



In re Application by MMK as Trustee of SW & GJ (Minors) (Environment & Land Miscellaneous Case E082 of 2024) [2025] KEELC 550 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELC 550 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND MISCELLANEOUS CASE E082 OF 2024**

JA MOGENI, J

FEBRUARY 13, 2025

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

AND

**IN THE MATTER OF THE LAND PARCEL NO.
RUIRU KIU BLOCK 2 (GITHUNGURI)/24744**

AND

IN THE MATTER OF APPLICATION BY MMK AS TRUSTEE OF SW & GJ (MINORS)

RULING

1. What is before this Court for determination is a notice of motion Application dated 14/11/2024 expressed to be brought under Article 50 & 159 (d) of *the Constitution*, Order 37 Rule 19 of the Civil Procedure Rules 2010, Section 3A of the *Civil Procedure Act* seeking the following:-
 - a. Spent
 - b. That the Applicant be granted authority as the proprietor in trust to sell and transfer land parcel No. Ruiru Kiu Block 2 (Githunguri)/24744 and the proceeds be utilized towards educational needs of the minors and other expenses of the minors.
 - c. That the costs of this Application be in the cause.
2. The Application is premised on the grounds that the Applicant is the biological mother and the sole breadwinner for her two minor children and that the Applicant intends to purchase cheaper land and other proceeds from the sale will enable her build a decent shelter for the children and pay school fees. That having bought the land in 2022 but is now divorced since 2023, her ex-husband has neglected and failed to contribute to the maintenance of the children.



3. The Application is supported by the Supporting Affidavit of Miriam Mwendu Kariuki sworn on even date. Miriam deposed that she is the biological mother of the minors and that she purchased the suit property which is registered in her name and put in a trust on behalf of the minors.
4. The Applicant brought the Application under Certificate of Urgency and did not file any submissions. The one issue though that arises from the Application is whether this Court has jurisdiction to give consent to, or allow the Applicant to sell the suit land which shows that she is holding in trust for the minors. The Applicant relied on Article 50 and 159 (d) of *the Constitution* and Order 37 Rule 19 of the Civil Procedure Rules.
5. Whereas Article 159 of *the Constitution* speaks to the Court having to administer justice without undue regard to procedural technicalities. It is one of the guiding principles of judicial authority in Kenya. The Court of Appeal pronounced itself on the same in the case of *Macharia Mwangi Maina & 87 Others Vs. Davidson Mwangi Kagiri* (2014) eKLR, and stated as follows:

“ Article 159 (2) (d) of *the Constitution* stipulates that justice shall be administered without undue regard to procedural technicalities. This is a Court of law and a Court of equity; ... The Court is bound to deliver substantive rather than technical and procedural justice ...”
6. Now the issue of sale of land as the Application requires is not a simple matter that would be considered as a technicality it is a serious issue that is substantive in nature and one cannot resort to Article 159 (2) (d) to address it. Therefore I will not overly consider it as being key in resolving the issue at hand.
7. This Court has looked at the Application and the Affidavit in support as well as the attachments therein and notes that the suit property is indeed a trust property and the beneficiaries are minors.
8. Order 37 Rules 19 of the Civil Procedure Rules makes provisions on the manner in which a trustee may approach Court on issues pertaining administration of trust property. It states:

“ Where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a Plaintiff, it may order the proceedings to continue as if the cause had so begun and may, in particular, order that any Affidavits filed shall stand as pleadings, with or without liberty of the parties to add to, or to apply for particulars of those Affidavits.”
9. The Application before the Court was brought as a miscellaneous Application and not an Originating Summons and therefore the provisions herein cannot apply to this Application.
10. I note though the power to this Court granting prayers sought are donated by section 56 of the Trustees Act, which gives the Court the authority to rescind such an order as and when need arises. It is trite that a trustee can neither interfere with the property of a beneficiary nor do such an act that will jeopardize the rights of the trustees. The Applicant wishes to sell the suit property and buy a cheaper one but also to pay school fees for the minors. She has attached the fee structure for the two schools where the minors attend. She has also covenanted that she will get a cheaper property and also pay school fees and ensure the children have a decent shelter. She has however not adduced evidence that she has found a cheaper piece of land and that with the proceeds she can get a cheaper property and still pay fees for the minors. I have to consider this in my final orders.
11. Section 17 of the *Trustee Act* gives power to a trustee to do that act to raise money including calling in all or any part of the trust property.



12. Where trustees are authorized by the instrument, if any, creating the trust or by law to pay or apply 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 the trust property for the time being in possession.

13. Further, Section 56(1) and (3) of the *Trustee Act*, cap 167 Laws of Kenya provides:-

“(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)

(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.”

14. From the Application I note that the Applicant avers that she has been educating the minors all by herself since she is divorced and her husband does not support her. She attached the decree absolute to lend credence to her claim for divorce. She however did not attach any document to show she has requested for support from her husband to educate the minors and he has declined. She therefore now wants to sell the suit property so that she purchases a cheaper one.

15. In the matter before me, the Applicant has demonstrated that she did purchase the suit property in the year 2022 and that she caused the same to be registered in trust in the name of the two minors. She now seek to sell the trust property in order to enable raise school fees for the said minors and to build a shelter for them. In that respect, Section 13 of the Trustees Act 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 titles or other matter as the trustees think fit, with power to vary any contract for sale, and to buy in at 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.”

16. Arising from the foregoing, it is my finding that the Applicant has properly invoked the jurisdiction of this Court under Order 37 Rule 1 of the *Civil Procedure Act* and Section 56 of the Trustees Act. It is also my finding that the purposes for which the proceeds of the sale are intended are in the best interest of the minors as the same are meant to enable the minors to further their education and also to have shelter.



17. Given the circumstances, I hereby allow the Application herein dated 14/11/2024 and accordingly make the following orders:

- a. Leave and authority is hereby granted to the Applicant as the proprietor in trust for the two minors to transfer their interest in the land for their use as provided by Section 56 of the Trustees Act. The Applicant is to sell Land Parcel No. Ruiru Kiu Block 2 (Githunguri)/24744 and,
- b. The portion of the proceeds of the said sale should strictly cater for the school fees of the minors to enable them study without disruptions.
- c. That the cheaper land to be bought to be held in trust for the minors by the Applicant who is the biological mother of the minors and a decent shelter to be constructed thereupon.
- d. The costs of the Application shall be in the course.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

..... For Ex Parte Applicant

Mr. Melita - Court Assistant

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MOGENI J

JUDGE

