



**J - NGNJA v DO & another (Family Appeal E002 of 2024)
[2024] KEHC 7599 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
FAMILY APPEAL E002 OF 2024
RE ABURILI, J
JUNE 25, 2024**

BETWEEN

J - NGNJA APPELLANT

AND

DO 1ST RESPONDENT

DM 2ND RESPONDENT

(An appeal arising out of the Ruling of the Honourable L.N. Kiniale in the Chief Magistrate's Court at Nyando delivered on the 18th January 2024 in Nyando CMCC No. E015 of 2023)

JUDGMENT

Introduction

1. The appellant filed an application under certificate of urgency dated 15th November 2023 in which she sought among others orders to be appointed as the minors' legal guardian so as to be able to continue to take care of the minors and be able to travel with them back to Germany so as to grant the minors the best education possible.
2. It was the appellant's case that the minors' father who is her biological brother had been diagnosed with cancer and was involved in a road traffic accident thus incapacitated and could not take parental responsibility over the minors.
3. The appellant averred that she had bonded with the minors, D.O. and D.M, over the years and they had a good relationship as she had been providing for their needs throughout their lives and that by granting her the orders sought, the same would not prejudice the rights of the children or any other person having parental responsibility over the said children.
4. On the 15th November 2023, the minors' parents Richard Oruko Nyangao and Caren Akoth Oruko swore a joint affidavit of no objection to the appointment of a guardian and deposed that they had



- no objection to the appellant being made the minors legal guardian as she had been supporting the minors since birth.
5. A report by the Children’s Department, Sub-County Children’s Office Nyakach by one John Wainaina dated 5.12.2023 also recommended that the minors be allowed to travel with the appellant herein to acquire education, upkeep and medical care and that the same was in their best interest.
 6. The trial magistrate in her ruling disallowed the application for legal guardianship of the children for purposes of travelling out of the country and advised the applicant to apply for adoption before the High Court for that purpose.
 7. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 12th February 2024 raising the following grounds of appeal;
 1. That the learned trial magistrate misdirected herself on the law and facts by concluding that the applicant cannot be granted guardianship rights of the minors herein.
 2. That the learned trial magistrate misdirected herself on the law and facts by disregarding the minors’ parents’ consent in allowing the applicant who is the biological aunt of the minors to be a legal guardian.
 3. That the learned trial magistrate misdirected herself on the law and the facts by disregarding the best interest of the minors to obtain the best quality education by travelling to Germany under the guardianship of the applicant herein.
 4. That the learned trial magistrate misdirected herself on the law and facts in disregarding the children’s officer’s reports which indicated that from their expert opinion that it would be in the best interest of the minors if the applicant is made the legal guardian.
 5. That the learned trial magistrate erred in law and facts in concluding that the applicants only legal recourse is the adoption of the minors in so far as the provision for the minors’ education is concerned.
 6. That the learned trial magistrate misdirected herself on the law and facts by concluding that the application for adoption cannot be used for th purposes of allowing the minors to travel out of the country.
 8. The appeal which is mainly Exparte in nature was argued by way of oral submissions.
 9. Mr. Wainaina, the Children’s Officer Nyakach sub-county was summoned to appear in court and shed light on the matter and he submitted that it was the minors’ parents who took the minors and stated that they were unable to take care of them but that the minors could be cared for by their Aunt, the appellant herein, who is in Germany and is capable of taking care of them. Mr. Wainaina submitted that the children were also willing to be taken care of by the aunt. He submitted that the children were 11 and 14 years old respectively.
 10. Mr. Emukule advocate for the appellant submitted that Section 122 of the *Children’s Act* provides that a guardian can be appointed to take care of the interests of the minors but cannot take the minor out of the country and should the court require the presence or production of the minor in court, the minor shall be produced.
 11. It was submitted that all the minors’ biological parents were terminally ill and this was impacting the minors and that the best interest of the minors was paramount. Mr. Emukule further submitted that



the minors and the appellant had a blood relation as she was their aunt and that she provides the minors psychological and emotional support.

12. Mr. Emukule submitted that although kinship adoption would have been the best option, the applicant had dual citizenship and Schedule 7 of the Children's Act provided for a moratorium on Inter Country adoption and further, that German laws also did not provide for Inter Country adoptions.
13. It was submitted that a guardianship order would have been a solution to the family's conundrum. Mr. Emukule submitted that the appellant was willing to comply with any of the court's orders including production of the children.

Determination

14. Section 122 of the *Children's Act* No 29 of 2022 provides for guardianship as such:

“(1) Guardianship means a person appointed by will or deed by a parent of a child or by an order of court to assume parental responsibility over a child on the death of the parent either alone or jointly with the surviving parent of the child in accordance with the provisions of the Act.”

15. Therefore, the conditions precedent for guardianship is appointment by a parent or by an order of the court, to assume parental responsibility of that child upon the death of a parent. However, section 125 of the Children's Act provides that:

“a. In addition to the powers of the court to appoint a guardian under section 122, the court may appoint a guardian on application by any person in the prescribed forms in any of the following circumstances-

- i. Where the child's parents are deceased or cannot be found and this child has no guardian or other person having parental responsibility over the child or
- ii. Where the child is one to whom section 121 applies.”

16. The law envisages a scenario where both parents are responsible persons or totally irresponsible and cannot be found or are dead. In the instant appeal, we have a scenario where both parents are alive and can be found. The second limb of the conjunctive in section 125 also provides that:

“and the child has no guardian or other person having parental responsibility over the child.”

17. In the present case, although the parents are alive and have breath, what they portrayed to court could not have been anticipated under section 122. The parents nonetheless, by their joint sworn affidavit confirmed to the trial court that they are not only unable to take care of the minor but also they themselves.

18. That being the case, the case before the trial court and this court falls under the provisions of section 150 of the *Children's Act*, 2022 on cases of children in need of care and protection and the section provides as follows:

150.



- (1) A Court before which any child in need of care and protection is brought may require an authorized officer or any other person to give a report or professional advice on any aspect of the proceedings relating to the manner in which the child should be dealt with.
- (2) If a Court is satisfied that a child brought before it is in need of care and protection, the Court may—
 - (a) order that the child be returned to his or her parent or guardian, or to the person having parental responsibility over the child;
 - (b) order the parent or guardian of the child, or other person having parental responsibility over the child, to execute a bond with or without surety to exercise proper care and guardianship;
 - (c) if the Court is satisfied that it is in the best interests of the child, commit such child to a rehabilitation school suitable to the needs and interests of the child;
 - (d) without making any other order, or in addition to making an order under this section, make an order for guardianship under Part X;
 - (e) if the child is a victim of armed conflict, civil disturbance or natural disaster, make an order requiring the Secretary to take such steps as may be necessary to ensure that the child is provided with appropriate care and protection;
 - (f) in any other case, make an order directing that the child be reunited with his or her parent or guardian;
 - (g) if the child has a disability or other special needs, make an order directing that the Secretary takes such steps as are necessary to meet the special needs of the child;
 - (h) if the child is subjected to early marriage, make an order declaring that such marriage is a nullity and requiring the child to be placed under the care of a fit person, or that the child be accommodated in a place of safety;
 - (i) where it is shown to the satisfaction of the Court that the child has been engaged in drug abuse, make an order directing that the child be committed to a drug rehabilitation center for treatment, or that the child be accorded professional counselling;
 - (j) in any case where —
 - (i) a child has accompanied the mother who is imprisoned or detained in lawful custody or remand;
 - (ii) a child or children have been left unattended in consequence of their mothers' or fathers' imprisonment or detention in lawful custody; or
 - (iii) the child or children accompanying the mother to prison or other place of detention have attained the age of four years, make an order directing that the child or children be placed under the care of a fit person, or that the child or children be accommodated in a place of safety; or



- (k) make any other order which the Court may think fit, and in the best interest of the child.
- (3) In considering the person with whom the child shall be placed, the court shall give priority to a member of the child's immediate family.
- (4) A parent or guardian who is ordered to exercise proper care and guardianship of a child under subsection (2)(b) shall, in addition to that order, be required to seek the assistance of a professional counsellor.
- (5) The order referred to in subsection (3) shall include a family assistance order made in accordance with section 135(1) (e).
- (6) The Court may make interim orders on such terms as the Court may direct, including an order that the child be accommodated in a place of safety, pending final orders for the care and protection of a child.
- (7) An interim order under subsection (6) shall not remain in force for a period exceeding fourteen days: Provided that the Court shall have power to extend such orders from time to time and on such terms as the Court may direct.
- (8) Without prejudice to the generality of subsection (5), the Court may order that a child shall remain in the custody of a county government entity, an appointed authorised officer, a charitable children's institution, a place of safety or a fit person, until the age of eighteen years, or such lesser age as the Court may direct.
- (9) The Court may from time to time, either of its own motion or on the application of any person, review, vary or revoke any order made under this section.
19. From the ruling of the trial magistrate, it appears that she could have awarded the appellant legal guardianship to the appellant but declined to make orders to allow her travel with the minors outside the jurisdiction of Kenya. The appellant and her advocate admit that the law both in Kenya and Germany do not allow for adoption out of the respective jurisdictions, now that the appellant has dual citizenship.
20. Section 17 of Schedule 7 of the *Children's Act* provides;
- “The terms of the Moratorium on inter-country and resident adoptions issued on 26th November 2014 shall apply to matters relating to inter-country adoption under this Act.
Appellants' Submissions.”
21. The aforementioned Moratorium in essence placed a ban on inter country adoptions.
22. This court has a duty to keep the child's best interests in every matter concerning the child in line with the provisions of Article 53 (2) of the *Constitution*. Furthermore, section 11 of the *Children's Act* guarantees every child the right to parental care and protection and provides that:
- 11.
- (1) Every child has the right to parental care and protection.
- (2) Except as is otherwise provided under this Act, every child has the right to live with his or her parents.



