



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC: APPLICATION NO. 16 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR CUSTODY AND GUARDIANSHIP**

**OF**

**M M (MINOR)**

**BY**

**J W N.....APPLICANT**

**RULING**

1. By way of an originating summons dated 31st May, 2016 J W N (hereinafter the applicant) sought orders:

1. THAT the applicant herein be declared a custodian and guardian of the minor herein.
2. THAT costs be in the cause.

2. The application is based on five (5) grounds as seen on the face thereof namely:

- a) That the applicant is an aunt to the minor who was born on 5th November, 2010.
- b) That the applicant has had custody of the minor since she was one 1 year old.
- c) That the biological mother has a mental disease and is unable to take care of the minor.
- d) That biological father has never taken up parental responsibility.
- e) That the order prayed for is in the best interests of the minor herein.

and is further supported by the affidavit of the applicant one by S W M and a supplementary affidavit by the applicant.

3. The gist of the application, the supporting grounds and the affidavits is that the applicant is an aunt to the minor. The biological parents of the minor are J N W and S W M.

4. J N W has been diagnosed with a mental illness and the doctor has concluded that she is incapable of taking care of the minor, M M. A medical report in the letter states:

**“RE: J N W – MEDICAL REPORT**

**The above named lady suffers from moderate mental retardation a chronic life long condition characterized by low intelligence (IO), impaired judgment and social adaptation. Patient with this disorder requires close supervision and assistance from family members in their daily activities. They may be incapable of meeting their daily needs, or taking care of themselves or their dependants.**

**J has a child aged 1 year and four months who had suffered from malnutrition, rickets and epilepsy and due to her condition**

she is incapable of taking care of this child.

Therefore, I would highly recommend that her older sister J W N takes care (custody) of this child to enable the child develop appropriately, receive the necessary medical attention and the right balanced diet.

Any assistance extended to J to enable her take care of this child would be highly appreciated.

Thanks in advance.

D. NJAU J. W.

FOR: MEDICAL SUPERINTENDENT

RIFT VALLEY PROVINCIAL GENERAL HOSPITAL.”

5. S W M, the father to the minor confirms this position and he gives his consent to the granting of custody as well as guardianship of the minor to the applicant.

6. I have considered the originating summons, the grounds raised and the affidavits on record.

7. Section 82 of the Children Act states as follows:

**“(1) A court may, on the application of one or more persons qualified under sub-section (3) of this section, make an order vesting the custody of a child in the applicant or, as the case may be, in one or more of the applicants.**

**(2) An order under sub-section (1) may be referred to as a custody order, and the person to whom custody of the child is awarded is referred to as the custodian of the child;**

**(3) Custody of a child may be granted to the following persons-**

**(a) a parent**

**(b) a guardian**

**(c) any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months preceding the making of the application;**

**(d) any person who while not failing within paragraph (a), (b) or (c), can show cause, having regard to section 83, why an order should be made awarding that person custody of the child.”**

8. In my considered view, a custody order will be necessary as the minor herein is likely to suffer harm if the order is not made. The biological mother is unable to offer the necessary care, protection and welfare of the minor due to her illness which the doctor described as chronic. It is therefore in the best interests of the child that the custody order be made.

9. I am also persuaded that this is a perfect case for the appointment of the applicant as the guardian of the minor. I note that the biological father of the minor is alive. I will thus appoint the applicant a guardian of the minor to act jointly with the father of the minor.

10. With the result that the Originating Summons dated 3th May, 2016 succeeds entirely. A custody order vesting the custody of the minor MM to J W N is to issue and with a further order appointing J W N as a guardian to minor “MM” jointly with S W M.

No orders are made as to cost.

Dated, Signed and Delivered at Nakuru this 22nd day of March, 2017.

A. K. NDUNGU

JUDGE