



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISCELLANEOUS CIVIL CAUSE NO. E006 OF 2021

IN THE MATTER OF SECTION 102 OF THE CHILDREN'S ACT NO. 8 OF 2001

AND

IN THE MATTER OF APPLICATION FOR GUARDIANSHIP TO JM

AND

IN THE MATTER OF EMN AND DKM

EMN & DKM.....APPLICANTS

JUDGMENT

A. Introduction

1. The applicants herein moved this court vide an Originating Summons dated 22.03.2021 brought under certificate of urgency. Essentially, the applicants seek for orders appointing them as the legal guardians in respect to the minor herein (JM) and further that upon guardianship being granted, the applicants (guardians) be known as the parents to the minor herein.

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicants. In a nutshell, the applicants' case is that the minor herein was born of one WWN and KK but W brought the minor up as a single mother until her demise on 18.04.2017. That after her demise, the minor was placed under the care of the applicants and the applicants have lived with her ever since and the whereabouts of her father is not known. Further that, the minor is happy and has bonded well with the applicants' children and that the applicants have financially maintained the minor and assumed parental responsibility, custody, care and are willing to continue to cater for the minor as one of their own child. They invited this court to consider the best interests of the minor.

3. When the summons came for hearing, Ms. Migwi for the applicants in support of the summons reiterated the contents of the summons herein.

4. I have considered the application together with the supporting affidavit and the oral submissions made on behalf of the applicants. It is my view that the sole issue for determination is *whether the application is merited?*

5. As I have already indicated, the application seeks appointment of the applicants as the guardians for the minor herein. Under section 102(2) of the Children's Act Cap 141 Laws of Kenya, a guardian may be appointed in respect of any child who is resident in Kenya whether or not the child was born in Kenya or is a Kenyan citizen. The guardian appointed need not be a Kenyan citizen. Under section 105, 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 having parental responsibility for him; and on application of any individual, where the child is a displaced child within the meaning of section 119 of the Act.

6. As such, it is clear that for an application to be brought under section 105(a) of the Act (such as the instant application), it is a prerequisite that;-

a) *the parents of the child ought not to be living (or cannot be found)*

b) *the child ought not to have a guardian*

c) *there should be no other person who should be having parental responsibility for the child.*

7. In the instant case, the applicants deposed to the fact that the mother of the minor herein who was their sister passed away on 8.04.2017.

They attached the death certificate of the deceased. They further deposed that the minor's father has never been part of the minor's life and that his whereabouts is not known. As such, it is my view that the applicants were able to prove that the mother is deceased and that the father cannot be found.

8. The applicants further deposed to the effect that they have been taking care of the minor herein since the demise of her mother and that they have been maintaining her and have assumed parental responsibilities.

9. **Section 102(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 for the child upon the death of the parent of the child either alone or in conjunction with the surviving parent of the child or the father of a child born out of wedlock who has acquired parental responsibility for the child in accordance with the provisions of this Act.”

10. It is clear that the minor herein 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.

11. As for the requirement that there should be no other person who should be having parental responsibility for the child, **Section 23** defines parental responsibility to mean

“all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.”

12. 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.

13. There is no evidence as to the minor's deceased mother having been married to the no-where to be found father at the time of the minor's birth or even subsequently. 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 4(2) of the Act which obligates this court to take as a paramount consideration, the best interest of the child in *all actions concerning children*. Section 4(3) 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 applicants have been staying with the minor herein from the demise of her mother and she has been under their care from then. It was deposed and further submitted in court that they have taken parental responsibility of the minor and pay her school fees at [particulars withheld] School and they are willing to continue taking care of her.

16. Further that, the minor has bonded with their (applicants') children. When the minor was interviewed by this court, she informed the court that she is comfortable with staying with the applicants and that their relationship is good and further that she relates well with her cousins. Further that, she would not wish to live with her father even if he (the father) requested that she lives with her. In my view, the best interests dictate that the minor herein remain with the applicants and guardianship be granted to them.

17. Considering all the above factors and the legal provisions, the applicants have 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 5TH DAY OF AUGUST, 2021.

L. NJUGUNA

JUDGE

.....**for the Applicants**