



**Kibathi & another v Kibathi & another (As trustees of David Gathuku Kibathi)
(Originating Summons E014 of 2022) [2022] KEELC 3560 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3560 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ORIGINATING SUMMONS E014 OF 2022**

JO MBOYA, J

MAY 19, 2022

BETWEEN

GATHUKU JOSEPH KIBATHI 1ST APPLICANT

MARY NYATHIKA KIBATHI 2ND APPLICANT

AND

MARY NYATHIKA KIBATHI APPLICANT

AND

GATHUKU JOSEPH KIBATHI RESPONDENT

AS TRUSTEES OF DAVID GATHUKU KIBATHI

JUDGMENT

Introduction

1. Vide originating summons dated the April 1, 2022, the applicants herein have sought for the following reliefs;
 - a. Gathuku Joseph Kibathi and Mary Nyathika Kibathi of Post Office Box Number 21098 – 00506 Nairobi be appointed and constituted as Guardians ad Litem of the minor.
 - b. The Honourable Court be pleased to authorize the sale of LR No Dagoreti/Riruta/4753, (hereinafter referred to as the suit property) and the proceeds realized from the sale of the same be applied in the settlement of the following;
 - I. Costs of and incidental to the transfer of the suit property.
 - II. The payment of school fees for the minor in this suit at St. Mary School.



- III. The investment of the balance of the sale in an in-investment scheme or call account for the purpose of future application for the education for the minor.
 - c. The honourable court be pleased to issue directions on the service of the originating summons herein.
 - d. Cost of and incidental to this application be provided for.
2. The subject application is premised on the various grounds enumerated at the foot of the application and same is further supported by the affidavit of one, Gathuku Joseph Kibathi, sworn on the April 1, 2022.

Deposition by the Applicants’:

3. Vide supporting affidavit sworn on the April 1, 2022, Gathuku Joseph Kibathi, who is the 1st applicant, has averred that the 2nd applicant and himself are the biological parents of the suit minor.
4. Further, the deponent has also averred that the Property, namely L.R No. Dagoreti/Riruta/4753, which is the suit property herein was transferred to in the joint names of the 2nd applicant and himself, albeit to hold on Trust for the suit minor.
5. On the other hand, the deponent has also stated that the transfer and registration of the suit property in the names of the 2nd applicant and himself, was to enable same to hold the suit property on trust for the suit minor and in particular, to cater for the educational needs and interests of the suit minor.
6. In any event, the deponent has further averred that the suit minor has been attending and receiving Educational instruction at St Mary School, wherein the suit minor is currently at year 11, but however the 2nd applicant and himself have since been experiencing financial difficulties and as a result of same, the minor has accumulated School fees Arrears.
7. On the other hand, the deponent has averred, that based on the accumulated school fees arrears, the suit minor, on whose behalf the suit property is held on trust, is likely to be driven out of school.
8. Further, the deponent has averred that owing to the financial constraints the 2nd applicant and himself were experiencing, same deliberated on the need and necessity to sell and/or dispose of the suit property and in this regard, same have since procured and identified a Purchaser, who is willing to purchase the suit property.
9. Nevertheless, the deponent has further stated that upon the identification of the suitable buyer the 2nd applicant and himself, proceeded to and entered into a sale agreement, wherein it was agreed that the suit property would be sold at the sum of Kshs.8, 000, 000/= only. For coherence, the deponent has attached a copy of the Sale agreement to that effect.
10. Based on the foregoing, the deponent has averred that what is now outstanding, to enable the Sale transaction to be progressed to conclusion, is the authority and/or authorization from this court to sanction the intended sale.
11. Finally, the deponent has averred that unless the authorization sought is granted, the intended Sale shall not be able to go through and in the premises, the Educational interests and welfare of the suit minor, will be prejudiced.



Submissions:

12. The originating summons herein came up for hearing on the May 16, 2022, and on which day same was canvassed vide oral submissions on behalf of the applicants.
13. It was the applicants' submissions that the suit property was transferred to and registered in the names of the applicants, albeit to hold same on trust for the suit minor.
14. On the other hand, it was further submitted that by virtue of being trust property, the suit property cannot be sold, disposed of and/or alienated in any manner whatsoever, without the authority and/or sanction of the court.
15. Other than the foregoing, counsel for the applicants' also submitted that it would be in the interest of the suit minor, if the suit property is sold, to facilitate the realization of the proceeds to cover the Minor's School fees and other Educational needs.
16. Finally, Counsel for the applicants' invited the court to take note of the provisions of section 13, 17 and 56 of the Trustees Act, Chapter 167 Laws of Kenya and thereafter, to allow the Suit Application.

Issues for Determination:

17. Having reviewed the originating summons dated the April 1, 2022, the supporting affidavit thereto and having similarly appraised the oral submissions rendered on behalf of the applicants, the following issues are germane for determination.
 - a. Whether the Suit Property is held on Trust for and on behalf of the suit minor and if so, whether same can be disposed of by the Applicants.
 - b. Whether the Intended sale and/or alienation shall be in the Interest of the suit Minor.

Analysis and Determination

Issue Number 1: Whether the suit property is held on Trust for and on behalf of the suit minor and if so, whether same can be disposed of by the Applicants.

18. From the supporting affidavit sworn on the April 1, 2022, it is evident and/or common ground that the suit property herein was transferred to and registered in the names of the applicants, albeit to hold on trust for the suit minor.
19. To vindicate and/or protect the interest of the suit minor, the transfer instrument which was executed by the grandmother of the suit minor and which facilitated the transfer of the suit property in favor of the applicants clearly constituted the applicants as Trustees.
20. On the other hand, upon the lodgment and registration of the Transfer instrument, the resultant title document which was issued denoting the applicants as the registered owners, clearly stipulated that same were registered as Trustees.
21. Based on the foregoing, there is no gainsaying that the suit property is indeed trust property held by the applicants, merely as Trustees of the suit minor.
22. In a nutshell, the suit property is therefore trust property and the applicants herein, have limited powers and/or mandate over and in respect of same.



