



AW & another v AW & another (As Trustees of AKM & WM) (Environment & Land Case E034 of 2025) [2025] KEELC 4318 (KLR) (10 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E034 OF 2025**

AY KOROSS, J

JUNE 10, 2025

**IN THE MATTER OF SECTIONS 13, 56 AND 57 OF
THE TRUSTEES ACT CAP 167 LAWS OF KENYA**

AND

**IN THE MATTER OF LAND REFERENCE NO. 12715/1279 (ORIGINAL
NO. 12715/1259/21) CERTIFICATE OF TITLE NO. I.R. 75571**

BETWEEN

AW 1ST APPLICANT

JMM 2ND APPLICANT

AND

AW 1ST RESPONDENT

JMM 2ND RESPONDENT

AS TRUSTEES OF AKM & WM

JUDGMENT

1. This suit is instituted by an ex parte originating summons (OS) dated 28/02/2025, seeking the following reliefs: -
 - a. Spent.
 - b. That the honourable court be pleased to authorise and allow the applicants to sell and transfer land reference no. 12715/xxxx (Original No. 12715/xxxx/21) certificate of title no. I.R. 75571 and the proceeds realised from the sale of the property be applied in settlement in the following: -
 - i. The costs of and incidental to the sale and transfer of the suit property.



- ii. The payment of fees and education related expenses for AKM and WM .
 - iii. The investment of the balance of the proceeds of sale in a savings or call account for the future application in the education of AKM and WM .
- c. That the costs of and incidental to OS be provided for.
2. The OS is supported by grounds on its face and amplified by the supporting affidavits deposed by the applicants, both deposed on 28/02/2025. In brief, it was stated; a) Jackson N. Musomba (“the deceased”), who was the father of AKM and WM (“children”), was the registered proprietor of land reference no. 12715/xxxx (Original Number 12715/xxxx/21) situate North West of Mavoko Municipality in the Machakos District (“suit property”); and
 3. B) The deceased died on 16/02/2014, and a grant of letters of administration of his estate in High Court in Nairobi Succession Cause No. 2180 of 2015 was issued to the applicants who are the children’s mother and uncle respectively and that the grant was confirmed on 19/06/2019), c) In the confirmed grant, the suit property was given to the applicants to hold in trust for themselves and the children and the current registration reflects as much; and
 4. D) The children are in school with AKM at the university, and her fees per semester are Kshs. 154,568/= and WM , a Year 11 student, requires school fees per year at Kshs. 290,005/= e) lastly, that though the applicants had been settling these accounts, it had become insurmountable, hence the need for them to sell and transfer the suit property and apply the proceeds thereof as sought lest the children drop out of school.
 5. In this case, the court directed that the OS be canvassed by written submissions and in compliance, the law firm of M/s. Kefa Ombati & Co. Advocates, which is on record for the applicants, filed its well-articulated submissions dated 20/03/2025, and this court is appreciative to counsel in that respect.
 6. Having carefully considered the OS, its grounds, affidavits, and submissions, the single issue for determination is whether the court should approve the sale of the suit property. Foremost, it is pertinent for this court to restate the legal framework that bestows it with the authority to entertain the OS.
 7. As rightfully submitted by the applicants’ counsel and as restated in In the Matter of GW & another (Minors) [2016] KEELC 1223 (KLR), the relevant legal provisions are found in our Sections 13, 17 and 56 of the Trustee Act, which provides as follows:

Section 13 thereof: -

- (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.”

Whereas Section 17: -

- (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.

Lastly, Section 56: -

- (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.”

8. Furthermore, the procedure for approaching the court is provided for in Order 37 Rule 1 of the Civil Procedure Rules, and it follows that the applicants have properly moved this court.
9. In this case, the applicants tendered several documents in support of their case which included a copy of the title deed which shows the suit property is still registered in the deceased’s name, various copies of birth certificates for the children, the grant of letters of administration intestate, the further rectified grant dated 14/02/2022, fee structure forms for the children and an agreement for sale between the applicants and Abdi Hassan Abey.
10. Regarding the title document of the suit property, whereby the applicants contend is registered in their names and that of the children as per the further rectified grant of 14/02/2022, the copy of the title document paints a different picture as it shows the suit property is still registered in the deceased’s name, meaning it does not grant the applicants the power to dispose of it.
11. The further rectified grant by which the applicants were ordered to hold the suit property in trust for themselves and the children as read together with Section 61 (2) (a) of the [Land Registration Act](#) shows the applicants as personal representatives of the deceased’s estate are required to perfect the registration of the trust by way of transfer by transmission before moving this court in the manner they did. In the absence of proof of such perfection, this court finds that it was moved prematurely and, at this juncture, is constrained from granting the orders sought.
12. Had the applicants availed a copy of a title document in their names together with that of the children as envisaged in the confirmed grant, this court would have undoubtedly allowed the otherwise straightforward case.
13. Nevertheless, even though this court sympathises with the children, it is this court’s humble view that it is only by proving that the title document is registered in the applicants’ names as trustees that this court could allow the OS. Having failed to so prove, this court finds the OS is not merited. In the end, the OS dated 28/02/2025 is hereby dismissed with the applicants bearing their own costs.

Orders accordingly.



DELIVERED AND DATED AT MACHAKOS THIS 10TH DAY OF JUNE, 2025.

HON. A. Y. KOROSS

JUDGE

10.06.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Kefa Ombati for applicant/respondent.

Ms Kanja- Court Assistant

