



In re Application for Guardianship of FM, DM & BK (Minors) (Guardianship Cause E002 of 2023) [2023] KEHC 25776 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
GUARDIANSHIP CAUSE E002 OF 2023
TW CHERERE, J
NOVEMBER 23, 2023
IN THE MATTER OF APPLICATION FOR
GUARDIANSHIP OF FM, DM AND BK (MINORS)**

BETWEEN

JLM APPLICANT

AND

IK RESPONDENT

JUDGMENT

Introduction

1. VKM (deceased) a police officer and son of the Applicant who is pleaded to be the father of the minors FM, DM and BK died on 01st February, 2023.
2. MK is the mother to FM and Respondent the mother to DM and BK.
3. By an Originating Summons dated and filed on 23rd March, 2023, Applicant seeks the following orders that:
 1. Applicant be appointed as legal guardian in respect of minors FM, DM and BK
 2. In the alternative, the Applicant and Respondent be appointed joint guardians of minors FM, DM and BK
 3. Upon appointment, Applicant be known as the parent of the minors FM, DM and BK
4. The application is premised on the grounds on its face and further supported by the affidavit sworn by the Applicant on 23rd March, 2023. In summary, the Applicant's case is that the minors DM and BK have been in his custody and partly in the custody of the Respondent. It is also the Applicant's case that FM who is a form 1 student has been continuously in his custody and he is apprehensive that



- the minor might lose in the benefits of the deceased since Respondent has declined to recognize the minor as son of the deceased.
5. The application is also supported by an affidavit sworn on 23rd March, 2023 by MK the mother of FM who states that she did not marry the deceased and that the minor has been in custody of the Applicant and additionally by an affidavit sworn by TMM, Applicant's wife who avers that he has been taking care of FM.
 6. In support of his claim, Applicant has annexed the certificate of birth for FM and a fees structure for FM from [particulars withheld] Secondary School.
 7. By her replying affidavit sworn on 05th May, 2023 and filed on 08th May, 2023, Respondent opposes the application. She denies that Applicant has been in custody of minors DM who is a student at [particulars withheld] in Nairobi and BK who is only one-year-old. She accuses the Applicant of filing this cause not for the best interest of the children but only for the purpose of obtaining the deceased's terminal benefits to her detriment and the children of the deceased.
 8. I have considered the application together with the affidavits and annexures on record and the written submissions made on behalf of the parties and the issue in question is whether the application is merited.
 9. Under section 122 of the *Children's Act* No. 29 of 2022 provides for Appointment of guardian and provides as follows:
 1. In this Part, "guardian" 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 of the child either alone or jointly with the surviving parent of the child in accordance with the provisions of this *Act*;
 10. Under section 105 (1) of the *Act*, the court has powers to appoint a guardian under section 122, in any of the following circumstances;
 - (a) where the child's parents are deceased or cannot be found, and the child has no guardian or other person having parental responsibility over the child; or
 - (b) where the child is one to whom section 121 applies.
 11. Flowing from the foregoing provisions, it is apparent that an applicant such as the one before the court has to demonstrate that:
 - a) the parents of the child ought not to be living (or cannot be found)
 - b) the child ought to have a guardian
 - c) there should be no other person who should be having parental responsibility for the child.
 12. In the instant case, both mothers of the minors are living. The only evidence in support of the Applicant's claim that he has been having the custody of the minor FM is the mother's averments and a fees structure with the name of the minor issued by [particulars withheld] Secondary School and that in my considered view is not adequate prove of custody over the minor nor assumption of parental responsibility by the deceased over the minor.
 13. Applicant has also not demonstrated that he has been having partial custody of the minor DM who is a Grade 5 pupil at [particulars withheld] in Nairobi and BK who is only one-year-old.



14. Under Section 24(3), where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other, the mother should have parental responsibility at the first instance and the father can only acquire parental responsibility either upon application to court or pursuant to a parental responsibility agreement.
15. Under Section 8(2) of the Act, the interests of the child are of paramount consideration and any action taken should be calculated to:
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest
16. I understand the Applicant to say that he seeks orders of guardianship to be able to secure the deceased's benefits for the benefit of the minors.
17. The issue of distribution of deceased's benefits is a succession matter where the court will not only determine who the beneficiaries of the deceased are but their respective shares. In my considered view, it is not in the interest of the minors to grant a guardianship order to the Applicant to advance the interests of minors whose mothers are living.
18. From the foregoing analysis of all the above factors and the legal provisions, I find that the Applicant has not made a case to warrant granting of the orders sought.
19. The Originating Summons dated and filed on 23rd March, 2023 is therefore disallowed.

DATED AT MERU THIS 23RD DAY OF NOVEMBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Applicant - Mr. Nyamokeri for Nyamokeri Ombachi & Co. Advocates

For Respondent - Mrs. Ntarangwi for J.K.Ntarangwi & Co. Advocates

