



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ADOPTION CAUSE NO. 2 OF 2019

IN THE MATTER OF FM.....A CHILD

AND

IN THE MATTER OF PARTY VII OF THE CHILDREN ACT CAP 141 LAWS OF KENYA

AND

IN THE MATTER OF APPLICATION FOR LEGAL CUSTODY

BETWEEN

DAM..... 1ST APPLICANT

AJ..... 2ND APPLICANT

AND

THE CHILDREN’S OFFICER..... 1ST INTERESTED PARTY

LAN..... 2ND INTERESTED PARTY

NLHT..... 3RD INTERESTED PARTY

JUDGEMENT

1. The applicants filed an origination summons expressed to be brought under **section 82, 83, 154 and 158** of the **Children’s Act** seeking an order vesting legal custody of the child herein to the applicants until the child obtains the age of majority. A chamber summons dated 22nd January 2019 was contemporaneously filed with the originating summons. In the chamber summons, the applicants sought to be appointed as guardian ad litem for the minor. JMO filed an affidavit of fitness of guardian ad litem confirming that that the applicants were fit to be appointed as guardian *ad litem*.

2. When the matter came up on 3rd December 2019 for directions, I ordered that the application be regularized by an amendment to include a neutral person as the guardian *ad litem*. Subsequently on 17th December the applicants filed an amended chamber summons seeking to have the applicants appointed as guardian ad litem and for the court to grant them with an order vesting legal custody of the child to the applicants.

3. Although the applicants are ready to give the minor a home, love, care and attention that any child deserves, the appointment of a guardian ad litem is nonetheless an important aspect in the adoption process. Before I consider the application it is vital to understand the role of guardian *ad litem* and who may be appointed as such. Under **section 160 of the Children Act**, their role includes:

“160. Guardian ad litem for the child

(2) It shall be the duty of the guardian ad litem to—

(a) safeguard the interests of the child pending the determination of the adoption proceedings;

(b) investigate and apprise the court as to the circumstances pertinent to the adoption of the child in the prescribed

manner;

(c) make recommendations as to the propriety of making any interim orders or an adoption order in respect of the child;

(d) intervene on behalf of the child and arrange for the care of the child in the event of the withdrawal of any consent prescribed by this Act;

(e) undertake such duties as the court may from time to time direct or as may be prescribed by the rules made under this Part.”

4. The court when making an adoption order is required by law to appoint a legal guardian as provided under **Section 164** of the **Children Act**. The section provides as follows:

“164. (1) The court at the time of making an adoption order may upon the application of the adopter, or of its own motion or in the case of applicants for an international adoption shall appoint any person approved by the adopter and whose prior consent thereto has been given in writing to be the guardian of the child in the event of the adopter, or both of the adopters where two spouses have applied for the adoption order, dying or becoming incapacitated before the child is of full age.

(2) The court may, at any time before the child is of full age, on the application of the adopter, or of the guardian appointed under subsection (1) or of the child, revoke such appointment and appoint any other person to be the guardian of the child.”

5. The purpose of appointing the legal guardian is to ensure that the child best interest is protected in the event the applicants are unable to fulfill their parental obligations in case they die or become incapacitated because of ill health, before the minor attains the full age.

6. It is on this foundation that it would not be in the interest of justice and in the best interest of the child to fully consider the application for adoption before me as the applicants also applied to be the guardians ad litem which in my view, ought to have been made by a neutral party other than the applicants.

7. Although this court gave the applicants the opportunity to amend their pleadings to regularize their application, very minimal efforts were made by the applicant’s advocate. A proper case for the making of an adoption order is not made out due to the above cited omissions. The suit is struck out with no orders as to costs. In the best interests of the child the applicants shall be at liberty to file a fresh Originating Summons in full compliance of the law.

DATED AND SIGNED AT KISII THIS 23RD DAY OF SEPTEMBER, 2021.

A. K. NDUNG’U

JUDGE