



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC MISCELLANEOUS APPLICATION NO. 113 OF 2017

IN THE MATTER OF HEA (MINOR)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO REGISTER A CHARGE

AND

IN THE MATTER OF L. R. NO. KISUMU/MUNICIPALITY BLOCK 4/[xxxx]

GAN.....APPLICANT

RULING

1. GAN, the Applicant, filed the ex parte notice of motion dated the 25th September 2017 brought under **Section 27 of the Land Act No. 6 of 2012** and **Section 47 of the Land Registration Act No. 3 of 2012**, seeking for the following prayers;

- a) Leave for the Applicant to use the title document for L.R. No. Kisumu/Municipality Block 4/[xxxx] as security for a loan.
- b) Leave be granted to the County Land Register (sic) Kisumu to register a charge over the said parcel of land in favour of Real People Kenya Limited.

2. The application is based on the seven (7) grounds on its face which are summarized as follows;

- a) That the Applicant bought the said parcel and registered it in the joint names of HEA, and himself.
- b) That the said HEA is his eight (8) year old son.
- c) That the Applicant intends to use the title of the said land as collateral for loan to recapitalize his business from which he provides for his son.

3. The application is supported by the Applicant's affidavits sworn on the 25th September 2017 and 12th October 2018 to which are attached the following documents among others;

1. Certificate of birth No. [xxxxx] confirming that HE was born on the 21st September 2009,
2. Certificate of lease and certificate of official search in respect of Kisumu Municipality/Block 4/[xxxx] and copy of the white card showing that the land was registered in the name of RIN before being transferred to the Applicant and HEAN (Minor) on the 18th October 2000.
3. Agreement for sale of land dated 11th September 2008 between RIN and the Applicant.

4. The court takes the issue for determination to be whether it has jurisdiction to give consent to, or allow the Applicant to use the title of the suit land, which is in his joint name and that of his son, a minor, as collateral for a loan.

5. The Court has carefully considered the affidavit evidence tendered and come to the following findings;

- a) That **Section 27 of the Land Act No. 6 of 2012** sets out the obligations of minors registered with land in the following words;

“27. A child shall be capable of holding title to land through a trustee and such child shall be in the same position as an adult with regard to the child’s liability and litigations to the land.”

That **Section 47 of the Land Registration Act No. 3 of 2012** provides on how a minor gets registered as proprietor of the land as follows;

“47. (1) The name of a person under the age of eighteen years may be entered in the register to enable the minor’s interest to be held in trust and shall be registered under the name of the guardian either on first registration or as a transferee or on transmission.

(2) Nothing in this section enables a person under eighteen years of age to deal with land or any interest in land by virtue of such registration, and, if the Registrar knows a child has been registered, the Registrar shall enter a restriction accordingly.

(3) If a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, that disposition may not be set aside only on the ground of minority.”

That from the foregoing two provisions of the law, it is clear HEAN, being of minority age, cannot enter into the transaction or give consent to the transaction, leading to the suit land’s title being used as collateral for the loan. That was that to happen and there be default in the loan repayment, the financier may exercise its power of sale and disposes the minor of his interest in the land.

b) That though the Applicant may be the one who single handedly purchased the land and voluntarily included the minor as a co-proprietor, the minor acquired the rights of a proprietor over the suit land upon registration as set out under **Section 25 of the Land Registration Act**. That co-proprietorship or co-tenancy of land is provided for under **Section 91** of the said Act in the following terms;

“91. (1) In this Act co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.

(2) Except as otherwise provided in any written law, where the instructions of transfer of an interest of land to the two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

(3).....

(4).....

(5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased’s share shall be treated as part of their estate.

(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

(7) Joint tenants, not being trustees may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenant in common.

(8) The Registrar may upon receipt of adequate proof dispense with the consent under Subsection (6) if the Registrar considers that the consent cannot be obtained or is being withheld unreasonably and the Registrar shall note on the register and on the instrument the reason for dispensing with the consent.

(9) A person who is aggrieved by the decision of the Registrar may apply to the court for the necessary orders.”

That the Applicant and the minor in this matter are registered as joint tenants without indicating the share each hold. They are therefore tenants in common in equal shares in terms of **Section 91 (2)** above.

c) That tenants in common may have the land partitioned and each to be registered as proprietor of their specific portion as provided for under **Section 93** of the said Act. That should the Applicant be allowed to charge the land as collateral for the loan and defaults, the interests of the minor will be adversely affected, should the financier exercise their power of sale. That it may then be too late to protect the minor’s interest.

d) That so as not hinder the Applicant from using the land as collateral for the funding he seeks, and at the same time safeguard the interest of the minor who is his co-tenant, the Applicant should consider charging only half of the land, and leaving the other half free in case a situation arises for the financier to opt to exercise their powers of sale.

6. That for the reasons set out above, the Applicant’s notice of motion dated the 25th September 2017 is allowed in the following terms;

a) That leave be and hereby granted to the Applicant, named GAN to use the title of L. R. No. Kisumu Municipality/Block 4/[xxxx] as security for a loan on condition that the extent of the liability is limited to his half share, and the other half share for the minor will remain free.

b) That the Land Registrar do ensure that the charge to be registered against the said land is limited to the half share that the Applicant is entitled to.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2019

In the presence of:

Applicant Absent

Counsel Mr. Oel for Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE