



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**ADOPTION 8 OF 2020**

**IN THE MATTER OF: NMH (A MINOR)**

**MNW.....APPLICANT/RESPONDENT**

**VERSUS**

**PHILIP JAGERO.....INTERESTED PARTY**

**RULING**

1. On 18<sup>th</sup> March, 2020, the Children officer Kisauni Sub-County presented the minor herein NMH before Tononoka Children's court seeking protection and care orders in respect of the minor; Upon considering the children officer's plea the court directed as follows;

- i. That the subject be placed at a rescue center upon thorough medical checkup at Coast General Hospital given the state of covid-19 in the country before being taken to the rescue center.**
- ii. That the children protection unit to conduct the investigations on the defilement allegations expeditiously**
- iii. That the children officer Kisauni sub county to conduct a social inquiry on the best placement.**
- iv. That the matter be mentioned on priority basis at the end of the lockdown.**

2. Subsequently, a detailed social inquiry report dated 20<sup>th</sup> July, 2020 was filed by the children officer Kisauni Sub-County after conducting length investigations and inquiry surrounding the departure of the minor herein from Uganda to Nairobi and later to Mombasa in Kenya. The officer made some observations as follows;

- i. NMH deserves to settle and have a pleasant life;**
- ii. NMH is sure of what she wants but is confused by so much that has been going on in her life having been to many schools and living with many relatives.**
- iii. NMH is convinced that CNC is not her mother but loves her so much and still wants to identify with her.**
- iv. From interviews from all parties it is not easy to determine fully who NMH's Mother is.**

3. Finally, the Children Officer made recommendations that;

- i. NMH is a confident, outspoken intelligent girl who has grown up in Uganda.**
- ii. She is in need of protection and care and desires settled life.**
- iii. That NMH be repatriated back to Uganda and through the children's department in Uganda they conduct further social inquiry to determine the relative who is best suited to live with NMH.**
- iv. The Ugandan government to look into any other issues coming up in relation to the subject's identity.**

4. Following the above orders, MNW through an Originating Summons dated 31<sup>st</sup> August, 2020 brought pursuant to Sections 102, 104, 105, 118, 119 and 125 of the Children's Act, Article 12 of the Convention on the Rights of A child came to this court in her capacity

as a cousin to the minor seeking the following orders;

- 1. That pending the hearing and determination of this suit, this honorable court be pleased to make an order that the minor herein NMH should not leave the jurisdiction of this Honourable court.**
- 2. That the applicant MNW be and is hereby appointed legal guardian of NMH the minor herein,**
- 3. That the applicant MNW be and is hereby appointed legal guardian of NMH the minor herein until further orders of this honorable court or until the minor attains the age of majority.**
- 4. That the consent of the biological parents of the children be and is hereby dispensed with**
- 5. That the costs of this application be in the cause.**

5. The application is founded on grounds stated on the face of it and an affidavit sworn on 31<sup>st</sup> August, 2020 by MNW. Contemporaneously filed with the originating Summons is a chamber Summons of even date seeking to have the application heard during the vacation as a matter of urgency. The application was on 31<sup>st</sup> August, 2020 certified urgent and hearing interpartes of the Originating summons scheduled for 30<sup>th</sup> September, 2020. An order for service of the application was made and the minor herein restrained from leaving the jurisdiction of the court.

6. Before hearing the originating Summons, one Philip Jagero an activist purporting to be acting in the interest of the minor filed a Notice of Motion dated 28<sup>th</sup> September, 2020 seeking orders as hereunder;

- i. That the application be certified urgent and service be dispensed with at first instance.**
- ii. That the applicant be and is hereby granted leave to be enjoined in the suit as an interested party.**
- iii. That the respondent's/applicant's application Originating Summons (OS) dated 31<sup>st</sup> August 2020 be stood over generally pending hearing and determination of this application.**
- iv. That the respondent /applicant do appear in court in person for cross examination on the hearing of her application.**
- v. That deportation/ production orders be issued to the United States of America Government to produce CNC living in the state of California to appear before this Honourable court for cross examination.**
- vi. That the inquiry file P&C No 94 of 2020 be forwarded to the Director of Public Prosecutions, Nairobi for pursual and report be filed in this court within twenty one (21) days pending hearing and determination of the suit.**
- vii. Costs be in the cause.**

