



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ORIGINATING SUMMONS NO.394 OF 2017**

**IN THE MATTER OF RUIRU/RUIRU EAST BLOCK 7/[PARTICULARS WITHHELD]**

**AND**

**IN THE MATTER OF P M K, W N N AND C W G N**

**P M K..... EXPARTE APPLICANT**

**JUDGEMENT**

By an ***Originating Summons*** dated 27<sup>th</sup> March 2017, the exparte Applicant herein **P M K**, has sought for the following orders;- That the court be pleased to grant an order to the Applicant to dispose off parcel of land known as ***Ruiru/Ruiru East Block 7/[particulars withheld]***

This Originating Summons is premised on the grounds stated on the face of the said Originating summons and the ***Supporting Affidavit*** of **P M K** and **W N N**. These grounds are:-

- a) That unless the orders sought above are granted, the Applicant shall not be able to dispose of the suit parcel of land as she holds the same in trust for herself and her two children namely W N N and C W G N (who is still a minor).***
- b) That the Applicant wishes to dispose the parcel of land as she needs to fund education of her children especially W N N who joined [particulars withheld] University last year.***
- c) That the Applicant intends to purchase another parcel of land and the same to be held by her and her daughter W N N (now an adult) in trust for themselves and for C W G N who is still a minor, to ensure the trust currently in existence in the suit parcel of land continues.***

In her ***Supporting Affidavit***, **P M K** averred that she is the registered owner of the parcel of land known as ***Ruiru/Ruiru East Block 7/[particulars withheld]***, as can be discerned from ***annexture PMK1***. She also averred that she holds the said parcel of land in trust for herself and her children **W N N** and **C W G N**, being her ***daughter*** and ***son*** respectively as per their ***birth certificates PMK2*** and ***PMK3***. She further contended that she now wishes to sell the parcels of land aforementioned to ***Monica Waitherero Wanjiru***, and they have entered into a ***Sale Agreement*** dated 23<sup>rd</sup> February 2017, for ***Kshs.800,000/=***. The said sale agreement was marked as ***annexture PMK4***.

It was her further contention that she will apply the sale proceeds towards purchase of another parcel of land known as title ***No.Kajiado/ Kipeto/[particulars withheld]***, from ***John Njenga Githama*** with whom they have entered into a ***Sale Agreement*** dated 10<sup>th</sup> March 2017, for ***Kshs.400,000/=***. The said sale agreement was marked as ***annexture PMK5***. She also contended that after the purchase of

**Kajiado/Kipeto/[particulars withheld]**, the same shall be registered in her name and that of **W N N**, who is now an adult and the two can hold the same for themselves and in trust for **C w G N** who is still a minor.

The deponent also contended that she will apply the remainder of the funds from the sale of the land towards the school fees of **W N N** who is a **student at [particulars withheld] University** since **September 2016** and **C W G N**. She has urged the Court to allow her sell the suit property and she also averred that her advocate has advised her on the need to continue the trust.

**W N N** also swore a **Supporting Affidavit** on **24<sup>th</sup> March 2017**, and averred that she is now an adult of **19 years** and a student at [particulars withheld] University, studying Bachelors Degree in Science. Her **letter of admission** was marked as **annexture WNN1**. She also contended that her mother **P M K**, has been struggling to raise funds to cater for university education and that has caused a strain in her academic progress. She also deposed that she has given consent to her mother to dispose off the suit property since her mother needs the funds to pay her university fees. It was her contention that the remainder of the purchase price will be utilized to purchase another land **Kajiado/Kipeto/ [particulars withheld]**, wherein her mother and herself will be registered as owners to hold in trust for their brother **C W G N**, who is a minor to ensure that the trust continue. She averred that she has not been unduly influenced nor coerced into signing this affidavit and that she did so on her own free will and volition. She urged the court to grant the orders sought so that she can continue with her education uninterrupted.

