



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. MISC.CASE NO. 197 OF 2015

IN THE MATTER OF SECTIONS 13, 17 & 56 OF THE TRUSTEES ACT CAP 167

AND

**IN THE MATTER OF THE SALE OF PARCELS NO. DAGORRETI/UTHIRU/T.359 AND PLOT
B. LR. NO.113460/11**

AND

IN THE MATTER OF GW AND TW (MINORS)

MANESSEH MWANGI ELIJAH KIHARA

JOHN CAURI KAMAU

ELIJAH KAHARA NDERE,

HANNAH NJERI KAHRA AND

BISHOP JOEL WAWERU MWANGI.....APPLICANTS

JUDGMENT

The Originating Summons before the court for determination is dated 22nd July 2015 and is brought by the Applicants *ex parte* under the provisions of **Order 37 Rule 1 (f) of the Civil Procedure Rules, 2010** and **section 3A of the Civil Procedure Act**. The Applicants seek for this Honourable Court to give authority to the trustees of the minors to transfer their interest in two parcels of land being Dagoretti/Uthiru/T.359 and Land Reference No. 13460/11 Lang'ata.

The Originating Summons is supported by affidavit sworn on 22nd July 2015 by one of the Applicants namely Elijah Kahara Ndere in which he averred that grant of letters of administration over the estate of Grace Wairimu Kihara was issued on 5th April 2001 to the following:

1. Manasseh Mwangi Elijah Kihara.
2. John Cauri Kamau.
3. Elijah Kahara Ndere.

4. Simon Gakinya Mwangi (deceased).

He further deponed that the grant of letters of administration was confirmed on 11th March 2014. He further averred that Esther Wangari Kihara was one of the beneficiaries of the estate of Grace Wairimu Kihara but that she passed away before the succession matter was concluded. He further averred that the late Esther Wangari Kihara was survived by two issues namely G W and an infant T W (hereinafter referred to as the “minors”). He further averred that since the minors were born out of wedlock and none of their fathers were involved in their lives, they were put under the care of relatives Elijah Kahara Ndere, Hannah Njeri Kahara and Bishop Joel Waweru Mwangi (hereafter referred to as the “Legal Guardians”) who applied for and were granted legal guardianship over the minors in **Nakuru Children Cause No. 9 of 2012**. He added that the court further extended legal guardianship over G W beyond her 18th birthday for a period of 6 years.

The Applicant further deponed that the Legal Guardians have been maintaining the minors from their pockets as they awaited the succession cause to be concluded where the minors’ share was provided for. He added that there is need to set up a fund for the welfare of the minors to cater for schooling and the special care T W needs as he was born with low immunity. He further averred that the Legal Guardians were registered as proprietors on behalf of the minors together with other beneficiaries in some of the properties hence there is need to sell them so that the minors’ share is realized for their use. Copies of two title documents in respect of Dagoretti/Uthiru/T.359 and Land Reference No. 13460/11 Lang’ata were annexed. He further averred that these particular parcels of land had been identified for sale well before the Legal Guardians were appointed as the Deceased wished to sell them to the church and part of the proceeds to be used in educating her adopted children. He added that they were now only carrying out the Deceased’s wishes to ensure that her grandchildren access education and do not suffer lack. He further added that in pursuance of this, the administrators entered into an agreement with a purchaser long before the demise of Esther Wangari, the minors’ mother, whereof she consented to the sale. He further stated that the purchaser made a deposit which was held by the advocate awaiting the confirmation of grant. He annexed a copy of the sale agreement for Dagoretti/Uthiru/T.359 indicating a purchase price of Kshs. 3.3 million and a copy of the offer made for L.R. No. 13460/11 measuring 4.5 acres at Kshs. 40 million per acre. He deponed further that the purchaser is now willing to complete the sale but the Legal Guardians as trustees to the share of the minors need a court order to be allowed to transfer the minors’ interest in the said properties to realize their share and create a fund for their upkeep in future. He further added that the minors were aware of the intended sale and had no objection. He further stated that the minors also wholly own the property known as Nairobi/Block 73/387 and there is therefore no risk that they would be rendered destitute.

