



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 428 OF 2013(O.S)

IN THE MATTER OF THE TRUSTEE ACT CAP 167 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE PROPERTY KNOWN AS L.R NO. [PARTICULARS WITHHELD]

AND

**IN THE MATTER OF A TRUST DEED DATED 18TH MARCH 1998 IN RESPECT OF FLAT
NUMBER 4 ERECTED ON THE PROPERTY KNOWN AS L.R. NO.[PARTICULARS
WITHHELD] NAIROBI**

M W K..... APPLICANT

VERSUS

M W K

(Through her guardians ad litem

E W K & N K)..... RESPONDENT

JUDGMENT OF THE COURT

The Applicant filed an originating summons dated 2nd April 2013 under the provisions of section 45 of the Trustees Act (Cap 167) and Order 37 Rule 1 of the Civil Procedure Rules seeking the following orders:

1. That this Honourable Court do issue an order vesting the property known as L.R. No. [Particulaes withheld] on M W K;
2. That this Honourable Court do issue an order vesting Flat No. 4 erected on the property known as L.R. No. [particulars withheld] Nairobi on M W K;
3. That M W K be registered as proprietor of the property known as L.R. No. [particulars withheld].
4. That MW K be registered as proprietor of Flat No. 4 erected on the property known as L.R. No. [particulars withheld] Nairobi;

The Applicant also filed a Notice of Motion of the same date seeking orders that E W K and N K be appointed joint guardians ad litem of M W K, the Respondent herein. The Notice of Motion was brought under the provisions of section 3A of the Civil Procedure Act, Order 32 Rules 3, 4, 5 and 15 and Order 51 rule 1 of the Civil Procedure Rules. The said orders were accordingly granted by this court on 8th July

2013, after the proposed guardians ad litem consented to their appointment both orally in court and through a written consent dated 24th April 2013 and filed in court on 25th April 2013, in accordance with the requirements of Order 32 of the Civil Procedure Rules.

The parties agreed to proceed with the prosecution of the Originating Summons by way of affidavit evidence, and requested for judgment on the basis of the affidavits filed at the hearing held on 29th July 2013. The Originating Summons is basically unopposed, but it is prudent to briefly lay out the grounds for the suit and the responses by the guardians ad litem.

The Originating Summons was supported by an affidavit sworn by the Applicant on 2nd April 2013 wherein she stated that she previously used the name W K and added the name M after her baptism. She annexed copies of her birth certificate, passport and a statutory declaration she declared on 7th July 2005 to demonstrate that her full name is M W K. She further stated that all references to W K and M W K in the documents relied upon in the suit herein are references to one and the same person.

The Originating Summons seeks vesting orders with respect to two properties. The first property is claimed by the Applicant as a result of an agreement for sale and a transfer made on 15th May, 1991, by the Respondent, who was her grand-mother, who purchased the property known as L.R. No. [particulars withheld] (hereinafter referred to “the 1st Trust property”) in the Applicant’s name and as her trustee from J K M and R M. The Respondent was subsequently registered as proprietor as the Applicant’s trustee of the 1st Trust Property and issued with a Certificate of Title registered on 11th July 1991. The Applicant annexed to her supporting affidavit a copy of the said Agreement for Sale and Transfer marked Exhibit “MWK2”, as well as a copy of the said Certificate of Title that was marked Exhibit “MWK3”.

The Applicant also claims a second property namely Flat No. 4 erected on the property known as L.R. No. [particulars withheld] Nairobi (hereinafter referred to “the 2nd Trust property”) by way of trust created in her favour by a Trust Deed dated 18th March 1998 executed by her father, P J K (since deceased) and the Respondent. The two executors were appointed as trustees by the said Trust Deed and declared *inter alia* that they held the 2nd Trust Property in trust for the Applicant, subject to covenants and conditions mentioned in a lease dated 10th December 1997 in respect of the 2nd Trust property. Further, that in the above-mentioned Trust Deed, the Respondent and the Applicant’s deceased father declared that they would, transfer the Lease and the 2nd Trust Property to the Applicant after she attained the age of 25 years, or to such person or persons as she would direct or appoint.

The Applicant also stated that her deceased father and the Respondent were registered as joint proprietors of 1 ordinary share in B H M L pursuant to the aforementioned lease. The Applicant’s father subsequently passed on 15th September 2005, leaving the Respondent as the sole surviving trustee under the Trust Deed. The Applicant annexed as evidence a copy of the Trust Deed and of the Lease as Exhibit “MWK 4”; a copy of the Share Certificate issued by the Director and Secretary of B H M as Exhibit “MWK 5”; and a copy of her father’s death certificate as Exhibit “MWK 6”. The Applicant further stated that she attained the age of 25 years on 12th June 2009, and became entitled to request the Respondent, as the sole surviving trustee, to transfer the Lease and the 2nd Trust Property to him as set out in the Trust Deed.

However, the Respondent was diagnosed as suffering from a mental disorder sometime in the year 2007, and that on 1st April 2008, this Court (the Honourable Mr. Justice Kubo) made an order in High Court Petition Cause No. 13 of 2008 by which it *inter alia* adjudged the Respondent to be a person suffering from a mental disorder under section 26 of the Mental Health Act, Chapter 248 of the Laws of Kenya, and the guardians ad litem herein were appointed as joint guardians of the Respondent and as joint managers of the Respondent’s Estate. A copy of the said order was annexed as Exhibit “MWK 7”.

