



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CHILD CASE NO. 1 OF 2019

IN THE MATTER OF

1. YJK

2. NCK.....MINORS

AND

PJK.....APPLICANT

JUDGMENT

The application

[1] Before the court is an application by Originating Summons dated 29th October 2019 for guardianship of children seeking the determination of the following questions:

“ORIGINATING SUMMONS (O.S) Exparte

Determination of the following questions:

- (a) Is the applicant related to the minor?*
- (b) Is the applicant entitled to be appointed a guardian to the minor?*
- (c) Is the applicant fit and proper person to be appointed as a guardian?*
- (d) Has the applicant established that the mother to the minors is no longer taking care of the minors?”*

[2] Upon such determination, the applicant prayed for orders of guardianship over the children by specific reliefs as follows:

“Orders:

- (a) THAT PJK be appointed the legal guardian to YJK and NCK (minors).*
- (b) THAT costs of this summons be in the cause.”*

[3] The application was supported by the affidavit of the applicant sworn on the 28th October 2019 in which she deponed as follows:

“AFFIDAVIT IN SUPPORT OF SUMMONS

I, P.J.K of post office number 98 KABARNET in the Republic of Kenya do hereby make oath and say as follows;

1. THAT I am the applicant herein and holder of ID/NO.[particulars withheld] and competent to swear this affidavit. I annex a photocopy of the ID. Card and mark it (“PJK1”).

2. THAT the above named Y.J.K. and N.C.K. are minors aged sixteen (16) and thirteen (13) years respectively. I attach copies of the birth certificates and mark them ("PJK2").
3. THAT the above named minors are children to J. K. K. (deceased). I annex a copy of the Death Certificate and mark it (PJK3").
4. THAT the deceased J. K. K. was husband to one E.C.
5. THAT later I got married to the said J. K.K. (deceased) as a second wife under the Kalenjin Customary rites.
6. THAT the above named minors are children to my co-wife E. C.(1st wife) thus are my step children.
7. THAT the mother to the minor children left to unknown destination since February 2012 and I have been taking care of them since then.
8. THAT on the 31st August 2019 the members of the family met and agreed in writing that I be appointed a guardian to the minors. I annex a copy of the memorandum of understanding and mark it ("PJK4").
9. THAT I have been taking care of the children since then and I annex a copy of a letter from the area chief and mark it ("PJK5").
10. THAT I have reported the matter to the children department and they have no objection to my being appointed a guardian to the children. I annex a copy of the letter and mark it ("PJK6").
11. THAT I make this affidavit stating that I am ready and willing to act as a guardian to the children."

Opinion of the Children

[4] Pursuant to section 4(4) of the Children Act, set out below, the court heard children subject of the application -

"4. (4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and degree of maturity."

While confirming that they had not seen their mother since 2012, the children expressed their agreement to having their step mother applicant appointed their guardian but jointly with another person named D.K., a brother to their deceased father.

Consent of the guardians

[5] By her affidavit in support of the application, the applicant was aware of the consequences of the appointment and she agreed to abide by the appointment as guardian and to take the responsibility. In examination on oath before the Court, the children's uncle, DK. brother to their father, whom the children wished to have appointed as co-guardian, confirmed his being aware of the duties and responsibility of a guardian to the children and his consent to act as a co-guardian with the applicant for the children subject of these proceedings.

[6] The court established that the whereabouts of the children's mother was unknown having left since 2012 when the applicant and their father, now deceased, have been taking care of them and confirmed from the children that they last saw their mother in 2012.

[7] The court also heard from the applicant that she did not object to joint guardian-ship with the deceased's brother as desired by the children. The court further noted the consent of the children's elder brother, C. K. K., an adult, who filed a consent by an affidavit sworn on 30th December 2019 and deponed that *"in the month of February 2012 my biological mother E.C. went missing and a search for her has borne no fruits"*; that ever since *"my siblings have been in the custody of my step mother one P. J. K. who has been looking after them and educating them"* and that he had *"no objection on P. J. K. being granted the guardianship of my siblings Y. J. K. and N. C. K."*

Power of the court to appoint guardian

[8] The Court has power to appoint a guardian **where the child's parent is dead or cannot be found**, under section 105 of the Children Act as follows:

"105. Appointment of guardian by the court

*In addition to the powers of the court to appoint a guardian under subsection (5) of section 104 **the court may appoint a guardian in the following circumstances—***

(a) On the 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;

(b) On the application of any individual, where the child is a displaced child within the meaning of section 119 of this Act."

Joint- Guardianship order with mother of the child

[9] Should the applicant's co-wife, the mother of the children whom they confirmed had not seen since 2012, come and seek to be appointed as joint guardians with the applicant and their said uncle pursuant to section 103 of the Act, above, the court shall consider the such application and make appropriate determination.

Revocation of guardianship

[10] Alternatively, the said mother may seek revocation of the Guardianship orders made in favour of the applicant and D. K., and the Court shall consider the matter and make appropriate orders in terms of section 106 (6) of the Act, which provides as follows:

“106 (6) Any appointment of guardian may be brought to an end at any time by order of the court on the application of—

a) Any parent or guardian; or

b) The child concerned with leave of the court; or

c) A relative of the child,

In any proceedings if the court considers that it should be brought to an end even though no application has been made.”

Lapse of Guardianship order

[11] The order of Guardianship herein shall lapse on the children attaining the age of 18 years, unless the court extends the order in the manner and for the reasons contemplated in section 107 of the Children Act, as follows:

“107. Extension of appointment of guardian beyond child's eighteenth birthday

(1) The appointment of a guardian shall be determined upon the child attaining the age of eighteen years, unless exceptional circumstances exist that would require a court to make an order that the appointment be extended.

(2) The exceptional circumstances referred to in subsection (1) are that the child suffers from a mental or physical disability or from an illness that will render him incapable of maintaining himself, or of managing his own affairs and his property without the assistance of a guardian after his eighteenth birthday or such other exceptional circumstances with regard to the child as the court may deem proper to warrant the making of an order under this section.

(3) Where an order is made under subsection (1), it shall be made prior to the child's eighteenth birthday and may be made on an application by—

(i) The child; or

(ii) The parent or guardian of the child; or

(iii) A relative of the child; or

(iv) The Director:

Provided that no order shall be made without the consent of the child, if he is capable of giving such consent, and of the guardian whose appointment is required to be extended.

(4) A court making an order under this section may attach such conditions as to the duration of the order and containing directions as to how it shall be carried out, imposing such other conditions that must be complied with and with such incidental, supplemental or consequential provisions as the court thinks fit.

(5) A court shall have power to vary, modify or revoke any order made under this section after the child's eighteenth birthday, on the application of any of the persons named in subsection (3), or where the child marries after his eighteenth birthday, his spouse.”

Conclusion

[12] Having heard the application and considering the opinion of the children subject to the application for guardianship, and being satisfied that the mother of the children cannot be traced, this court makes an order in respect of each child that, unless the applicant and her co-guardian, appointed hereby as desired by the subject children, disclaim their appointment as a guardian in terms of section 106 (5) of the Children Act, and unless and until their such appointment is revoked under section 106 (6) of the Act, the court pursuant to sections 102 and 109 of the Act, appoints the applicant and Mr. D. K. as co-guardians over each child with **“parental responsibility over the child”** and **“powers over the estate and person of the child.”**

Orders

[13] Accordingly, for the reasons set out above, the Court grants the applicant, **P. J. K.**, and **D. K.**, Orders of Guardianship as joint Guardians in respect of each of the children named in the Originating Summons herein to last until their attainment of the age of 18 years, unless earlier revoked, or later lawfully extended, by the court in accordance with the law.

[14] There shall, therefore, issue, as prayed by the applicant in respect of each child subject of the suit before the court, separately for each child, joint-guardianship orders in terms of section 102 of the Children Act in favor of the said applicant **P. J. K.**, and **D. K.**, the brother to the children's deceased father.

Order accordingly.

DATED AND DELIVERED THIS 21ST DAY OF FEBRUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Applicant in person.