



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**MISC. APPLICATION NO.76 OF 2016**

**RE B M M.....APPLICANT**

**RULING**

***(Application seeking leave to dispose of certain land; land held by applicant as trustee for her children; applicant wishing to sell the same to purchase other land; other land will be for the benefit of the children; application allowed)***

[1] This is an Originating Summons filed pursuant to Order 37 Rules 1, 2 and 3 of the Civil Procedure Rules, and Sections 1A, 1B, and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. The applicant is the mother of two minors, namely S N and M M. She is registered as proprietor of the land parcel Nakuru/Piave/[particulars withheld] which is land measuring 1.6 Hectares, to hold in trust for the two minors. A title deed to the land was issued on 3 December 2015. It was not quite revealed how she came to be registered as trustee, but in this suit, she wants to be allowed to sell the said land for the reason that she is "in dire need of finance for the basic needs of the minors herein to wit housing, food, clothing and school needs." She attached a copy of a fee structure said to be for one of the minors from [particulars withheld] Girls High School.

[2] When the matter first came before me on 9 March 2016, I thought it prudent to have a guardian ad litem appointed for the minors and I appointed Ms. N N, a fairly experienced counsel, to act for them. I also directed her to interview the minors and visit [particulars withheld] Girls High School where it was said that one of the minors goes to school. Ms. N did visit the said school but discovered that none of the children of the applicant have ever been in the said school but that the girl is actually in [particulars withheld] School. I of course was not too happy with this turn of events, but since the issue concerned the minors, I let it pass, and directed Ms. N to visit the correct school and later make a report. She did visit the minors and did make a report that was filed on 3 May 2016. The report gave a good history of the matter.

[3] I came to learn that the applicant was married as second wife to one P K M who is deceased. The first wife to P is also deceased and she left behind 3 children. The applicant on her part was left with the two children named in this suit. The estate of P was distributed vide *Nakuru High Court Succession Cause No. 24 of 2015*. Among the properties distributed was a land parcel Nakuru/Piave Block 1/[particulars withheld] vide which the two minors herein benefited from 4 acres and their share was to be held by the applicant in trust for them. I believe the land was later subdivided so as to produce title to the land parcel Nakuru/Piave/[particulars withheld]. The guardian ad litem also stated in her report that the applicant wishes to purchase another land being Nakuru Municipality Block 29/[particulars withheld] (Ronda) at a consideration of Kshs. 8,500,000/= which is developed with permanent houses and which has an income of about Kshs. 70,000/= per month. It was her view that the property to be purchased is reasonable although it was then under a charge in favour of Equity Bank Limited. Ms. N also revealed that the

applicant had already received a sum of Kshs. 600,000/=. It is then that Mr. Chege for the applicant requested to file a supplementary affidavit which I allowed.

[4] In the supplementary affidavit, the applicant deposed that she is a teacher by profession. She stated that she has an agreement to swap the title Nakuru/Piave/[particulars withheld] with Nakuru Municipality Block 29/[particulars withheld]. She stated that she intends to hold the title to the new property in trust for the two minors and that the same will assist them in their educational goals. A letter was also annexed showing that the property in Ronda has now been discharged.

[5] I directed that a valuation report of the two properties be made and this was done by Prime Valuers. I have seen in their two reports that the property Nakuru/Piave/[particulars withheld] is valued at Kshs. 6,950,000/=. The land has no structural improvements. On the other hand the property Nakuru Municipality Block 29/[particulars withheld] (Ronda) is valued at Kshs. 7,400,000/=. That property is developed with some rental units which are let out to tenants. They fetch an income of Kshs. 75,000/= per month.

[6] It is apparent that the applicant's intention is to swap the two properties so that she can derive income to raise the minors. The transaction has been given a clean bill of health by the guardian ad litem to the minors.

[7] The application herein is brought inter alia under the provisions of Order 37 Rule 1. The same is drawn as follows :-

***(1) Who may take out originating summons and in respect of what matters [Order 37, rule 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.*

[8] I am of the view that the application is properly before me pursuant to subrule (f) above. The question at hand concerns an approval for sale and/or purchase of land held under a trust.

[9] Having considered all relevant factors, I see no reason to deny the applicant to proceed with the intended transaction. However, she will only hold the property Nakuru/ Municipality Block 29/ [particulars withheld] (Ronda) as trustee for the two minors and not absolutely. The income to be derived from the said properties is to go towards the upkeep of the minors and towards ensuring that their basic needs and education are well catered for. The applicant is also to keep an account of all proceeds derived from the property and how she has applied the same until the property is handed over to the beneficiaries. The account is to be made to the guardian ad litem on a regular basis.

[10] In as much as I have allowed the prayers sought, I cannot hold myself back from expressing my deep disappointment in the manner in which the applicant has conducted this case. First, she failed to disclose all material facts and it needed intervention for all matters to come to light. Secondly, and for reasons that I am unable to fathom, she provided the wrong school and even attached a fee structure not of her child to the application. This did not reflect well on her. I would probably not have given her and the application herein a second look if I did not think that the end result will benefit the minors. I also sincerely hope that she appreciates that she is only a trustee and that she must act in the best interests of the beneficiaries and that she must represent an honest, open and steadfast character.

[11] Before I close, I must express my sincere gratitude to Ms. Njoroge for taking up the brief in this matter on behalf of the minors and for acting as guardian ad litem for the minors. This was all pro bono yet she took her role seriously and acted in the matter professionally. I hope that she will not feel that I have burdened her with an unbearable yoke by asking her to continue in this role until the minors attain majority.

[12] It is so directed and orders to issue accordingly.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of September 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :-**

Mr. Chege for the applicant

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**