The Applicant averred that arising from the facts that the Respondent is the sole trustee in respect of the 1st Trust Property and the sole surviving trustee in respect of the 2nd Trust Property, and that she suffers a disability on account of her being adjudged as suffering from a mental disorder under section 26 of the

Mental Health Act, it has become impossible to get the 1st and 2nd Trust Properties transferred to the Applicant, who is desirous of having the 1st and 2nd Trust Properties vest in her and be registered in her name as sole proprietor.

The guardians ad litem in did not oppose the grant of the orders sought in the Originating Summons, and confirmed that the contents of the Applicants supporting Affidavit in their Replying Affidavit sworn on 19th July 2013 and filed in court on the same date. They further confirmed the current status of the Respondent as averred to by the Applicant, and stated that they have no objection to having the 1st Trust Property and the 2nd Trust Property vested on the Applicant and registered in her name.

The applicable law with regards to the orders sought is section 45 of the Trustees Act and Order 37 Rule 1 of the Civil Procedure Rules. Section 45 of the Trustees Act provides as follows:

“In any of the following cases—

(a) where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;

(b) where a trustee entitled to or possessed of any land or interest therein, whether by way of mortgage or otherwise, or entitled to a contingent right therein, either solely or jointly with any other person -

(i) is under disability; or

(ii) is out of the jurisdiction of the court; or

(iii) cannot be found, or, being a corporation, has been dissolved;

(c) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any interest in land;

(d) where it is uncertain whether the last trustee known to have been entitled to or possessed of any interest in land is living or dead;

(e) where there is no personal representative of a deceased trustee who was entitled to or possessed of any interest in land, or where it is uncertain who is the personal representative of a deceased trustee who was entitled to or possessed of any interest in land;

(f) where a trustee jointly or solely entitled to or possessed of any interest in land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or interest or a release of the right, to convey the land or interest or to release the right, and has wilfully refused or neglected to convey the land or interest or release the right for twenty-eight days after the date of the requirement;

(g) where land or any interest therein is vested in a trustee, whether by way of mortgage or otherwise, and it appears to the court to be expedient;

the court may make an order (in this Act called a vesting order) vesting the land or interest therein in any such person in any such manner and for any such estate or interest as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct:

Provided that—

(i) where the order is consequential on the appointment of a trustee, the land or interest therein shall be vested for such estate as the court may direct in the persons who, on the appointment, are

the trustees; and

(ii) where the order relates to a trustee entitled or formerly entitled jointly with another person, and that trustee is under disability or out of the jurisdiction of the court or cannot be found, or being a corporation has been dissolved, the land, interest or right shall be vested in the other person who remains entitled, either alone or with any other person the court may appoint.”

Order 37 Rule 1 provides the procedure to be followed in seeking such vesting orders and provides as follows:

“1. 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 creditor, 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 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 or trust, of any of the following questions

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or *cestui que trust*;
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- (f) the approval of a sale, purchase, compromise or other transaction;
- (g) the determination of any question arising directly out of the administration of the estate or trust.”

Does the Applicant’s Originating Summons fall within the above stated provisions? On the applicability of Order 37 Rule 1, it is clear from the documents provided in evidence that the Applicant is a beneficiary under the sale agreement, transfer and trust deed executed by the Respondent with respect to the 1st Trust Property and 2nd Trust Property. She has brought this suit seeking certain rights and orders in her capacity as *cestui que trust* and for the grant of a vesting order as the trustee is suffering from a mental disability. Guardians ad litem have been properly appointed to act on behalf of the Respondent who suffers from mental disability. I therefore find that as the Originating summons herein concerns a trustee, and a *cestui que trust* under the deed and other instruments referred to in the foregoing, it is properly brought under Order 37 Rule 1 of the Civil Procedure Rules.

The second issue is whether a vesting order can be granted pursuant to section 45 of the Trustee Act. I have perused the sale agreement and transfer with respect to the 1st Trust Property which was annexed by the Applicant as Exhibit “MWK 2”. Both the said sale agreement and transfer are between J KM and R M on the one part, and the Applicant through the Respondent as her Trustee on the other part. It is therefore clear that the Applicant is entitled to the said property, and that the certificate of title was not issued in her sole name for reason of his infancy.

I have also perused the Trust Deed annexed by the Applicant as Exhibit “MWK 4” and note that it was made on 18th March 1998 by the Respondent and PJ K as Trustees for the Applicants benefit, and is

supplemental to a Lease registered as title number [particulars withheld] on 31st December 1997 between S H L and the above-mentioned Trustees for the lease of the 2nd Trust Property for a period of ninety-nine years from 1st May 1995. The Trust Deed declared that the said Trustees were to hold the said 2nd Trust Property and the income thereof in trust for the Applicant, and had agreed to transfer the same to the Applicant upon her attaining the age of 25 years, and to execute all documents or to do any acts necessary to procure such transfer. It is clear that the Trustees were by the date of the Originating Summons herein required to have transferred the 2nd Trust Property to the Applicant, but were unable to do so by reason of death and mental disability. This is a case that therefore falls within the provisions of section 45 of the Trustees Act, and it is expedient that this Court grants the orders sought.

Arising from the above-stated reasons, this Court enters judgment for the Applicant as follows:

1. That M W K be and is hereby granted a vesting order for the property known as L.R. [particulars withheld]
2. That M W K be and is hereby granted a vesting order for Flat No. 4 erected on the property known as L.R. No. [particulars withheld] Nairobi;
3. That M W K be registered as proprietor of the property as L.R. No. [particulars withheld].
4. That MW K be registered as proprietor of Flat No. 4 erected on the property known as L.R. No. [particulars withheld] Nairobi;
5. There will be no order as to costs as the Originating Summons was not opposed.

Dated, signed and delivered in open court at Nairobi this 16th day of October , 2013.

P. NYAMWEYA

JUDGE