



REPUBLIC OF KENYA



KENYA LAW
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In re Purity Ndegi Mugo (Environment and Land Miscellaneous Application E028 of 2022) [2022] KEELC 15726 (KLR) (23 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15726 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E028 OF 2022
A KANIARU, J
NOVEMBER 23, 2022
IN THE MATTER OF SECTION 17, 56, 57 AND 65
OF THE TRUSTEE ACT (CAP 167) LAWS OF KENYA
AND
IN THE MATTER OF THE SALE OF A PORTION OF
LAND PARCEL NUMBER MBETI GACHOKA 9423
AND
IN THE MATTER OF AN APPLICATION BY THE REGIUSTERED
PROPRIETOR AND TRUSTESS PURITY NDEGI MUGO
IN THE MATTER OF
PURITY NDEGI MUGO APPLICANT

JUDGMENT

1. This is a unique matter as it lacks the adversarial character of the normal cases in a court of law. It was filed vide a notice of motion dated October 21, 2022. It has only one party, the applicant. The application is expressed to be brought under rules 2, 3 and 4 of the *Trustee Rules*, order 37 rule 1(f) of the *Civil Procedure Rules* and all other enabling provisions of the law.

Application

2. The applicant in the application is Purity Ndegi Mugo and she has brought the application *ex parte*.



3. The motion came with three (3) prayers but prayer 1 is now moot. The prayers therefore for determination and consideration by the court are as follows:-

Prayer 2: That the applicant be granted leave to excise and sell a portion measuring 0.40 hectares out of land parcel number Mbeti/Gachoka/9423 and the proceed realised from the sale be applied in the settlement of the following:

- a. The costs of and incidental to the subdivision and the transfer.
- b. The payment of school fees and for the purpose of future application in the education of Francis Collins Muriithi Ngari and Trizer Pauline Murugi Ngari.

Prayer 4: That costs be in the cause.

4. The application is anchored on grounds on the face of it and the supporting affidavit sworn by the applicant. She deposed that she is the registered proprietor of land parcel number Mbeti/Gachoka/9423 which she holds in trust for herself and her five children namely; Nimrod Muthomi Ngari, Anastasia Njoki, Francis Collins Muriithi, Trizer Pauline Murugi Ngari (all adults) and Jane Laurine Gakenia, a minor. She averred that she intends to sell a portion of the land measuring 0.40 hectares to pay for the school fees and other education expenses for two of her children - Francis Collins Muriithi Ngari and Trizer Pauline Murugi Ngari - who study at Nairobi Technical training Institute and Jaramogi Oginga Odinga University of Science and Technology respectively.
5. It was her case that the two children were in dire need of school fees and were likely to be chased away from school for lack of fees. Further, she averred that the rest of the children had given their consent for sale of the land held in trust. She equally deposed that the application was necessitated by the need to protect the best interest of the children by paying their school fees and other academic expenses. She was of the view that the application had been made in the interest of justice and that the prayers sought should therefore be allowed.
6. The application was canvassed by way of written submissions which were filed on November 11, 2022. The applicant identified three issues for determination by the court. The first was whether the applicant was a trustee of the land. She submitted that she had annexed a copy of certified search for the suit parcel as evidence of this. The second issue was whether she should be granted the leave sought, and she argued that beneficiaries of the trust had granted consent for the intended sale. Further, she submitted that she was the sole provider of the children who were now in dire need of school fees and for that reason the leave sought was necessary to enable her to pay the minor's school fees in their respective institutions of learning.
7. Lastly, she submitted on the issue of whether the application was properly before the court. She relied on the provisions of section 13 of the *Trustee Act*, which gives power to the trustee to sell land held in trust. In that regard she submitted that she was the registered proprietor of the land and therefore had the power to sell the land. The applicant also submitted that her intention was to raise money for the benefit of the beneficiaries. She sought reliance on sections 17 and 56 of the *Trustee Act*.
8. The applicant further submitted that she has power to transact in the land but that such power was limited as leave of court was necessary to ensure that the rights of the beneficiaries were protected. On this, she relied on order 37 rule 1(f) of the *Civil Procedure Rules* which empowers the court to ratify any sale done by a trustee for the benefit of the beneficiaries. Reliance was made on the case of *Re Eunice Wanjeri Njenga* [2013] eKLR and on the case of *GW & another (Minor)* [2016] eKLR. To that end, the application was said to be properly before the court and the court was urged to allow it as prayed.



9. I have considered the application made and the submissions. The applicant seeks leave of court to dispose of a portion of land-parcel Mbeti/Gachoka/9423 - which according to the copy of official search annexed to the application she is holding in trust for her children. The applicant has correctly traced the law governing sale of land held in trust by a trustee. It is trite law that a trustee's role is to hold the property in trust for the benefit and well-being of the beneficiaries to the trust and to carry out activities under the trust that are not to the detriment of such beneficiaries.
10. The legal framework governing the conduct and powers of the trustees is entrenched in various acts of laws in Kenya, among them the *Trustee Act*. The applicant has moved the court under the provisions of section 17, 56 and 57 of the *Trustee Act*. The said provisions provide as follows; section 17 of the *Trustee Act* provides that

“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... 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.”

11. Section 56 of the *Trustee Act* provides that

“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”.

It is further provided:

- “(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.”

12. Further section 57 of the *Trustee Act* states as follows

“An order under this *Act* for the appointment of a new trustee, or concerning any interest in land, stock or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

- (2) An order under this *Act* concerning any interest in land, stock or thing in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.”



13. The above provisions provide that a trustee can exercise powers to pay or apply money for any purpose or in any manner, and can proceed to raise such money required by sale of any part of the trust property and the court has such powers to make orders for the trustees to exercise the said powers of sale. Equally the provisions of order 37 rule 1(f) of the Civil Procedure Rules also provide that a trustee can make an application to the court for the approval of a sale, purchase, compromise or other transaction.
14. The applicant has appropriately moved the court in her capacity as a trustee of the suit parcel of land. She is seeking leave to dispose of a portion of the suit parcel which she holds in trust for her children. The entire parcel of the land measures 1.925 Ha and the portion she seeks to sell is 0.40 hectares. She has put up a case that she intends to sell the land in order to pay school fees for her children who are in two learning institutions. She has annexed copies of the fee structures from the said institutions. Equally, she has averred that her other children, whom she also holds the land in trust for, have consented to the sale of the portion of land and this court is satisfied that such consent has been granted. I am of the view that the application is merited. The applicant only seeks to provide decent education for her children and the sale of the land would advance their best interest as envisaged under article 53 of the Constitution and the Children Act. In the circumstances, I allow the application as prayed. I make no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF NOVEMBER, 2022.

In the presence of;

Kimanzi for applicant.

Court assistant: Leadys

AK KANIARU

JUDGE