7. When the application came up for hearing on 15<sup>th</sup> October 2020, the court directed that the two applications be heard together. The court further directed parties to file submissions and the minor to file a statement regarding her wishes. Mention was then fixed for 12<sup>th</sup> November, 2020 to fix hearing date.

#### **Applicant's case in respect of the Originating Summons dated 31<sup>st</sup> August, 2020**

8. According to the averments contained in the affidavit in support of the application, the applicant herein MNW who claims to be a cousin to the minor herein is a Ugandan national born in Kenya on 8<sup>th</sup> June, 2003. That the father to the child passed away on 2<sup>nd</sup> April, 2009 while in the U.S.A. That the child's mother CNC is a resident of U.S.A.

9. She stated that she wants to be appointed as a legal guardian for the minor notwithstanding the fact that she is Ugandan. According to her, NMH was left under her care for two months in the year 2013 when she (NMH) first visited Kenya.

10. She claimed that NMH's mother who is her aunt one CNC, a resident in the USA had left the minor under the protection and care of AB who lives in Mombasa from where the minor was taken to a rescue centre.

11. In her view, having been in Kenya, being married with 3 children and now working at Nairobi with a security company as security personnel, she is capable of taking care of the minor. She further averred that the minor's mother who lives in California is willing to take the child to the United States of America. She contended that she was willing and ready to take full parental responsibility in the best interests of the child.

12. Despite service of the originating summons upon the Child Protection Unit and the Children Department there was no response filed.

#### **Applicant's case in respect of the application dated 28<sup>th</sup> September, 2020**

13. The applicant herein, Mr. Philip Jagero sought to be enjoined as an interested party in this case on grounds of being a human rights

activist representing public interest.

14. He stated that he had enough intelligence and overwhelming evidence of human trafficking cartels who have made several attempts to fake documents to transfer the subject minor to the USA where the key suspect lives in California.

15. He contended that the minor has fake Ugandan passport nos [...] and [...] issued on 5<sup>th</sup> November 2013 and 2<sup>nd</sup> September, 2013 respectively (annexure PJ1 (a) and (b)). He further stated that the trafficking cartels have published a bunch of documents for processing a visa for the minor to transit to the USA (annexure PJ2)

16. That from the DCI investigation report (annexure PJ 3), it was evident that the minor is a case of child trafficking. According to Jagero, this case ought to have been filed before the children's court as a court of first instance. That CNC has throughout used dubious means and paid cartels through her sister VK in Jinja Uganda in an attempt to traffic the subject to the USA through Kenya.

17. In his view, the application for guardianship is meant to abuse the court process to facilitate child trafficking.

#### **Respondent's response to the application dated 28<sup>th</sup> September ,2020**

18. In response to Jagero's application, MNW filed a replying affidavit sworn on 2<sup>nd</sup> October, 2020 claiming that the application is bad in law. fatally and incurably defective.

19. She contended that the applicant is purporting to represent the DCI, DPP and Children Officer who despite being served with the Originating Summons failed to respond. She averred that Jagero has no locus standi to appear in this matter.

#### **Submissions**

20. Mr. Ondabu appearing for MNW the applicant in the Originating Summons filed two separate sets of Submissions in respect of each application. The two sets of submissions are both dated 23<sup>rd</sup> October, 2020 and filed don 26<sup>th</sup> October, 2020.

21. Basically, Mr Ondabu adopted the averments contained in the affidavit in support of the Originating Summons dated 31<sup>st</sup> August, 2020 and replying affidavit in response to the application dated 28<sup>th</sup> September, 2020. Learned counsel submitted that the applicant in respect of the application dated 28<sup>th</sup> September, 2020 has no locus standi under Article 22 of the Constitution a provision under which he is purporting to draw his authority from to participate in these proceedings. Mr Ondabu submitted that Article 22 only applies in public interest litigation matters and not in children matters where there is a clearly stipulated procedure of litigation on representation.