I have carefully considered the pleadings filed and submissions made by the Applicants. The issue for determination is whether this court should approve the sale of the parcels of land known as Dagoretti/Uthiru/T.359 and Land Reference No. 13460/11 Lang’ata to enable the Legal Guardians to realize the share thereof belonging to the minors for the purpose of setting up a fund for their upkeep. There are various laws that apply in this regard. In terms of procedure, **Order 37 Rule 1 of the Civil Procedure Rules, 2010** provides as follows:

“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 from doing, any 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.”**

In this Application, the Applicants have produced a copy of title deed of the first parcel of land known as Dagoretti/Uthiru/T.359 whereby Elijah Kahara Ndere, Manasseh Mwangi Elijah Kihara and the Legal Guardians of the late Esther Wangari’s children are indicated as the registered proprietors. However, the copy of Certificate of Title for second parcel of land being L.R. No. 13460/11 indicates that the registered proprietors thereof are one Rahab Ruguru Arthur and Grace Wairimu Kihara. This second parcel of land is not in the names of the Applicants and cannot therefore be said to be under their power to dispose. Accordingly, no order for the sale of that second parcel of land can be made by this court at this juncture. However, in respect of the first parcel of land being Dagoretti/Uthiru/T.359, the Applicants have shown that they are trustees thereof by virtue of their registration as proprietors thereof. They seek to sell that parcel of land and have annexed a copy of the sale agreement. The power to sell trust property is conferred upon the Applicants as trustees by **section 13** and of the **Trustee Act. Section 13** provides as follows:

“(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.”

Section 17 (1) of the Trustees Act in addition allows trustees to raise the money required to pay or apply capital money subject to 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. Lastly, the locus of the Applicants and jurisdiction of the court to grant the prayers sought is also provided by section 56 of the Trustees Act which empowers the court to authorize dealings with trust property as follows:

“(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.”

I therefore find that the Applicants have properly brought this Application under the provisions of **Order 37 Rule 1 of the Civil Procedure Rules, 2010 and sections 13, 17 and 56 of the Trustees Act**, and that the Application is competently before the court. In summary the general duties of trustees in relation to the trust property are to safeguard the assets of the trust, to invest any trust money in his or her hands, and to distribute the assets to the beneficiaries and satisfy any claims of the beneficiaries. With relation to the beneficiaries, trustees are under a duty to maintain equality between beneficiaries and to provide accounts and information to the beneficiaries. Section 56 of the Trustees Act cited in the foregoing also gives this court power to authorize specific investments upon application by a trustee, and together with section 59 permits this court to order that costs of a sale and application to the court be met from the proceeds of sale of a trust property. The Applicants have averred that they intend to use the proceeds of the sale to establish a fund to be used to pay the minors' school fees and medical expenses, especially for the infant minor. It is my view that the plan to establish this fund for the minors is in their interest. I have also noted that Applicants have duly informed the minors of the same, who have no objection. I therefore see no reason why the approval and orders sought by the Applicants should not be granted by the court in respect of only Dagoretti/Uthiru/T.359, which as I mentioned earlier is the only parcel of land in respect of which the Applicants have the power of disposal as the registered proprietors.

I therefore allow the Applicant's Originating Summons dated 22nd July 2015 as follows:

1. That the Applicants be and are hereby permitted and empowered by the Court to sell the parcel of land known as Dagoretti/Uthiru/T.359.
2. That the Applicants shall apply 1/3rd of the sale proceeds thereof in establishing a fund for the minors for use in paying their school fees, medical expenses and general upkeep.

Orders accordingly.

DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF APRIL 2016.

MARY M. GITUMBI

JUDGE