



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISCELLANEOUS CIVIL CASE NO. 21 OF 2020 (OS)

IN THE MATTER OF APPLICATION FOR GUARDIANSHIP OF MINORS

AND

IN THE MATTER OF JKN and DM (MINORS)

MWW..... APPLICANT

RULING

A. Introduction

1. The applicant herein moved this court vide an Originating Summons dated 13/07/2020 and filed in court on 14/07/2020 under certificate of urgency and wherein she substantively prayed for orders that this court be pleased to appoint her as the guardian to JKN and DM who are minors. The application is brought under Sections 102 and 105(a) of the Children's Act Cap 141 of the Laws of Kenya.
2. The application was supported by the grounds contained in the supporting affidavit of the applicant. The prayers sought are based on the facts that the subjects are orphans as their mother who was the applicant's daughter passed away on 23/03/2017 and that the whereabouts of the minors' father was unknown as he was not introduced to the family by the deceased before her death. That the applicant has been taking care of the minors aged 14 and 4½ years respectively as their guardian since the death of their mother. Further that despite the said deceased being employed by the Teachers' Service Commission and having been entitled to gratuity the said funds were held by the Public Trustee, Embu, pending compliance with the legal requirement. One of those requirements is that the applicant must first be appointed guardian of the subjects before the said funds can be released to her for the benefit of the subjects.
3. The applicant was directed to serve the application on the surviving siblings who were required to file their written consent to the applicant being appointed as the guardian of the minors. The said siblings accordingly complied by filing a duly signed consent dated 20/07/2020. As such, the application was not opposed.
4. When the applicant appeared before this court, she made oral submissions wherein she reiterated the contents of her supporting affidavit. She further submitted that she had discussed the issue with her six (6) children and that they were not opposed to her appointment as a guardian.

B. Issues for determination

5. I have considered the application herein together with the supporting affidavit thereon and the oral submissions by the applicant when she appeared before this court on 18.08.2020. In my view, the sole issue for determination is whether the applicant has made a case for appointment of guardian to the minors.

C. Analysis of the law and determination

6. 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 needs not to be a Kenyan citizen. Under Section 105, the court has powers to appoint a guardian: -

i. on application of any individual;

ii. 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;

iii. and on application of any individual, where the child is a displaced child within the meaning of Section 119 of the Act.

7. As such, it is clear that for an application to be brought under Section 105(a) of the Act 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 an existing guardian.

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

8. In the instant case, the applicant deposed that the mother of the minors who was her daughter passed away on 23/03/2017. The applicant attached the death certificate of the deceased confirming that the mother of the subject ANW is indeed deceased. She deposed further that the deceased had never introduced the minors' father(s) to her and thus their whereabouts was not known and that the minors did not know him. The said father(s) have never taken care of any of the minors to the knowledge of the applicant or to other members of the family. The name of RMN appears on the birth certificate of DM. However, it is deposed that he has never lived with the deceased or with any of her children and is unknown to the family of the applicant.

9. The applicant further deposed that she was the one who was caring for the minors since the demise of their mother and had been carrying out the said duties diligently. 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 minors herein do not have another guardian within the meaning of this section and thus the second condition has been satisfied. Their father(s) if any did not show up even after the death of ANW. It cannot therefore be said, that any of them acquired any parental responsibility at any one time, or that are guardians within the meaning of the law.

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, the mother is entitled to the 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. There is no evidence that the father(s) of the minors applied for the parental responsibility in any court of law or that there was a parental responsibility agreement between the deceased and any other person. I reach a conclusion that there is no other person who has parental responsibility of the minors save for the applicant.

13. I take cognizance of the provisions of Article 45 of the Constitution which is replicated in 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. The elder subject JKN aged 14 years was interviewed by the court and she said she has always stayed with the applicant and that she wishes to continue staying with her.

14. This fortified the applicant's evidence that she has been staying with the minors herein from the demise of their mother and with JKN since she was born. The minors have been under the applicant's care for more than three (3) years since the mother of the minors passed on. The applicant submitted in court that she has been paying school fees for the elder minor JKN. She further submitted that she was familiar with the minors and had bonded with them for a reasonable period. Further the siblings of the subjects' mother filed their consent to the applicant being appointed the guardian of the minors. The best interests in my view, dictate that the minors herein remain with the applicant and that guardianship be granted to her.

15. Upon considering all the above factors, I am of the considered opinion that the applicant has proved her case on the balance of probabilities. I hereby grant the prayers in the Originating Summons dated 13th July 2020 in the following terms: -

a) That the applicant MWW is hereby appointed guardian to the minors JKN and DM until they attain the age of majority.

b) That there shall be no order as to costs.

16. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 22nd day of September, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Applicant and Subjects