22. In support of his submission, counsel placed reliance in the case of **Robert Meleya Ole Letoluo & 5 others V Synergy Industrial Credit Ltd & 2 others ( 2014) e KLR** where the court held that there has to be a legal basis for any party to come on record for a minor. He further opined that Jagero did not follow the procedure under Order 32 of the CPR to file a representative suit on behalf of a minor as a next friend.

23. In support of the arguments that Jagero is not acting in public interest, counsel cited the case of **Brian Asin and 2 others V Wafula W Chebukati & 9 Others ( 2017) e KLR** where the court stated that public interest litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by the public.

24. Regarding the Originating Summons, Mr Ondabu submitted that under section 105 of the Children's Act, a court has powers to appoint a guardian. That the mother to the child is living in America and the people she left her child with in Kenya among them one AB have forsaken the child hence the need to appoint MNW as a legal guardian having stayed with the child for 2 months before.

25. In support of the application for appointment of a legal guardian, counsel made reference to the holding in the case of **Kabaranet Guardianship No.2/2019 and Embu Misc.No. 21/2020 (OS) In the matter of an application for guardianship of a minor JKW and another** where both courts granted the applications for guardianship in the best interests of the children in the respective cases. During the hearing, Mr Ondabu basically relied on the submissions filed and the relevant affidavits.

26. On his part, Mr Jagero filed his two sets of submissions on 29<sup>th</sup> October, 2020 claiming that under Article 22 of the Constitution, he has locus to appear on behalf of any person. He opposed the application claiming that the orders sought were meant to perpetuate a case of child trafficking thus undermining the competence of the subordinate court which made the orders.

27. Submitting on MNW's ability to be appointed as guardian, Jagero contended that the proposed guardian has not exhibited her fitness to be a legal guardian.

#### **Minor's opinion**

28. Pursuant to the direction's made on 15<sup>th</sup> October, 2020 the minor was to file a statement which she subsequently did on 22<sup>nd</sup> October, 2020. She stated that throughout her lifetime she has been moving up and down in order to be processed travel documents to the USA which have always failed.

29. She further stated that she has been from one school to another thus interfering with her education to become an important person in society. She expressed her desire to finish school while at AB's place in Mombasa Kenya before travelling abroad. That if anyone wants to

get guardianship over her, it should be aunt AB who is caring, loving and supportive.

30. She claimed that the reason why she left aunt AB's place was because there was a false allegation that AB's son F had had an affair with her.

31. She stated that if she does not stay with AB then her second option is S who her mom CNC supports since she does not have any job to do.

32. When the court summoned her to appear in court, she did appear on 18<sup>th</sup> November, 2020 and confirmed that she was a Ugandan citizen and her mother CNC is in America. She further stated that, she last spoke to her mother early 2019. She claimed that she has been staying with many relatives among them I, V, L her cousin and AB her mother's friend who picked her from Nairobi, after V, I and L went back to Uganda.

33. When asked by the court whether she would like to go back to Uganda, she stated that life in Uganda was hard and therefore preferred to school and stay in Kenya. That her relatives in Uganda were hard on her and that she wants to stay with AB.

### **Determination**

34. I have considered the two applications, affidavits in support, responses thereof and oral submissions. For clarity purposes, I will determine each application separately.

### **Application dated 28<sup>th</sup> September, 2020**

35. This is an application filed by a human rights activist known Mr Jagero. He prayed for orders to be enjoined as an interested party thus representing the minor's interest. He expressed himself that he drew his authority from Article 22 of the Constitution which provides for a person to represent any other person who for one reason or the other is incapable of instituting a suit. He basically opposed the appointment of MNW as a legal guardian to the minor. Mr Ondabu opposed the application for joinder of Jagero as an interested party on grounds that he has no locus standii and that this is not a public interest litigation.

