



In re JNN (Applicant) (Environment and Land Miscellaneous Application E032 of 2022) [2023] KEELC 487 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 487 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E032 OF 2022
A KANIARU, J
JANUARY 26, 2023
IN THE MATTER OF: SECTION 17, 56 57, AND 65
OF TRUSTEES ACT (CAP. 167) LAWS OF KENYA
AND
IN THE MATTER OF THE SALE OF A PORTION OF
LAND PARCEL NUMBER NGANDORI/KIRIGI/XXXX
AND
IN THE MATTER OF AN APPLICATION BY THE
REGISTERED PROPRIETOR AND TRUSTEE JNN
IN THE MATTER OF
JNN APPLICANT

JUDGMENT

1. This matter was filed here on December 7, 2022 via an originating summons dated November 29, 2022. The summons is expressed to be brought “under rules 2, 3, and 4 of the *Trustee Rules*, order 37 rule (f) of the *Civil Procedure Rules* and all enabling provisions of law.” It came with three prayers but prayer 1 is spent. The prayers for consideration therefore are (2) and (3), which appear in the summons thus:

Prayer 2: that the applicant be granted leave to excise and sell a portion measuring $\frac{1}{4}$ acre out of land parcel No Ngandori/Kirigi/xxxx and the proceeds realised from the sale of the same be applied in the settlement of the following:

- a. The costs of and incidental to the subdivision and the transfer
- b. The payment of school fees and for the purpose of future application in education of BK aged 17 years, EMN aged 7 years and JMN aged 12 years.



Prayer 3: that costs be in the cause.

2. The grounds on which the summons are anchored are on the face of the application and include, *interalia*, that the applicant – JNT – is the registered proprietor of land parcel No Ngandori/Kirigi/xxxx which he holds in trust for himself and his children; that the children are students in different institutions of learning and are in dire need of school fees and other requirements for their survival; that the children have been chased away from school for lack of school fees, and are not even allowed to register for exams as their school fees payment is in arrears; and that a court order is required to effectuate the intended sale transaction.
3. The summons came with a supporting affidavit which generally explicates the grounds advanced in support. The applicant is the father of the three minor children (names withheld) named in the summons who are students in various schools (names of schools withheld). He deposed, *interalia*, that he is a single father and a casual labourer and that his earnings are not enough to meet the needs of his minor children. A further affidavit was also filed later. The further affidavit shows that a buyer has already been found.
4. To the affidavits was attached various documents including a copy of search showing ownership of the land, birth certificates of the minor children, letter from the chairman of land control board of the area in which the land is situated confirming the intended sale, and also expressing a no-objection position provided the money from the sale is used for intended purpose; a sale agreement; some receipts showing some payment of money to the school where one of the minors is schooling; and a letter from the head teacher of one of the schools where one minor is schooling confirming the minor’s studentship in the school and intimating that the minor is a needy child.
5. The summons was canvassed by way of written submissions. The applicants submissions were filed on December 21, 2022. It was submitted, *interalia*, that the applicant is a welder and used to work for a Chinese company that went bust because of the harsh business environment wrought by Covid-19 pandemic. He is therefore out of job and survival is difficult. This court was urged to look at what is contained in the summons and grant the prayers sought. The applicants actions were said to be “in good faith and are intended for the benefit of the children.”
6. I have considered the summons, and the applicant’s submissions. I would wish first to have a look at the applicable law. Order 37 rule 1 of the *Civil Procedure Rules, 2010*, sets out the manner in which the court may be approached and some reasons for coming to court. I set out here the relevant part of the order *Ipssisma verba*:

order 37:

- “(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 such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before 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.
- b.
- c.
- d.
- e.
- f. the approval of a sale, purchase, compromise or other transaction;
- g.

7. From the foregoing provision, it is plain that the court should, as the applicant has done here, be moved by way of an originating summons. It is clear also that one of the reasons for which the court may be so moved is the approval of sale, purchase or some other transactions.

8. Further, section 17 of the *Trustee Act* (cap 167) is an enabling provision for the trustee to raise money required to pay for a need or to 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 his possession. section 17 states as follows:

section 17 (1)

“Where the 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 for sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession.

9. The power of the court itself to authorise dealings in trust property is contained in section 56 of the *Trustee Act* (cap 167 Laws of Kenya). To paraphrase the provision, the court is enabled to authorise the trustee either generally or specifically on a given issue or purpose to deal in the trust property and may impose conditions or direct in what manner such dealing may be undertaken. It can also direct the manner the money raised may be expended. The court is also empowered to vary or rescind any order it makes or make new or further orders as circumstances may require. The provision further states that applications to move the court to make the orders may be made by the trustees themselves or by any person beneficially interested under the trust.

10. Jurisprudence emanating from our courts is available to shed light on an issue like this. Examples are the cases of *VB v VB (as trustees of CADP)* HCC No 2 of 2019 (OS), Malindi and *Manesseh Mwangi Elijah Kihara & 4 others*, ELC Misc No 197 of 2015, Milimani, Nairobi. These cases dealt with issues that are broadly similar to the matter at hand.

11. This is a matter involving children. I am alive to the requirements of article 53 (2) of our *Constitution* which states as follows:

“53(2) A child’s best interests are of paramount importance in every matter concerning the child.”



12. I am further alive to the provisions of the *Children's Act*, No 29 of 2022, which, at section 8(1) (a) states as follows:

“8
(1) “(1) In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies

a. The best interests of the child shall be the primary consideration.

13. It appears to me clear that the applicant is a responsible father to the three school-going minors named in the summons herein. It is plain that the minors are in dire need of school fees and the applicant lack the financial wherewithals to pay the required fees. He therefore needs to sell part of the property that he holds in trust. He does not appear to me to be motivated by ulterior motives. I have no reason to believe that he is not acting in the best interests of the minors. His desire is to pay school fees. Educating the minors is one of their best interests.

14. Accordingly, I find that the merits of the summons herein have been demonstrated. My view is that the applicant is acting in the best interests of the three minors. I therefore allow the summons in terms of prayer 2. I will not make any order as to costs as the summons have been prosecuted before me *ex parte*.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF JANUARY, 2023.

In the presence of Koome for Muthoni Mboi for applicant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

26/01/2023

