

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 58 OF 2017

IN THE MATTER OF THE GUARDIANSHIP AND CUSTODY OF A B M BY Y T AND H N N

RULING

1. The suit herein commenced by way of an Originating Summons dated 20th April 2017, where the applicants, Y T and H N N, seek guardianship orders in respect of A B M (a minor) following the death of her adoptive mother, R M N, on 12th April 2016.
2. Filed simultaneously with the Originating Summons is a summons in chambers of even date, where the applicants invite them to appoint them joint guardians of the child, with an additional prayer that the child remains in the custody, care and control of Y T.
3. The interlocutory application was argued orally on 18th May 2017. I was informed that the male applicant had been cohabiting with the adoptive mother of the child prior to her death, and was in the process of finalizing the home where the child lived with the deceased. I was further told that the female applicant had moved into the home of the male applicant so as to take care of the child.
4. Let me start by stating in the outset that the first prayer in the chamber summons is not available at this stage. It is also the primary prayer in the Originating Summons. The question of the appointment of the applicants as joint guardians of the child can only be addressed at the full hearing of the main suit.
5. On the second prayer, I do note that the court in Adoption Cause No. 220 of 2012 appointed the female applicant, in a judgment delivered in that cause, legal guardian of the child in the event of death of the adoptive mother. That appointment is encapsulated in the judgment delivered in the adoption cause on 20th June 2014 and the adoption order extracted therefrom on 23rd December 2014.
6. I am told that the adoptive mother died on 13th April 2016, a death certificate serial number [particulars withheld] is even attached to the application as an exhibit. That they means that the order in the adoption cause appointing the female applicant herein legal guardian of the child kicked in and she should have taken over custody, care and control of the subject child effective from 13th April 2016.
7. It would appear that the male applicant grounds his prayer for care, control and custody on the basis that he and the adoptive mother of the child had been married and lived together with the child. The picture painted in his papers does not appear to be in sync with the contents of the documents lodged in Adoption Cause No. 220 of 2012. In the instant cause the male applicant appears to say that he did not apply jointly with the deceased for adoption of the minor on the grounds that Japan did not have an adoptive relationship with Kenya then. In the adoption proceedings the male applicant and the adoptive mother were said to be separated and living apart and the male applicant was not depicted as a person who was really privy to the adoption process.
8. Taking everything into account, I am reluctant to grant interim custody of the subject female child to Y T at this stage. Custody, care and control of the child shall remain with the legal guardian appointed in Adoption Cause No. 220 of 2012 until further orders.
9. In the meantime, the Director of Children Services is hereby directed to investigate the male applicant herein to assess his suitability as legal guardian. The Director shall file his report within forty-five (45) days. The Originating Summons herein shall thereafter be allocated a hearing date as a matter of priority

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE