



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS  
MISC. CAUSE NO. 130 OF 2019  
FAMILY DIVISION  
IN THE MATTER OF THE CHILDREN ACT, 2001

AND

IN THE MATTER OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT, NO. 12 OF 2011

IN THE MATTER OF AN APPLICATION FOR APPOINTMENT AND RECOGNITION AS LEGAL GUARDIANS OF LB AND SNB

CKN.....1<sup>ST</sup> APPLICANT

MWBK.....2<sup>ND</sup> APPLICANT

**RULING**

1.The subjects LB and SNB were born in 1994 and 1997, respectively. They were born to CMM and JWB. This couple separated and left the matrimonial home and abandoned the subjects whose care was taken up by their maternal grandmother, GNK. JWB relocated to the United States of America. She is in touch with the subjects. CMM lives in JuJa. He begun another family. He does not care about the subjects. In 2007 the applicants CKN and MWBK took up the care of the subjects and have since been their *de facto* guardians. They have seen them through school. The 2<sup>nd</sup> Applicant is the sister to the mother of the subjects.

2.The subjects want to go to the United States of the America for work and further training, but have each been denied Kenyan passport by the Immigration Department. Each has a Kenyan identity card. They have, since they were children, been using the name B. The name is reflected in their identification documents.

3.The Immigration Department has advised that the only way the subjects can each get a Kenyan passport is if the applicants are formally appointed as their legal guardians to be able to stand in the place of their parents. According to **Regulation 12** of the **Kenya Citizenship and Immigration Regulations, 2012** when applying for a Kenyan passport one is required to file and submit a statutory form known as Form 19 which requires one to provide supporting documents which include the applicant's parent Kenyan National Identification Card. The subjects cannot use the applicants' identity cards because they are not legally recognized as their guardians.

4.The instant application by way of notice of motion has been filed under **sections 22(1)(g)(iii), 24** and **27(1)** of the **Kenya Citizenship and Immigration Act (Cap 12 of 2011)**, **Regulation 12** of the **Kenya Citizenship and Immigration Rules, Sections 1A(2) and 3A** of the **Civil Procedure Act** and **Order 51** of the **Civil Procedure Rules** for the order –

**“That CKN and MWBK be appointed and recognized the legal guardians of LB and SNB upon such terms as the court may deem just and necessary.”**

This application was brought by way of a miscellaneous application.

5.The Director of Children Services supported the application.

6.The application was prosecuted by M/s Gachara who was holding brief for Mrs. Muriithi. Counsel filed written submissions in support of

the application. When the court asked counsel whether the issue of jurisdiction had been considered, she tailored her written submissions to address the issue by saying that under **Article 165(3)(a)** of the Constitution this court had unlimited original jurisdiction to hear and determine the issue. Counsel further made reference to **Article 50(1)** of the Constitution that provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body. Counsel then went ahead to address the court on the right of every Kenyan to obtain a passport as provided in **Article 12(1)(b)** of the Constitution. The **Article** provides as follows:-

**“12. (1) Every citizen is entitled to—**

**(b) a Kenyan passport and any document of registration or identification issued by the State to citizens.”**

She further relied on **Article 22(1)** of the Constitution that states that-

**“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”**

7. Lastly, counsel made reference to the decisions in **Abrurahman Kadhr –v- Attorney General for Canada [2006]F.C 727** cited in **Kenya Anti-Corruption Commission –v- Deepak Chamanlal Kamani & 4 Others [2014]eKLR** and **Christopher Ndarathi Murungaru –v- Standard Limited & 2 Others [2012]eKLR**.

8. What was telling was the following submission by the applicants’ counsel:-

**“Your Lordship, the applicants did not file for formal adoption or legal recognition as guardians of the Subjects for the simple reason that the need never arose when the Subjects were growing up, and as such, it did not occur to them that the subjects would be disadvantaged later in life. However, this mistake or error in judgment should not be visited upon the Subjects who were innocent minors at the time. It is our humble submission that this Honorable Court can exercise its discretion to see that justice is granted and end the situation that the subjects are in, by hearing and determining this matter in their favour.”**

9. I am clearly aware of the jurisdiction of this court under **Article 165(3)(b)** of the Constitution to hear and determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The applicants have, however, not brought a constitutional case to enforce any of their rights, privileges, and benefits over a passport under **Articles 12** and **22(1)** of the Constitution. The notice of motion has not invoked the constitutional authority of this court to enforce the subjects’ rights to a Kenyan passport. When either the subjects or the applicants will seek to enforce their constitutional right to a Kenyan passport, they will certainly be required to bring the matter against the Attorney General and the Director of Immigration for them to be heard before a determination is reached.

10. Otherwise, the issue whether or not one should be appointed a guardian over a child is provided for under **section 105** of the **Children Act, 2001**. If the child has since become of age and there is need for extension of the appointment of guardian beyond the child’s eighteenth birthday, then the application will be made under **section 107** of the **Act**. In either case, **section 73(1)** of the **Act** confers on the Children Court the jurisdiction to hear and determine the application.

11. There is the other issue that the subjects are adults. It has not been deponed that they suffer from any incapacity in the sense that they cannot themselves approach the court to enforce any legal rights due to them. If they have gone to the Immigration Department and have been denied a Kenyan passport, would they legally be required to sue for the same through the applicants? Don’t they have capacity to sue?

12. In conclusion, for all the foregoing reasons, I find no merit in the notice of motion which I dismiss.

**DATED AND DELIVERED NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL 2021**

**A.O. MUCHELULE**

**JUDGE**