



**GM v Republic & another (Criminal Appeal 62 of 2019)
[2024] KEHC 13220 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL 62 OF 2019
EM MURIITHI, J
OCTOBER 31, 2024
IN THE MATTER OF GUARDIANSHIP OF GM TO KM**

BETWEEN

GM APPLICANT

AND

REPUBLIC 1ST RESPONDENT

MMM 2ND RESPONDENT

RULING

1. By a certificate of urgency dated 2/10/2023, the applicant seeks that:
 1. The suit and or pleadings be reopened
 2. The applicant herein be released as the guardian of KM
 3. The Honorable Court do make such other or further orders as it deems fit and just in the circumstances.
2. In his supporting affidavit, the applicant avers that the accused is his brother and he has been faithfully paying school fees for KM until he exhausted his resources. He will suffer irreparable loss and damage unless he is released from the said guardianship. Besides, the said KM has now attained the age of majority and no party will be prejudiced if the orders sought are granted.
3. The 2nd respondent has opposed the application vide his replying affidavit sworn on 20/3/2024. He avers that the dispute herein involves their ancestral piece of land registered in the name of their father JM (deceased) being L.R No. Ithima/antuambui/xxxx. That land has miraa plantation which they used to harvest for their subsistence before his arrest and imprisonment, which sentence will end in two years' time. The applicant was ordered by the court to harvest the said miraa and use the proceeds



therefrom to educate his son KM. The applicant has on numerous occasions been summoned by the Chief Antuambui location and the Children Office Igembe North on issues pertaining the upkeep and school fees of his son. His son, who has attained the age of majority, is pursuing a degree at Egerton University, and if the orders sought are granted, his son will be unable to further his education due to lack of school fees and upkeep. In the alternative, the court can order that the miraa harvesting in the said land be done in alternation between the applicant and KM with the supervision of the area chief and the OCS Laare Police station.

4. KM (hereinafter referred to as the interested party) swore a replying affidavit on 5/4/2024 in opposition to the application. He avers that this court gave an order dated 5/7/2019 directing the applicant herein to pay his school fees and maintenance then when he was a Form one student at Mwiatheni Boys High School, because his father, the 2nd respondent was and is still in jail due for release in 2025. The applicant is in charge of their ancestral land being L.R No. Ithima/antuambuI/xxxx where his father has a share. The said land has miraa plantation which his father used to harvest for their subsistence before his arrest and imprisonment. He is a student at Egerton University but he deferred his studies due to lack of school fees. He is unable to take care of himself and pay his school fees and he urges the court to extend the orders of 5/7/2019 until the release of his father from prison to enable him pursue his education. In the alternative, if the court is inclined to grant the orders sought, it should order that the miraa harvesting in the said land be done in alternation between himself and the applicant with the supervision of the area chief and the OCS Laare Police station, pending the release of his father from jail.
5. The parties to the application agreed to rely on their respective affidavits filed in the case and ruling was reserved.

Determination

6. The singular issue for determination is whether the application is merited.
7. The order the applicant seeks to be discharged from was made by Justice A. Mabeya on 4/9/2019 as follows;
 - “ 1. That in the event the guardian Geoffrey Murur fails to pay school fees at anytime hereafter, the Children Officer Imenti North is directed to take action including charging the guardian for child neglect.
 2. That the minor is at liberty at anytime to report to the Children’s Officer through Area Chief.
 3. That this order be served upon the Children’s Office and the Chief Antuambui Location.
 4. That hearing of appeal on 4th September, 2019.”
8. That order was to subsist until the interested party completed his studies all the way to the University level. The interested party has exhibited an offer letter to join Egerton University, but he was compelled to defer his studies due to lack of school fees. It is not disputed that the order was made when the interested party was a minor who has since attained the age of majority.
9. The question that begs is whether the applicant’s aspiration to pursue higher education cannot come into fruition. The applicant is adamant that he has exhausted his resources and he is thus unable to continue paying school fees for the interested party. It bears repeating that the source of the school fees is proceeds from the sale of miraa on a land belonging not to the applicant, but his deceased father,



where the 2nd respondent is a beneficiary. Had the 2nd respondent not been in prison, the interested party's post education would have progressed without any hitches. In the 2nd respondent's absence, the applicant was given that mantle by the court to act as the interested party's guardian to ensure that his school related needs have been met when and if they fall due.

10. This court is enjoined by the provisions of Article 53 of the *Constitution* to protect the paramount interests of a child and ensure their right to education is promoted and protected.
11. This court is equally empowered by the provisions of section 127 of the *Children Act* to extend the appointment of a guardian beyond the child's 18th birthday in exceptional circumstances as follows:
 - “(1) The appointment of a guardian shall expire upon the child attaining the age of eighteen years, unless exceptional circumstances exist that would require a court to make an order that appointment be extended.
 - (2) The exceptional circumstances referred to in subsection (1) are that the child suffers from a mental or physical disability or from an illness that will render him incapable of maintaining himself, or of managing his own affairs and his property without assistance of a guardian after his eighteenth birthday or such other exceptional circumstances with regard to the child as the court may deem proper to warrant the making of an order under this section.
 - (3) Where an order is made under subsection (1), it shall be made prior to the child's eighteenth birthday and may be made on an application by—
 - (a) the child;
 - (b) the parent or guardian of the child;
 - (c) a relative of the child; or
 - (d) the Secretary:Provided that no order shall be made without the consent of the child, if he is capable of giving such consent, and of the guardian whose appointment is required to be extended.
 - (4) A court making an order under this section may attach such conditions as to the duration of the order and containing directions as to how it shall be carried out, imposing such other conditions that must be complied with and with such incidental, supplemental or consequential provisions as the court thinks fit.
 - (5) A court shall have power to vary, modify or revoke any order made under this section after the child's eighteenth birthday, on the application of any of the persons named in subsection (3), or where the child marries after his eighteenth birthday, his spouse.”
12. This court finds that the interested party's enthusiasm to pursue post secondary education, his attainment of the age of majority notwithstanding, pending the release of his father, the 2nd respondent herein, from prison, is an exceptional circumstance to warrant extension of the guardianship of the applicant.



13. The alternative prayer to have the applicant and the interested party harvest the miraa in turns is not viable because of the obvious bad blood between the 2nd respondent and the interested party on one part and the applicant on the other part.

Orders

14. Accordingly, in the interest of justice and in the spirit of section 127 of the *Children Act*, the court makes the following orders:
1. The application dated 2/10/2023 is dismissed.
 2. The applicant shall continue to pay school fees for Kelvin Mutwiri, the interested party herein until the release of the 2nd respondent from prison.
 3. Either party is at liberty to apply for further orders of the court.
 4. File closed.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mose for the Applicant.

Mr. Mungai for the Appellant.

Mr. Masila for the Respondent.

