



REPUBLIC OF KENYA



KENYA LAW
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**In re MWG & BGN (Minor) (Environment and Land Miscellaneous
Application E005 of 2022) [2022] KEELC 2805 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2022**

LN GACHERU, J

MAY 26, 2022

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO REGISTER
A CHARGE OVER PROPERTY TITLE NO. LOC.X/GAKOIGO/XXX**

IN THE MATTER OF MWG & BGN(MINOR)

IN THE MATTER OF

MWG 1ST APPLICANT
BKN 2ND APPLICANT
MWN 3RD APPLICANT

RULING

1. By Chamber Summons Application dated March 7, 2022, and filed in this court on the March 29, 2022, the applicants sought for the following orders;
 1. Spent
 2. That this honourable be pleased to grant consent to charge Title No. Loc.x/Gakoigo/xxx, on behalf of BGN (Minor) and the Registrar of lands to effect the said conveyancing documents
 3. That the costs of this application be provided for.
2. The summons are premised on the grounds, facts and the particulars set out on the face of it and a supporting affidavit of MWG, sworn on the March 7, 2022. It is the Applicants' averments that MWG, is the registered proprietor of Loc.x/ Gakoigo/xxxx, and which she holds in trust for BKN, MWN & BWN, her children.
3. It is the deponent's disposition that that her co-applicants are students attending college and/ or university while BWN, is a minor and that all of them depend on her for their financial needs. She depones in paragraphs 5, 6 & 8 on the source of her monthly income and avers that she has put up



rental houses on the suit premise and which they are desirous of completing the constructions thereon so as to increase the family income. Further, that to complete the construction, she intends to secure a loan facility with Equity Bank, whereby the suit property will be used as security. The Applicant covenants that as per the loan offer marked “MWG 11 & MWG12”, she will be required to pay Kshs. 56,883/= monthly to service the loan, an amount she has the financial ability to raise. Additionally, that the suit property is valued above the charge amount and in an event of a forced sale, the minor will not be prejudiced. It is her averments that unless issued with an order by this court to transact on behalf of the minor, she will not be able to obtain the relevant consent or register the charge at the Land Registry. The suit is miscellaneous one hence undefended.

4. The court gave directions on May 11, 2022, that the summons be dispensed with by way of written submissions. The applicants filed their brief written submissions dated May 20, 2022, on the even date and raised two issues for determination by this court.
5. It is the applicants submissions that Margaret Wanjiru Githaka, became the registered owner of the suit property vide Mombasa Succession Cause No. 295 of 2011, where she holds the property in trust for her children, BKN, MWN & BWN.
6. On whether leave should be granted, the applicants submit on the relevant provisions of the Trustees Act that gives power to the applicants on need basis to do such and act for the benefit of beneficiaries. Further, that this court has the authority vested on it by sections 56 and 57 of the *Trustees Act* to grant the orders sought. They invite this court to be guided by the case of *Bennetah Mukimba Wafukho v The Land Registrar, Trans Nzoia & others*, Kitale Misc App No 8 of 2019, where the court pronounced itself on grant of leave in similar circumstance.
7. On whether leave should be granted to the Land Registrar Murang’a, the Applicants submit that this court do so in realization of the provisions of section 48(4) of the *Land Registration Act*. In the end, they submit that to fully provide for the children, it is important that a loan be taken out for purposes of increasing the source of income.
8. This court has looked at the application and the affidavit in support as well as the attachments therein and notes that the suit property is indeed a trust property and one of the beneficiaries, BWN, is a minor. As per the attached offer for loan; a deed of assignment of rental income with respect to buildings on the suit property and an indemnity from BKN and MWN will be used as security.
9. Order 37 Rules 1 & 2 of the *Civil Procedure Rules* makes provisions on the manner in which a trustee may approach Court on issues pertaining administration of trust property.
10. This power is also donated to this court by section 56 of the *Trustees Act*, which also gives the court the authority to rescind such an order as and when need arises. It is trite that a trustee can neither interfere with the property of a beneficiary nor do such an act that will jeopardize the rights of the trustees. The applicants wishes to take out a loan to develop the suit property in a bid to increase her income for the interest of her children. She covenants that she has the financial strength to service the loan and has despite not adducing evidence deponed that she has a cumulative monthly income of Kshs. 155,000/=.
11. Section 17 of the *Trustees Act* gives power to a trustee to do that act to raise money including calling in all or any part of the trust property.
12. 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.



13. 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.
14. Further, section 56(1) and (3) of the *Trustees Act*, cap 167 Laws of Kenya provides:-
 - (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)
 - 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.”
15. The other two applicants are alleged to be college students, but no evidence has been placed before this Court in support of this. However, as per the attached copy of identification cards, it is safe to conclude that BK & MAW are college students. There is attached a copy of a minor’s birth certificate showing that he is thirteen years old. According to their mother, the children solely depend on her and she intends to take out a loan so as to develop the suit property by completing construction of the rental houses. From the Valuation Report attached and marked “MWG13” which this court has no reason to doubt, the residential houses on the suit property are 70% complete. This court is satisfied that the applicant’s disposition coincides with the documents attached and has no reason to doubt her authenticity. This is an uncontroverted cause and the court cannot take the evidence of the applicant on the face value without interrogating the facts.
16. It is important to point out that the applicants had moved court in Mombasa Miscellaneous 2 of 2021 *In re MWG, BKN, MWN & BGN (Minor)* [2021] eKLR, but the court declined to grant the orders. The circumstances in the foregoing suit were different from the present in the sense that the applicant in the Mombasa cause wanted to take out a loan over title for land, Mombasa/MN/ Block 1/xxx, in a bid to develop the suit property. The court opined that it could not grant the orders as it was not sure whether the monies were to be used to develop land held in trust for the co-applicants therein and the minor, the applicant had not furnished the said court with a copy of title over Loc. X/Gakoigo/xxx, which she intended to develop.
17. Presently, it is evident that Loc. x/Gakoigo/xxx, is land held in trust for the minor and the co-applicants and any improvement thereon will be for their interest. This court has no reason to deny the applicants the orders sought and therefore proceeds to grant prayer 2 of the Summons.
18. Having carefully considered the instant chamber summons application dated March 7, 2022, the court finds it merited and it is allowed entirely in terms of prayer No. 2 with costs being in the cause.
19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF MAY, 2022.



L. GACHERU

JUDGE

Delivered online in the presence of; -

M/s Wachira H/B for Mr Kangata for the Applicants

Alex Mugo - Court Assistant

L. GACHERU

JUDGE

