



**In re MWN (Minor) (Miscellaneous Cause 1 of 2023)
[2023] KEHC 19515 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CAUSE 1 OF 2023
LM NJUGUNA, J
JUNE 27, 2023**

IN THE MATTER OF

TNM APPLICANT

RULING

1. The applicant herein moved this court vide an Originating Summons dated January 17, 2023 brought under certificate of urgency. Essentially, the applicant seeks for orders appointing him as the legal guardian in respect to the minor herein (MW).
2. The application is premised on the grounds on its face and it's supported by the affidavit sworn by the applicant. In a nutshell, the applicant's case is that the minor herein was born of one LN who brought the minor up as a single mother until her demise on December 30, 2021. That after her demise, the minor was placed under the care of the applicant and he has lived with her ever since and the whereabouts of her father is not known. He invited this court to consider the best interests of the minor since he needed to access LN's bank accounts in order to pay school fees for the minor.
3. When the summons came up for hearing, Mr Kariuki, counsel for the applicant via his written submissions in support of the summons reiterated the contents of the summons and the supporting affidavit.
4. He submitted that the mother to the minor died on December 30, 2021 and that her father remains unknown. That the annexed correspondences from Mbeere – North Children's Officer buttresses the need to have legal guardian appointed by the court. Reliance in support of the application was placed inter alia on sections 122 of the *Children's Act* and in the matter of *EMN & DKM MISC E006 of 2022 eKLR*. This court was therefore urged to allow the application herein.
5. I have considered the application together with the supporting affidavit and the annexures and the written submissions made on behalf of the applicant. It is my view that the sole issue for determination is whether the application is merited?



6. As I have already indicated, the applicant has sought to be appointed as the guardian for the minor. Under section 122 of the Children’s Act, 2022 Laws of Kenya, a guardian may be appointed in respect of any child who is a resident in Kenya whether or not the child was born in Kenya or is a Kenyan citizen. The court has powers to appoint a guardian on application of any individual, where the child’s parents are no longer living, or cannot be found and the child has no guardian and no other person has parental responsibility for him/her.
7. As such, it is clear that for an application to be brought under section 125 (1) of the Act (such as the instant application), it is a prerequisite that:-
 - i. The parents of the child ought to be dead or cannot be found,
 - ii. And the child has no guardian or
 - iii. There should be no other person who should be having parental responsibility of the child.
8. In the instant case, the applicant submitted that the mother of the minor herein who was his sister passed on December 30, 2021. He attached the death certificate of the deceased and further submitted that the minor’s father has never been part of the minor’s life and that his whereabouts is not known. The applicant was able to prove that the mother is deceased and that the father cannot be found.
9. The applicant further deposed that he has been taking care of the minor since the demise of her mother and that he has been maintaining her and has thus assumed parental responsibilities.
10. Section 122(1) of the Act defines a guardian to mean:

‘ A person appointed by will or deed by a parent of the child or by an order of the court to assume parental responsibility over a child on the death of the parent of the child either alone or jointly with the surviving parent of the child in accordance with the provisions of this Act.’
11. It is clear that the minor does not have a guardian within the meaning of this section and thus the second condition was satisfied. Her father cannot be found and thus cannot be said to have acquired parental responsibility and thus a guardian within the meaning of this section.
12. As for the requirement that there should be no other person who should be having parental responsibility for the child, the applicant has submitted that he has been living with the minor since the demise of her mother and that they are in good relationship. [See Part III of the [Children Act](#)].
13. There is no evidence that the father of the minor applied for the parental responsibility or that there was a parental responsibility agreement. The evidence before the court is that the father’s whereabouts is not known. It is my view, therefore, that there is no one who has parental responsibility of the minor herein. As such, the third condition was satisfied.
14. I take cognizance of the provisions of Section 5(8) (1) of the Act which obligates this court to take as a paramount consideration, the best interest of the child in all actions concerning children. Further Article 53 of the [Constitution](#) obligates this court, in exercise of any powers conferred by the Act, to treat the interests of the child as the first and paramount consideration to the extent that the same is consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child, conserve and promote the welfare of the child and to secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.



15. The applicant has been staying with the minor from the demise of her mother and she has been under his care. It was submitted that he has taken parental responsibility of the minor and further, that he needs to pay her school fees at [particulars withheld] School and as a result, he needs to access the benefits of the deceased to enable him clear fee balance of the minor.
16. In my view, the best interests dictate that the minor herein remain with the applicant and guardianship be granted to him.
17. Considering all the above factors and the legal provisions, the applicant has made a case to warrant granting of the orders sought.
18. The application is granted as prayed.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

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Applicant

