



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC MISCELLANEOUS CIVIL SUIT NO. 62 OF 2013
IN THE MATTER OF SECTIONS 17, 18, 56 AND 57 OF THE TRUSTEES ACT
AND
THE SALE OF A PORTION OF
PARCEL OF LAND TITLE NUMBER DAGORETTI/RIRUTA/2028
EUNICE WANJERI NJENGAAPPLICANT

JUDGMENT

The Originating Summons before the court for determination is dated 29th August 2013 and is brought by the Applicant *ex parte* under the provisions of Order 37 Rule 1 (f), 3 and 7 of the Civil Procedure Rules. The Applicant is the registered proprietor of the property measuring 0.2 hectares known as Dagoretti/Riruta/2028 (hereinafter referred to as the trust property), which she holds in trust for herself and her three children, Mary Wanjiku Njoroge, Kevin Njenga Njoroge and Faustin Gathuru Njoroge. She is seeking the approval of this court to sell a portion of the trust property equivalent to 0.1 hectares, and that the proceeds of sale be applied to develop the remainder of the portion and to the acquisition of a larger piece of land elsewhere.

The originating summons is supported by affidavits sworn on 28th August 2013 by the Applicant, and by the three beneficiaries namely Mary Wanjiku Njoroge, Kevin Njenga Njoroge and Faustin Gathuru Njoroge. The Applicant states therein that she wishes to sell a portion of the trust property so that she can purchase a large piece of land where she can undertake farming, construct more decent rental houses in the remaining portion that will fetch a higher income, and to put her sons to good high schools. The Applicant attached a copy of the title to, and photographs of the trust property as evidence.

The Applicant further deponed that she had already entered into a sale agreement with Spears Services Limited for sale of the said portion of the trust property, and had received ten per cent (10%) of the purchase price as deposit, which deposit she applied to the costs of the transfers of the trust property into her name and the sub-division of the property. She annexed copies of the said sale agreement and proposed sub-division.

The beneficiaries in their affidavit stated that they had not been able to acquire quality education as their mother has been unable to afford the fees to take them to school, and that the trust property is too small and of little economic value as the water and electricity connections were removed. Further, that they understood that the Applicant holds the property in trust for them, and that she had explained to them why she needed to sell a portion of the land. They believed that the sale would be in their best interest and a prudent investment. They also stated that they had signed the sale agreement for the said portion of the

trust property.

The Applicant's counsel was directed to file written submissions on the Originating Summons. He argued in the said submissions dated 27th September 2013 that the Applicant in this case is a *cestui que trust*, as she holds the trust property on behalf of her children and on her own behalf. Further, that she is a bona fide vendor of immovable property held under a trust, having entered into an agreement for sale of a portion of the piece of the trust property. The counsel submitted that the Applicant accordingly has *locus standi* to bring the application.

The counsel further submitted that Part II of the Trustees Act (Cap 167 of the Laws of Kenya) provides for the powers of trustees to invest and proposes how the investments are to be done, while Part III of the Act grants powers to the trustee to manage and administer the investments, guided by her absolute discretion. The counsel also pointed out that section 56 of the Trustee Act, read together with Order 37, rules 1 and 3 of the Civil Procedure Rules, 2010 empowers the court to approve a sale of trust property.

It was averred by counsel that the Applicant has demonstrated that she has managed the trust property prudently, and that she only intends to invest the proceeds of the sale partly on the remainder of the portion, a part to applied to improve the education of her sons and to invest a part in a piece of land to be acquired elsewhere. Further, that the Applicant was willing to abide by any just orders and conditions that this court may order, for the further and better administration of the trust property. Counsel in this regard relied on the decision in **Re Estate Of Mbiyu Koinange, Succession Cause No. 527 Of 1981** where the court stipulated how the trust funds were to be applied.

Lastly, the counsel sought the exercise of the Court's discretion to order that the costs incidental to the sale of the portion of land including of this application, be borne from the proceeds of the sale. He relied on section 59 of the Trustee Act which authorises the Court to order that the costs and expenses of and incidental to an application for sale or any conveyance be raised and paid out of the property in respect whereof it is made, or out of the income thereof.

I have carefully considered the pleadings filed and submissions made by the Applicant. The issue for determination is whether this court should approve the sale of a portion of the trust property herein, and direct that the proceeds of sale be applied to develop the remainder of the portion and to acquire a larger piece of land.

There are various laws that apply in this regard. In terms of procedure, Order 37 Rule 1 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 the present application the Applicant has shown that she is a trustee by virtue of her registration as proprietor of the trust property in trust for herself and her children. She produced the title deed for the trust property issued on 17th July 2013 as evidence in this regard. She seeks to sell the trust property and has annexed a copy of the sale agreement. The power to sell trust property is conferred upon the Applicant as trustee by section 13 and of the Trustees 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.”

In this respect the right of the Applicant as a registered proprietor of land are provided in section 24 of the Land Registration Act (Act No 3 of 2012) which states that the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. This includes the rights to sell the said property.

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 Applicant and jurisdiction of the court to grant the prayers she seeks 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 Applicant has properly brought this application under the provisions of Order 37 Rule 1 of the Civil Procedure Rules and sections 13, 17 and 56 of the Trustees Act, and that the application is competently before the court.

The only remaining issue is whether the court can grant the orders sought. I am in this respect mindful of

the provisions of section 25 (2) of the Land Registration Act which provides that the rights of a proprietor of land provided in sections 24 and 25 of the Act shall not be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. The powers, duties and obligations of trustees are laid out in the Trustee Act and under equitable principles.

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 Applicant has averred that she intends to use the proceeds of the sale to invest in the remaining portion of the trust property, to pay for the beneficiaries' school fees and to buy a larger portion of land. Section 4(1) of the Trustees Act allows a trustee to invest any trust funds in the purchase of immoveable property in Kenya and provides for certain conditions as to the tenure of the land to be purchased.

It is my view that the proposed investments by the Applicant are prudent and in the interests of the beneficiaries. I have also noted that Applicant has duly informed the beneficiaries of the same, who have no objection. I therefore see no reason why the approval and orders sought by the Applicant should not be granted by the court, subject to such conditions as may be necessary.

I therefore allow the Applicant's Originating Summons dated 29th August 2013 and accordingly order as follows:

1. That the Applicant, be and is hereby permitted and empowered by the Court to sub-divide and sell a portion of 0.1 hectares of the trust property known as Dagoretti/Riruta/2028
2. That the Applicant shall apply not more than half (50%) of the proceeds of the sale of the said portion of 0.1 hectares of the trust property to improvements and investments on the remaining portion of the trust property; the payment of claims by, and costs of the beneficiaries; and to the legal costs of the said sale and of this Originating Summons.
3. That the Applicant shall apply the remainder of the proceeds of sale of the said portion which shall not be less than half (50%) of the said proceeds, to the purchase of an immoveable property in Kenya held for an estate in fee simple or for a term of years of which not less than forty years is unexpired, and which is not subject to a rent exceeding four per centum or the unimproved value thereof or to any condition of re-entry except for non-payment of rent, or on first mortgage thereon.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____4th____ day of
____December____, 2013.

P. NYAMWEYA

JUDGE