- (3) Despite subsection (2), a child may be separated from his or her parents where the Court or the Secretary determines that the separation is in the best interest of the child.
- (4) Where a child is separated from his or her parents under subsection (3), the child shall be provided with the best alternative care available, in accordance with this Act or any other written law, giving priority to family based alternative care.
- (5) Where an order made under subsection (3) applies to two or more siblings, the order shall provide that the siblings be placed under care and protection together and that they may not be separated, except for such compelling reasons as the Court shall record.
- (6) Subject to subsection (3), every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with the parent or parents on a regular basis, unless it is shown to the satisfaction of the Court that such contact is not in the best interest of the child.
- (7) Where a child is separated from his or her parent or parents otherwise than under an order of the Court, and without the consent of the parent or parents, the Secretary shall, on request by the parent or parents, facilitate the tracing and reunification of the child with the parent or parents.

23. The above section guarantees every child the right to live with their parents. It further allows separation of children from their parents if it is in their best interest. What that means is that it is not just for the parents to give away the rights of their children who cannot consent to being given away, but that the court in making any orders affecting the children must at all times bear in mind these rights of children affected and who may have no voice to say no because of their social and economic situation. I underscore the fact that the children's parents may be poor but I refuse to accept any invitation suggesting that financial muscle is what guarantees any child their rights as clearly spelt under section 11 of the *Children's Act* as reproduced above.

24. The appellant is the paternal aunt to the children and if indeed these children are in need of care and protection by dint of their parent's social and economic situation, and if she has been providing for the children since their infancy, nothing prevents her from continuing to provide for them while they remain in custody of their parents who are still alive in view of the children's right to live with their parents.

25. In addition, if it is a matter of emotional and psychological support, the children and their parents need each other for that purpose during such moments.

26. This position I take is supported by section 12 of the *Children's Act* which is very elaborate as follows:

12.
 - (1) Every child whose parent or guardian is unable to maintain the child has the right to social security as guaranteed by Article 43(3) of the *Constitution*;
 - (2) ...

27. The section provides for alternative care which includes guardianship and at section 12(4) (c) and (d), the following principles, among others, shall be considered when placing a child in alternative care—

- (c) poverty, disability or provision of education shall not be the driving factor for removing a child from his or her family and placing him or her in alternative care;



- (d) the removal of a child from his or her family for the purpose of placement in alternative care shall be temporary and a last resort, and shall be carefully monitored in accordance with this Act;
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28. The objectives of alternative care includes, under section 12(3)(b), to place the child as close as possible to his or her usual place of residence among others.
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29. On matters education, Kenya has some of the best schools in the world, both public and private and international schools such that it is not correct to say that if the appellant is granted guardianship importantly for purposes of travelling with the children out of the country, is when they will receive the best education courtesy of the appellant.
30. The appellant's good gesture is appreciated but she can as well place the two children in boarding schools which offer the best education in Kenya, including international schools and once they are 18 years of age, now that they are in their teens, they can make their decisions as adults to travel with her out of the country.
31. From the affidavit on record, the appellant has been helping the minors since birth. There's no reason why she should stop now. There is also no reason why she cannot continue supporting her ailing brother and his wife who are struggling to make ends meet.
32. As earlier stated, under section 150 of the Children's Act, the appellant can be appointed as guardian to the two children and if, as a guardian, she finds it necessary for the children to travel to Germany to be with her there at her invitation, then all she would need is leave of court. This is not the same as seeking to be granted legal guardianship of the children for purposes of travelling with them out of the country.
33. In the circumstances I find that the trial magistrate did not err when she dismissed the application regarding appointment of the appellant as legal guardian for purposes of travelling with the children out of the country to Germany.
34. However, nothing prevented the trial court from appointing the appellant as legal guardian to the two children, under section 150 of the *Children's Act* and with a caveat or a rider, which I hereby do and appoint Juch – Niemann Geb Nyangao Jeannette Amelie as legal guardian to the two children D.O. and D.M. The two children shall, however, only travel with their guardian out of the country, with express leave of this court.
35. As inter country adoptions has a moratorium and as the Germany laws are said not to allow the appellant to adopt the two children, the aspect of the order by the trial court for kinship adoption is set aside.
36. I make no orders as to costs.
37. I so Order.
38. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