36. The only issue that emerge for determination is whether the applicant/ interested party Mr. Jagero has locus standii to act on behalf of the minor.

37. Who is an interested party in civil litigation? What are the parameters for consideration for one to be enjoined as an interested party in asuit. In the case of **Communication Commission of Kenya & 4 others Vs Royal Media Services Limited and 7 others (2014)eKLR** the supreme court pronounced itself regarding who an interested party is as follows;

**“In determining whether the applicant should be admitted into the proceedings as an interested party we are guided by this court’s decision in Mumo Matemo case where the court at paragraph 14 and 18 ) held “an interested party is one who has a stake in the proceedings, though he or she was not party to the cause abinitio...He or she is one who will be affected by the decision of the court when it is made, either way. Such a person seeks that his or her interest will not be well articulated unless he himself or she herself appear in the proceedings and champions his or her cause. Similarly, in the case of Meme Vs Republic (2004) E.A 124, the High court observed that a party could be enjoined in a matter for the reason that:**

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings**
- ii. Joinder to provide protection for the right of a party who would otherwise be adversely affected in law.**
- iii. Joinder to prevent a likely cause of proliferated litigation.**

**We ask ourselves the following questions (a) what is the interested party’s stake and relevance in the proceedings and (b) will the interested party suffer any prejudice if denied joinder...”.**

38. In the instant suit what interest does Jagero have in this proceedings? What prejudice will he suffer if not enjoined? From the facts of this case, he has no direct or indirect interest at stake that will be prejudiced incase his joinder application is denied. For a party to be enjoined as an interested party, he must prove the injustice he is likely to suffer if joinder is refused. In this case I do not find any.

39. Although he is purporting to protect the minor's interest, there are enough institutions who took part in the proceedings among them the children department and the Director Criminal Investigations hence the minor is not exposed to any prejudice. There is no vacuum in protecting the minor's interest to warrant Jagero's intervention. For those reasons, his joinder though well intended as an interested party is not necessary in the circumstances.

40. The second ground relied on is that this is a public interest litigation. Article 22 (2) of the Constitution provides that every person has a right to institute court proceedings claiming that his or her rights have been violated or are likely to be violated. Sub Article 2 (a) allows any person to act on behalf of another person who cannot act on his own.

41. In this case, Mr. Jagero has not with specificity identified the rights of the minor that have been violated and the intended remedy thereof. He has not sought any specific order for redress of any Constitutional breach against the minor. Further, I do agree with Mr. Ondabu

that Jagero ought to have filed a representative suit first under order 32 of the Civil Procedure Rules to act as a next friend to the minor. In his prayers he is seeking an order to deport the mother of the minor from America to Kenya for cross examination and an order directing forwarding of the DCI inquiry file No 94/2020 to the DPP for approval and, that the applicant to the Originating Summons do appear for cross examination.

42. What public interest is exhibited in this suit to call for Jagero's participation? It is trite law that the DPP's office and the Inspector General's office under which the DCI falls are independent offices with clear Constitutional and statutory mandate on how to independently discharge their duties. This court cannot interfere unless there is manifest reluctance or refusal to do that that they are by law required to do. Has the applicant satisfied the test of Article 22 (1) (a)? In **Brian Asin and 2 others Vs Wafula Chebukati, and others ( supra)** Mativo J held that;

**“Public litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice ...The courts therefore, need to keep a check on the cases being filed and ensure the Bonafide interest of the petitioners and the nature of the cause of action. In order to avoid unnecessary litigations, vexatious and mischievous litigation must be identified and struck down so that the objectives of public interest litigation aren't violated”**

43. Although the minor herein has various fundamental rights, they are enforceable in personam and not in rem. Accordingly, it is my finding that the application dated 28<sup>th</sup> September, 2020 does not meet the test of a public interest litigation. Although Jagero's intention is in good faith, the bar for public interest litigation is too high so that courts are not overwhelmed by busy bodies' litigation. For those reasons, the application dated 28<sup>th</sup> September, 2020 is dismissed for lack of locus standii and failure to meet the test for public litigation interest.

