) which are in *pari materia* with Sections 32 and 36 of the Trust of Land Act which give the trustee power to raise money by way of mortgage and/or charge.

LEGAL ANALYSIS

5. Section 17 of the Trustees Act provides as follows:-

1. **Where the 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 of the trust property for the time being in possession.**

6. Section 56 of the Trustees Act stipulates as follows:-

1. **Where, in the management or administration of any property of any property vested in trustees, any sale, lease or mortgage, 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 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 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.**

7. Section 32 of the Trust of Lands Act Cap 290 (laws of Kenya) provides as follows:-

1. **Where money is required for any of the following purposes-**
 - a. **Discharging an encumbrance on the land held upon trust for sale or part thereof;**
 - b. **Paying for any improvement authorised by the Act or by the instrument, if any, creating the trust for sale;**
 - c. **Equality of exchange;**
 - d. **Payment of the costs of any transaction authorized by this section or section 31.**

8. Section 36 of the Trust of Lands Act stipulates as follows:-

1. **Any transaction (which includes sale, mortgage etc.emphasis court) affecting or concerning land held upon trust for sale, or any part thereof, or any other land (not being a transaction otherwise authorized by this Act, or by the instrument, if any creating the trust for sale) which in the opinion of the court would be for the benefit of the land held upon trust for sale, or any part thereof, or the persons interested under the trust for sale, may, under an order of the court, be effected by trustees for sale, if it is one which could have been validly effected by an absolute owner.**

9. The court deemed it necessary to reproduce the sections with a view to establishing whether indeed the Applicant herein could use the trust property as security for another person, in this case, the Company.

10. Under Section 32 of the Trust of Land Act, the power to raise money by mortgage or charge would only arise if it was for purposes of discharging an encumbrance on the land held upon trust or for improvements as provided by the Act. Under Section 17 of the Trustees Act, the trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money for the benefit of the beneficiaries.

11. In the case of **In Re: Eunice Wanjeri Njenga [2013] eKLR** that was relied upon by the Applicant, the trustee therein intended to use the proceeds of the sale to invest in the children's school fees, to invest the remaining portion to the trust property and to purchase a larger portion of land. That was investment that fell within the investments that were contemplated under Section 4 (1) of the Trustees Act.

12. Evidently, Section 36 of the Trust of Land Act is not applicable in this case as the subject property

- is not subject to any sale. In any event, the court would only grant orders if it was of the opinion that the transaction would be for the benefit of the beneficiaries for whom the land was held in trust for sale which was quite distinguishable from the facts of this case.
13. The purpose of the mortgage to be applied for by the Applicant herein was to be utilised towards improving the Company which would in turn, benefit all the beneficiaries. This was not a purpose that was recognised by the Trust of Land Act. The beneficiary of the monies to be obtained by the Applicant is the Company in which Christine Maureen Wanjiku Waweru and Wairimu Waweru are not shareholders or directors. In fact, the letter dated 22nd September 2014 exhibit marked “JW 1” shows that the purpose of the facility was “**Vuna Hela- Vanilla**” and the applicant of the loan, was the Company.
 14. The reality on the ground is that if the Company defaulted in paying the mortgage, it would automatically lead to the financial institution exercising its statutory power of sale as the subject property was to be used as the security. For all purposes and intent, it would be deemed to be a commodity that was placed in the open market and if disposed of, it would be prejudicial to Wairimu Waweru who has not been shown to benefit directly from such a transaction or to have given consent for the charging of the subject property.
 15. The above notwithstanding, the court noted that the signatures in Dennis Brian Waweru Mwangi’s Identity Card, the letter of 22nd September 2014 and his Affidavit sworn on 8th October 2014 are different. His signature and that of Christine Maureen Wanjiku Mwangi in the Affidavit also sworn on 8th October 2014 bear strong similarities.
 16. Whilst the court does not purport to be an expert document examiner, a careful perusal of the Identity Card of Dennis Brian Waweru Mwangi, the letter dated 22nd September 2014 and the Affidavits of Dennis Brian Waweru Mwangi and Christine Maureen Wanjiku Mwangi reveal marked differences in the signatures appended thereto.
 17. Accordingly, having considered the Applicant’s application, affidavit evidence and written submissions that were dated on 22nd October 2014 and filed on 23rd October 2014 the court has come to the conclusion that the taking of a mortgage to invest in the Company was not an investment as was envisaged in Section 4(1) of the Trustees Act. The court was also not satisfied that the aforesaid signatures signified acceptance of both Dennis Brian Waweru Mwangi and Christine Maureen Wanjiku Mwangi for the Applicant to apply for the financial facility with the financial institution.
 18. For the foregoing reasons, the court is not inclined to grant the orders sought in the application herein.

DISPOSITION

19. For the foregoing reasons, the upshot of this court’s ruling is that the Plaintiffs’ Notice of Motion application dated and filed on 9th October 2014 was not merited and the same is hereby dismissed. There will be no order as to costs as this was an *ex parte* application.
20. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of October 2014

J. KAMAU

JUDGE