



REPUBLIC OF KENYA



In re SNM (As Trustee of KM & DMN (Minors) (Miscellaneous Application E033 of 2022) [2023] KEELC 615 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 615 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
MISCELLANEOUS APPLICATION E033 OF 2022
A KANIARU, J
JANUARY 25, 2023
IN THE MATTER OF LAND PARCELS NO. GATURI/WERU/13044
AND GATURI/WERU/13045
IN THE MATTER OF APPLICATION BY SUSAN NJOKI MWANGI AS
TRUSTEE OF KM AND DMN(MINORS)

JUDGMENT

1. By an originating summons dated December 19, 2022 filed in court on even date, the applicant – Susan Njoki Mwangi – moved the court for grant of three prayers. The prayers are as follows:
 - i. That this application be certified urgent.
 - ii. That the applicant be granted leave to sell and transfer land parcel Nos Gaturi/Weru/13044 and Gaturi/Weru/13045 and the proceeds be applied towards educational needs of the minors and development and completion of residential house.
 - iii. The costs of the application be in the cause.
2. Prayer (i) is already spent and is therefore not for consideration at this stage. The prayers for consideration are therefore (ii) and (iii) which are formulated or expressed as aforesaid. The legal basis of the application is stated to be “Article 53 of the Constitution of Kenya, Order 37 of Civil Procedure Act, Rules 2, 3, & 4 of Trustee Act and all other provisions of Laws of Kenya”
3. The applicant is a mother of two children (names with held) for whom she holds the parcels of land she intend to sell as a trustee. The reasons for her desire or intention to sell are well stated both in the grounds put forth on the face of the application and the accompanying supporting affidavit. Simply put, the applicant is a widow and the sole bread winner for her two minor children. The children are of school going age and the applicant is increasingly finding it difficult to pay their school fees. She is also putting up a decent shelter for herself and the children and the construction seems to have stalled



due to lack of funds. She is a woman of humble circumstances and her meagre earnings are not enough to cater for the needs of the two children. She therefore asks that she be allowed to sell land parcels Nos Gaturi/Weru/13044 and 13045 in order to pay school fees for the children and also complete the construction of the house she is putting up.

4. In order to buttress her case, she made available documents of ownership of the two parcels of land and some documents to show the school fee structure of the institutions in which the children are schooling. There is also pictorial evidence of the structure she is putting up. Additionally, there are also copies of agreements for sale of the two properties.
5. The application was canvassed by way of written submissions. The submissions were filed on December 22, 2022. The submissions reiterate the reasons for the intended sale and in addition highlight the applicable law. Further, some case law was proffered for guidance. In this regard the case of *VB v VB* (as Trustee of CADP): HCC No2 of 2019 (O.S.) *Malindi And Manesseh Mwangi Elijah Kihara & 4 Others*: ELC Misc Case No 197 of 2015, Milimani, Nairobi were made available for consideration and guidance. They are cases that dealt with issues that are generally similar to the issues in this matter.
6. I have considered the originating summons as filed and the submissions filed in support. I would wish first to have a look at the applicable statute law. Section 13 of the *Trustees Act* (Cap 167, Laws of Kenya) states as follows

Section 13

- (1) Where a trust for 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 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.

Quite clearly, the provision confers on a trustee the power or authority to sell property held under a trust.

7. Further, Section 17 (1) of the *Trustee Act* is an enabling provision for the trustee to raise 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 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.

8. The power of the court itself to authorise dealings in trust property is contained in Section 56 of the *Trustee Act*.



Section 56 is as follows:

“ 56 (1) Where, in the management or administration of any trust 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 can not be effected by reason of the absence of a power for the purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustee either generally or in any particular instance the necessary power for 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”

9. As to the kind of application to be made, one needs to have recourse to Order 37 Rule 1 of the [*Civil Procedure Rule, 2010*](#). I will set out 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 of 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, heirs 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;
(underlining, mine)
- (g) the determination of any question arising directly out of the administration of the estate of trust.



10. The import of the above provisions is that the application regarding authorization of the kind of transaction desired by the applicant in this matter, which squarely seems to fall under sub-rule (f) of order 37 (supra), should, as the applicant has done, be brought by way of an originating summons.
11. There is ample jurisprudence from case law illuminating the path to be followed. Two are the VB and Manasseh Mwangi cases (supra) cited by the applicants. The other two are *RE Eunice Wanjeri Njenga* [2013] eKLR and *GW & Another (minor)* 2016 eKLR while yet another is that of *Purity Ndegi Mugo*: ELC No E028 of 2022 (O.S.), Embu, handled by this court recently. These cases have broad similarities with the matter at hand.
12. This is a matter involving children. I am alive to the requirements of Article 53 (2) of our *Constitution* which states thus:

(2) A child's best interests are of paramount importance in every matter concerning the child.

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:

“(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. My appreciation of the facts and circumstances surrounding this matter is that the applicant is a loving and responsible mother to her children. It seems reasonably clear that if she had the financial wherewithals to ensure the educational needs of the two children are well catered for, she wouldn't sell the two properties she now intends to dispose of. But times seem to be hard for her and the only way to ensure that her two children advance in education is to sell the properties. She does not appear to me to be driven by any ulterior motive. Her desire also to ensure that the children live in a decent shelter is not misplaced.
14. Accordingly, my finding is that the applicant has demonstrated well the merits of her matter before me. My view is that she is acting in the best interests of the two children. I therefore allow the originating summons herein in terms of prayer (ii). As for costs – which is prayer (iii) – the court makes no order since the applicant has been prosecuted exparte.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF JANUARY, 2023.

In the presence of Koome for M/s Ndorongo.

Court assistant: Leadys

A.K. KANIARU

JUDGE

25/01/2023

