



REPUBLIC OF KENYA



**Ndichu v Land Registrar, Ruiru (Miscellaneous Application
E006 of 2023) [2024] KEELC 1099 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E006 OF 2023**

JG KEMEI, J

FEBRUARY 28, 2024

BETWEEN

CATHERINE WANGUI NDICHU APPLICANT

AND

THE LAND REGISTRAR, RUIRU RESPONDENT

RULING

1. The Applicant has moved the Court under Section 56 *Trustees Act*, Section 3A *Civil Procedure Act* and Order 32 Rule 6 *Civil Procedure Rules* vide a Notice of Motion dated 23/1/2023. In the main the Applicant wishes to terminate the trust (in favor of the minors) and be the sole registered owner of the property known as Ruiru/Ruiru East Block 2/32630, hereinafter referred to as the suit land.
2. The Application is based on the grounds that the Applicant and her husband jointly purchased the suit land as a matrimonial property. That the Applicant was registered as the owner thereof holding the suit land in trust for their minor children. That the Applicant and her husband now wish to obtain a mortgage secured by the suit land to build their home hence the Application.
3. The Application is supported by Affidavits of even date of Catherine Wangui Ndichu, the Applicant and her husband, Peter Njoroge Kamau. They echoed the above grounds and annexed copies of their Identity Cards, title deed of the suit land, the minors' Birth Certificates and a Letter of Consent.
4. In support of the Application, the Respondent filed a Replying Affidavit sworn on 25/5/2023 by Land Registrar Mr. Robert Mbuba. He deponed that according to their office records, the green card was opened on 9/10/2019 and first registered in favor of Margaret Wambui Njuguna. That later on 4/8/2020 the title was transferred to the Applicant herein as a trustee of ET, JW and ZWN. Copy of the green card is annexed as 'RM1'.
5. On 26/10/2023 directions were taken for parties to canvas the Application by way of written submissions. The Applicant did not file any submissions.



6. On behalf of the Respondent, Senior State Counsel Faith Njeri Njuguna filed submissions dated 2/11/2023. It was submitted that the law recognizes trusts as an overriding interest over registered land as stipulated in Section 28 [Land Registration Act](#). That Section 56 of the [Trustees Act](#) recognizes the Court's power to authorize dealings with trust properties while ensuring that trustees manage their mandate in such a manner that benefits the beneficiaries of the trust. There being no opposition to the prayers sought, the Respondent urged the Court to allow the Application with no orders as to costs.
7. The singular issue for determination is whether the Application is merited.
8. The relevant law guiding the Court to authorize dealings in trust property is found in Section 56 [Trustees Act](#) which provides;
 - “ 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.”
9. Section 57 of the [Trustees Act](#) *inter alia* allows a person appointed as trustee to move the Court for appropriate orders under the above Section.
10. The Applicant and her husband have deponed that they wish to secure a mortgage against the suit land for purposes of building a family home. They take the view that a matrimonial home will benefit the children and therefore safeguarding the minors' best interests. The Respondent confirms the existence of the trust and does not oppose the prayer for termination of the trust. Reliance was placed on the case of [Heartbeat Ltd v Ng'ambwa Heartbeat Community Children's Home & Rescue Centre](#) [2018] eKLR.
11. For a valid trust to be created there are critical events that need to the present that is to say that a donor; Trustee; trust asset and finally a beneficiary. In the circumstances of the case the Court finds that the donor and the Trustee is the Applicant, the suit land is the trust property and the beneficiaries are the three children of the Applicant.



12. In this case the Applicant has not provided the Court with a copy of the trust instrument creating the trust. In the absence of a written instrument creating the trust the Court will imply a trust from the wording of the title registration details on the title which states;

“Catherine Wangui Ndichu – to hold in trust for; ET; JW and ZWN.”

13. It is on record that the Applicants husband one Peter Njoroge Kamau purchased the trust property vide a sale agreement dated the 11/9/2019 from Margaret Wambui Njuguna. In his Supporting Affidavit deponed on the 23/1/23 in support of the Application, the said Peter Njoroge Kamau stated that the property was purchased as a matrimonial home in 2019 and caused the same to be registered in the name of the Applicant, his wife to hold in trust for their children. Like the Applicant he sought orders to terminate the trust for purposes of securing a loan to build a matrimonial home on the property.

14. The Applicant has deponed that the trust property is a matrimonial property. A matrimonial home is defined under Section 2 of the *Matrimonial Property Act* to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

15. Section 6 of the *Matrimonial Property Act* (MPA) defines matrimonial property as follows;

“6. Meaning of Matrimonial Property

- (1) For the purposes of this *Act*, matrimonial property means
 - (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and moveable property jointly owned and acquired during the subsistence of the marriage.
- (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
- (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
- (4) A party to an agreement made under subsection (3) may apply to the court to set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”

16. In the first instance there was no evidence led by the Applicant to demonstrate that there is a home either leased and or owned by the Applicant or her spouse on the suit land. The property therefore does not contain a matrimonial home. It would appear that the trust land is undeveloped.

17. In the second instance of the Act at Section 6 *MPA* expressly states that trust property does not form part of a matrimonial property. Based on the above the Applicant is therefore disabused from referring the property as a matrimonial property. This is on the basis of the finding that the property is held



in trust in favour of known and declared beneficiaries. Neither the Applicant nor her spouse own the property.

18. Having made the finding that the property is trust property I shall now discuss the role of trustees under the Act. The powers of a trustee include the following; power to manage the trust asset; to sale the asset; to mortgage the asset; to receipt proceeds relating to the trust assets; to employ agents.
19. Under Section 56 of the Act the Court is vested with powers to superintend the management of properties that are held under trust to ensure that the trustees manage and or execute their mandate in such a manner that benefits the beneficiaries of the trust and also that the Trustees Act in accordance with the law.
20. The Court notes that notwithstanding the above the Applicant seeks to terminate /dissolve the trust thus divesting the property from the beneficiaries. The Court has applied its mind to Article 53 of the Constitution that states as follows;

“ 53.

- (1) Every child has the right—
 - (a) to a name and nationality from birth;
 - b. to free and compulsory basic education;
 - c. to basic nutrition, shelter and health care;
 - d. to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - e. to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
 - f. not to be detained, except as a measure of last resort, and when detained, to be held—
 - i. for the shortest appropriate period of time; and
 - ii. separate from adults and in conditions that take account of the child’s sex and age.
- (2) A child’s best interests are of paramount importance in every matter concerning the child.”

21. The rights of a child to decent shelter are espoused in the Constitution. Section 4(2) of the Children’s Act also espouses the Court to look into the best interests of the child.
22. It is in the interest of the children who are the beneficiaries that the Court shall allow the Application.
23. Orders accordingly.



DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 28TH DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Applicant – Absent but served

Respondent – Absent but served

Court Assistants – Phyllis/Oliver