The Applicant further filed written submissions on **23<sup>rd</sup> June 2017** to support her application. She relied on various provisions of law and submitted that as a holder of the suit property in trust for herself and her children, she has *locus standi* to bring the current Originating Summons. She also relied on Section 13 of the Trustees Act which provides that:-

***“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 changes 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 think fit, with power to vary any contract for sale, and to buy in any other auction or to rescind any contract for sale or 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 part thereof”.***

This court has carefully read and considered the Originating Summons herein, the written submissions and the relevant provisions of law and the court makes the following findings:-

It is evident that the Applicant herein has sought to be allowed to dispose off **Ruiru/Ruiru East Block 7/[particulars withheld]**, so that she can utilize the proceeds for education of her children. There is no doubt that the Applicant herein is the registered owner of the suit property and as per the official search dated **14<sup>th</sup> April 2010**, she is holding the land as a **Trustee for herself** and **W N N** and **C W G N**. It is therefore evident as a holder of the said suit land and a trustee, she cannot sell the suit land without the approval of the court. The Applicant therefore has a *locus standi* to bring this Originating Summons for determination.

The originating summons herein is brought under Order 37 Rule 1 of the Civil Procedure Rules 2010 which provides:-

***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 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.*

The Applicant herein has alleged that she intends to sell the suit property so that she can pay school fees for her children and also buy another parcel of land wherein she will be registered together with **W N N**, who is now an adult to hold in trust for **C W G N** who is a minor. She has stated how she intends to utilize the proceeds of the sale of the suit property.

**W N N**, one of her children has stated that she has been informed of the intended sale of the suit property and she has no objection. She has further confirmed that she will be a joint proprietor in the intended property which is to be purchased from the proceeds of the sale of the suit property herein. Further the Court has seen the sale agreements for sale of the suit property and the intended purchase of **Kajiado/Kipeto/ [particulars withheld]**. The court believed that the Applicant intends to utilize the proceeds of the purchase price well and for good intention towards the benefit of the children named in the certificate of title.

The court has considered the provisions of Section 17(1) of the Trustees Act and it is clear that it allows the trustees to raise the money required to pay or apply capital money subject of the trust by the sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession.

This Court has also considered the provisions of Section 56 of the Trustees Act and it grants the court discretion to allow dealing with the trust property. The said Section provides as follows:-

*“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 either generally or in any particular instance the necessary power for the purpose, or 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 beneficiary interested under the trust”.***

Upon consideration of the available provisions of law and the pleadings in general, the court finds that the application herein is properly brought under the available provisions of law and further the Applicant has *locus standi* to bring this application.

The Applicant has averred that she intends to use the proceeds of the sale to pay school fees for her children or beneficiaries of the trust. She also intends to open an interest earning account on the balance of the purchase price and also purchase another parcel of land ***Kajiado/Kipeto/[particulars withheld]*** which will be jointly owned by her and ***W N N***, to hold in trust for ***C W G N***. The Applicant has also informed the beneficiaries especially ***W N N*** of the intended sale and as per her affidavit sworn on 24<sup>th</sup> March 2017, she has no objection to the said sale.

Having now carefully considered the instant ***Originating Summons***, the ***Court finds it merited and the Court allows the Exparte Applicant herein to sell land parcel No.Ruiru/Ruiru East Block 7/[particulars withheld] and use the proceeds as follows:-***

- a) Payment of school fees towards University Education of her daughter W N N.***
- b) Pay school fees for the second child who is a minor, C W G N.***
- c) Purchase land parcel No.Kajiado.Kipeto/[particulars withheld] and have the same registered in her name and that of W N N to hold in trust for C W G N.***
- d) Establish an interest earning fund and deposit the remainder of the balance of the purchase price to ensure her childrens' school fees and upkeep are secured for future use.***

It is so ordered.

Dated, Signed and Delivered at Thika this ***17<sup>th</sup>*** day of ***November***. 2017.

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Mwaura H/B for Mr. Mwaura Ngaruo for Exparte Applicant

Lucy - Court clerk.

Court – Judgement read in open court in the presence of the above stated advocate.

**L. GACHERU**

**JUDGE**

**17/11/2017**