#### **Determination of the Originating Summons dated 31<sup>st</sup> August, 2020**

44. These proceedings are a culmination of the Tononoka Children's court order in protection and care case no. 94/2020 where a repatriation order for the minor herein to Uganda her mother land was made allegedly in the best interest of the minor. To circumvent this order, the applicant MNW moved this court by this Originating Summons seeking to stop the said repatriation and her appointment as a legal guardian to the minor. The issues that arise for determination are;

**i. Whether the applicant MNW is qualified to be appointed as legal guardian**

**ii. Whether the application amounts to abuse of the court process**

45. Under section 102 (2) of the Children's Act, a court can appoint a guardian in respect of any child who is resident in Kenya whether or not the child was born in Kenya or is a Kenyan citizen. A guardian appointed under this Act need not be a Kenyan.

46. Section 105 of the Children's Act empowers a court to 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 requirements of Section 119 of this Act.**

47. In this case, the child does not have a living father. The mother is said to be staying in U.S.A. The minor seems not to be sure if CNC now living in the U.S.A is her mother. On her own she could not confirm that fact as she relies on what she has been told. The children department is also skeptical of the claim that CNC is mother to the minor.

48. However, the applicant claimed that she is a cousin to the minor and that at some point she stayed with her for two months. Unfortunately, there is no proof that the minor and the applicant are related. Besides, the minor whose opinion the court sought as required by the law categorically stated that she does not want to stay with MNW. This is a person aged above 17 years now. She has a right to choose or reject any person purporting to take custody of her or guardianship. The court cannot force her to stay with the applicant who is unknown to her.

49. It is trite that in every decision the court makes in matters affecting a child, it must be guided by Article 53 (2) of the Constitution and Section 4 (2) and (3) of the Children's Act which underscores the paramountcy principle of the best interests of a child.

50. The mystery surrounding the visiting and stay of the minor in Kenya since 2013 has not been addressed. From the DCI's and the social inquiry report by the Children's Department, the child is a victim of several abuses among them defilement and possibly a case of child trafficking. This is clear from the admission of the minor that she came to Kenya to be processed for travelling to U.S.A.

51. Is the prayer for guardianship made in good faith? who is MNW to the minor yet the girl does not know her? She is more of a stranger than a relative. This court cannot forcefully entrust the minor to a stranger who has not even been vetted by the children department.

52. From the DCI's report attached to the application dated 28<sup>th</sup> September, 2020 and the social inquiry report by the children department, there is more than meets the eye. This is a case of possible child trafficking.

53. I am alive to the fact that the orders of the lower court are still in force. They have not been set aside nor reviewed. They were made by a

competent court with jurisdiction. Any affected party should come in as a next friend to the minor and then challenge the order by way of appeal or judicial review before the High Court.

54. To file a suit such as the one before me is to say the least a decoy intended to circumvent and overturn the execution process of the lower court order. Courts cannot run parallel proceedings over the same subject matter. If I appoint a guardian, it will automatically set aside the lower court order through the back door. For the court to allow the application, it will amount to overturning the lower court decision unprocedurally.

55. For the above reasons stated, it is my finding that the application dated 31<sup>st</sup> August, 2020 does not meet the criteria for appointment of a guardian. It is not in the best interests of the child to do so.

56. The applicant does not have a good reason as to why the child should not go to her relatives in Uganda from where the mother now in U.S.A will process her traveling documents. To leave her in the hands of people who sneaked her out of Uganda to Kenya and now trying to do the same to U.S.A, will amount to perpetuating child trafficking which is now rampant in the country.

57. Accordingly, the application is hereby dismissed with no orders as to costs.

**Dated, signed and delivered this 18<sup>th</sup> day of December 2020**

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**HON. JUSTICE J.N.ONYIEGO**

**JUDGE**