23. Having authenticated that the suit property is Trust property, the next question that begs to be addressed, is whether same can be sold, disposed of and/or alienated by the Trustees, namely the applicants herein.
24. As concerns the powers of Trustees to deal with and/or dispose of trust property, which is bestowed under their custody, it is imperative to take cognizance of the provisions of sections 13 & 17 of the Trustees Act, which provides as hereunder;
13. Power of trustees for sale to sell by auction, etc.
- (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.
17. Power to raise money by sale, mortgage, etc.
- (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.
25. Nevertheless, it is imperative to note that the power of trustee to sell and/or alienate the trust property, in terms of section 13 and 17 (supra) is restricted to where the trust instrument, contains a provision and/or a clause which authorizes the Trustees to sell and or dispose of the suit property.
26. However, in respect of the subject matter, the applicants herein have not placed before the court a copy of the instrument creating the trust, so as to discern whether any power to sell and/or dispose of the Suit Property was granted to and/ or was vested in the applicants pursuant to and/or by virtue of the instrument.
27. Notwithstanding the foregoing, it is important to note that even where the instrument creating the trust does not confer authority to the trustees to sell, dispose of and/or charge the trust property, the court is bestowed with certain powers to authorize and/or sanction dealings with the Trust property.
28. In this regard, it is worthy to note and take cognizance of the Provisions of sections 56 of Trustees Act, Chapter 267 Laws of Kenya. For convenience, the provisions of section 56 (Supra) are reproduced as hereunder;
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.

29. Premised on the foregoing, it is therefore the courts conclusion that even where the instruments creating the trust, does not donate and/or confer power on the Trustees to sell or alienate the suit property, the court is bestowed jurisdiction to authorize and/or sanction alienation or such other dealings with the trust property, if such dealings shall be in the Interest of the designated beneficiaries.
30. In any event, it is not lost on the court that the general duty and/or powers of the trustees in relation to the suit property are inter-alia, to safeguard the assets of the trust, invest any such monies in his/hers, to distribute the assets to the beneficiary and also to satisfy any claims by and/or on behalf of the beneficiaries.
31. In regards to the foregoing observation, I adopt and endorse the holding of the court in the case of *Re- Eunice Wanjeri Wanjenga* (2013) eKLR, where the court held as hereunder;

‘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 immovable property in Kenya and provides for certain conditions as to the tenure of the land to be purchased.’

32. Having reviewed the provisions of section 13, 17 and 56 of the *Trustees Act*, the court comes to the conclusion that the Applicants herein as Trustees of the suit minor, can be authorized to sell, and/or dispose of and or deal with the same, provided that the intended dealings are geared towards the satisfaction of the Interests of designated beneficiaries.

Issue Number 2: Whether the Intended sale and/or alienation of the Trust Property shall be in the Interest of the suit minor.

33. It has been stated that the sale and disposition of the suit property is calculated to attract and/or accrue proceeds which are to be used in off-setting of the school Fees arrears and further school fees and in the



investment of the Balance of same , in an appropriate scheme to ensure that the future Educational needs of the suit minor are taken care of.

34. Essentially, the purpose of the realization and disposal of the suit property is towards taking care of and protecting the Suit minor, who is the beneficiary of the suit property.
35. In the premises, one needs to take into account the provisions of section 4 (1) and (2) of the *Children's Act*, 2001, which provides as hereunder;
 - (1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.
 - (2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
36. Other than the foregoing provision, it is also imperative to refer to the provision of article 53 (2) of *the Constitution* 2010, which provides as follows;
 - (2) A child's best interests are of paramount importance in every matter concerning the child.
37. The bottom line of the provisions that have been alluded to in the preceding paragraphs under score the centrality of the best interest of the child, namely, the suit minor herein and consequently, it behooves the court to ensure that any intended action that propagates the best interests of the child, are authorized, embraced and/or sanctioned.
38. In the premises, given that the intended sale and/or dealing in respect of the suit property, is calculated to generate funds and/or resources to enable the suit minor to further his education, same is therefore in accord with the spirit and values espoused vide article 53(2) of *the Constitution* 2010.
39. In a nutshell, the court concurs with the proposal by the applicants herein to sell and dispose of the suit property, provided however that the proceeds realized therefrom shall be used and utilized to propagate the Best interests of the Minor and not otherwise.

Final Disposition

40. Having considered and addressed the itemized issues for determination, it is therefore appropriate to dispose of the subject originating summons by making appropriate orders.
41. Taking into account the deliberations outlined herein before, the court comes to the conclusion that the originating summons is meritorious and same is hereby allowed.
42. Consequently, the court makes the following orders;
 - a. The applicants herein be and are hereby authorized to sell, dispose of and/or alienate LR No Dagoreti/Riruta/4753 and the sale proceeds arising therefrom shall be used for purposes of defraying the costs, if any of the transfer of the suit property, payment of the accumulated fee arrears and any other fees for and on behalf of the suit minor.
 - b. Any excess and/or balance outstanding after of the payment of the accumulated fee arrears and further fees on behalf of the suit minor shall be invested in suitable investment scheme to be identified by the applicants and which scheme shall be operated solely for the benefit of the Educational interest of the suit minor.
 - c. The subject application was precipitated by the need to protect the interests of the suit minor. Consequently the costs if any, shall be borne out of the proceeds of the sale.



43. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms. T. J Michaels for the Applicants

Mr. Joseph Kibathi – 1ST Applicant present.

