



**In re Marcela Kagendo (Applicant) (Environment & Land Case E007 of 2024) [2024] KEELC 14146 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 14146 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND CASE E007 OF 2024**  
**CK YANO, J**  
**OCTOBER 24, 2024**  
**IN THE MATTER OF SECTION 56 AND 57 OF**  
**THE TRUSTEE ACT (CAP 167) LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF APPLICATION FOR AN ORDER TO SELL PORTION OF**  
**NUMBER IGOKI/GIKUI/XXXX HELD IN TRUST FOR MINORS JJK AND JM**  
**IN THE MATTER OF**  
**MARCELA KAGENDO ..... APPLICANT**

**RULING**

1. The applicant herein moved this court vide the originating summons dated 5<sup>th</sup> September, 2024 filed in terms of Order 37 Rules 1,2,12,13,14, and 16 of the Civil Procedure Rules, Sections 12(1) 17, 33(1) (A), 34, 45(G) 49(A) 54(C) 57(1) and 59 of the *Trustee Act*, Cap 167 Laws of Kenya and Sections 1A, 1B & 3A of the *Civil Procedure Act*. The applicant sought for orders that-;
  1. An Order permitting the applicant, Marcella Kagendo, to sell a portion from Title No. Igoki/ Gikui/xxxx held in trust for the benefit of the minors JKK and JM for the purpose of funding their educational needs.
  2. An order that the proceeds from the sale be used specifically for the educational needs of the minors.
  3. That the Honourable court be pleased to issue directions on the service of the originating summons application herein.
  4. That the costs of and incidental to this application be provided for.



2. The application is supported by the affidavit of Marcella Kagendo sworn on 5<sup>th</sup> September, 2024. The applicant is the mother to the minors and wife to the late Charles Murithi Mwenda (deceased). Copies of the certificates of birth of the minors are annexed and marked “MI 1”.
3. The applicant avers that she was registered together with the minors as joint owners of the suit land. The applicant states that she has been struggling to pay school fees for the said minors and also to maintain them due to the harsh economic times they are facing. That the minors are in imminent danger of missing out on their education since the applicant cannot afford to pay their school fees. The fees structure is exhibited. That one of the minors JJK, has even dropped out of school due to lack of school fees, but the applicant intends to take him back to school once the money required to pay his school fees is gotten. The applicant avers that she has agreed with the minors to dispose a portion of the subject land parcel for the purposes of facilitating the minors’ education. The applicant believes that selling of the property is in the best interest of the minors who have no capacity to dispose of their shares of the suit land. That this court has the authority to permit the sale of the trust property if it is deemed beneficial for the minors. The applicant believes that granting the orders sought is in the best interests of the minors and will ensure their educational needs are met without undue hardship.
4. I have considered the application and the affidavit in support. The issue for determination is whether this court should approve the sale of a portion of the property known as title No. Igoki/Gikui/xxxx as sought. The procedure for the authorization of such sale is outlined by various legal provisions of law.
5. 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 foresaid, 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 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 account, by the executors administrators or trustees, and the vouching, when necessary, of such account.
    - 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.



6. Section 13 of the *Trustee Act* confers power to an applicant to sell trust property and 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 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 contracts 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.  
  
A trust or power to sell or dispose of land includes trust or power to sell or dispose of part thereof.
7. Going further, Section 17 of the Act empowers the court with the power to raise money by sale, mortgage, etc in the following terms-:
  - (1) Where trustees are authorized by instrument, if any creating the trust or by law to pay or apply any capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in or mortgage of all or any part of trust property for the time being in possession.
  - (2) This section applies notwithstanding anything to the contrary contained in the instrument, if any creating the trust, but does not apply to trustees of property held for charitable purposes.
8. Further, Section 56 of the *Trustee Act* grants the court with the jurisdiction to make appropriate orders in the following terms-;
  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 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 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 trustee, or by any of them, or any person beneficially interested under the trust.
9. From the above provisions of law, the court has power and discretion to confer upon a trustee any necessary power to deal with property held in trust such as this present one. In this case, the applicant is holding the suit land in trust for the minors. The applicant states that she has been unable to meet the minors needs, including paying their school fees. Indeed, the applicant avers that one of the minors JKK, has dropped out of school due to lack of fees. The applicant intends to sell part of the suit land for the educational needs of the minors, including taking JKK back to school. The court must always consider the interests of children.



10. The court finds that the necessary orders that commends itself is to allow the application in terms of prayer 1 and 2 of the originating summons. Consequently, the court finds that the originating summons dated 5<sup>th</sup> September, 2024 is merited and the same is allowed as prayed.
11. The applicant shall apply the balance of the sale agreement thereof in an investment or call account for the minors for the benefit of their further education.
12. It is so ordered.

**DATED SIGNED AND DELIVERED AT MERU THIS 24<sup>TH</sup> OCTOBER, 2024**

In the presence of

Court Assistant- Tupet

No appearance for applicant

**C.K YANO**

**ELC JUDGE**

