



**REPUBLIC OF KENYA**

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

**HCC NO. 8 OF 2016**

**R L B alias W N.....THE CHILD**

**VERSUS**

**L L B..... APPLICANT**

**JUDGMENT**

**BACKGROUND**

1. Through an originating summons dated 23<sup>rd</sup> July, 2015 but filed on 29<sup>th</sup> July, 2015, the applicant herein L L Bay filed a Misc. application case No 157/2015 before Milimani Children's Court seeking orders:

- (a) That L R B be appointed the legal guardian of the child, R L B alias W N herein.**
- (b) That in the alternative L R B be granted legal custody, care and control of the child.**
- (c) That the Director of Immigration be authorized to issue the child with a Kenyan passport.**
- (d) That the court be pleased to make any further orders as it deems fit and just in the circumstances.**

2. The application was premised on grounds on the face of it and on affidavit deposed by the appellant (applicant) on 23<sup>rd</sup> July, 2013 wherein she (appellant) claimed that she had been taking care of the said child as a foster

parent and therefore sought for legal .....or guardianship.

3. Upon hearing the application, the learned magistrate Honourable F.K. Munyi vide her ruling dated 14<sup>th</sup> June, 2016 dismissed the same and made the following orders:

- (1) That the minor RLB alias W.W be returned to the Nest Children's Home for care and protection with immediate effect.**
- (2) The Director Children's Services and the Manager Nest Children's Home do ensure compliance of this order.**
- (3) That the applicant is at liberty to support the minor RB alias W.W as he continues to be under the care and protection of the Nest Children's Home.**

**(4) Application dated 23<sup>rd</sup> July, 2015 is hereby dismissed.**

4. Aggrieved by the said decision the applicant (appellant) lodged an appeal vide a memorandum of appeal dated 21<sup>st</sup> January, 2016 and filed on 22<sup>nd</sup> January, 2016 challenging the said ruling on grounds that the learned magistrate erred in fact and law by:

**(1) Failing to take into account the best interests of the child.**

**(2) Failing to regard the general principles and factors stated in Section 76 and 83 of the Children's Act 2001.**

**(3) By raising extraneous issues and making reference to law that does not apply to guardianships.**

**(4) Failing to consider the child's current environment and his emotional and psychological well being.**

5. Contemporaneously filed with the memorandum of appeal was a chamber summons dated 21<sup>st</sup> January, 2016 under certificate of urgency seeking stay of execution of the said decision thereby ordering that the child to remain in the custody and care of the applicant pending hearing and determination of the application and appeal herein.

6. After hearing the application *ex parte*, Justice Ougo granted the orders on 20<sup>th</sup> January, 2016 pending hearing and determination of the substantive application. Subsequently, the application was heard before Justice Achode who delivered her ruling on 12<sup>th</sup> February, 2016 allowing the applicant to have temporary custody of the child and continue to provide for him as she did before pending the hearing and determination of the appeal.

7. Despite service of the application and appeal upon Director Children Services, there was a response hence the matter proceeded for the hearing of the appeal *ex parte*.

**Applicant's Case**

8. According to the affidavit deposed by the applicant on 23<sup>rd</sup> July, 2015 in support of the originating summons before the Children's Court, the appellant described herself as a female American citizen working on contract as an [particulars withheld] with a United States of America [particulars withheld] known as [particulars withheld] based at [particulars withheld] in Kenya.

9. She contended that, sometime 8<sup>th</sup> March, 2013, S K J the biological mother to the subject herein gave her consent by way of an affidavit offering her child to her (appellant) for purposes of adoption.

10. That she later assumed parental responsibility of the child on account of being a foster parent on 11<sup>th</sup> March, 2015 after Nest Children's Home where the child was committed to by Limuru Magistrate's Court approved the same. The appellant/applicant contended that, since the biological parents of the child are not able and willing to take full parental responsibility of the child, and having gotten the mother's consent and aunt's by the name of S J who swore affidavits, she has since taken care of the child's basic needs *inter alia* offering parental love and material support, medical care: enrolling the child in a specialized institution for speech and physical therapy.

11. She (appellant) therefore prayed for legal guardianship orders instead of being a foster parent so as to enable her process and facilitate more benefits for the child in particular medical cover in case of urgent medical attention which benefit cannot accrue in the current situation of being a foster parent. She asserted that, in exercise of her parental responsibility as guardian, she will be able to travel with the child outside the country hence the need to have Immigration Department issue the child with a passport for purposes of processing a visa.

12. In dismissing the appellant's/applicant's originating summons, learned magistrate relied on the Children's Officer's report dated 8<sup>th</sup> September, 2015 and observed that the appellant being a foreigner is ineligible to be a legal guardian of a male child contrary to Sections 148 (2) and 151 of the Children's Act of 2001 and rule 13 (6) of the guardianship of Children (Practice and Procedure) rules; breach of adoption guidelines having pre selected the child: that the appellant/applicant does not qualify to be a guardian as required under Section 105 of the Children's Act: that the appellant's stay in Kenya is work related and rarely visits Kenya and quite often leaves the child with a nanny: that consent by the biological mother was for adoption specifically and not guardianship and lastly, that there was no comprehensive medical report showing that the child has a medical condition requiring specialized treatment or medical care.

13. When the mother came before Justice Achode on the stay application dated 21<sup>st</sup> January, 2016, the learned Judge granted the application although inevitably dealt almost substantively with the issues raised in the memorandum of appeal. In .....the best interests of a child as the cordial consideration before making orders, the honourable Judge appreciated the .....of Article 53 of the Constitution and Section 4 (2) and 3 of the Children's Act.

14. The learned Judge held that, the learned magistrate misdirected herself in holding that Section 148 (2) of the Children's Act mandatory with regard to the issue of ....of the child and .....guardian and that the application of Section 158 (2) of the Children's Act with regard to adoption proceedings was wrong hence a misappropriation of Section 151 of the Children's Act.

15. The honourable Judge also observed that the appellant had met the requisite conditions for being a guardian under rule 9 (4) on guardianship and therefore Section 102 (3) of the Children's Act setting requirements for guardianship had been satisfied by the appellant in the interest of the child.

16. During the hearing, Mrs. Mbugua for the appellant submitted orally relying on the grounds of appeal contained in the original petition, supplementary appeal dated 26<sup>th</sup> January, 2016, a further supplementary dated 26<sup>th</sup> February, 2016 and a further affidavit dated 2<sup>nd</sup> June, 2016 filed with leave of the court.

17. In her written submissions filed on 11<sup>th</sup> January, 2017, Mrs. Mbugua combined grounds 1 and 2 arguing that, the learned magistrate failed to appreciate the child's emotional wellbeing in that he had created a new cycle of friendship and .....Kindergarten where he has been enrolled hence to take to him back to the Children's home will not be in his interest. She further stated that, the subject has been enrolled at .....Kindergarten where has deployed physical development and speech is being advanced under specialized attention. Regarding the social well being of the child, counsel submitted that, the child was used to a more conducive and friendly environment and making several holiday trips.

18. Regarding ground two of the appeal, counsel stated that, the learned magistrate misapprehended Section 76 of the Children's Act in that, ... a court is to make any order affecting the child, it should consider physical, emotional and .....areas likely effect on the child in case of change of environment , any risk the child may have suffered or likely to suffer by making such orders. Counsel asserted that to return the child to Nest Children's Home will be prejudicial to the physical and emotional well being of the child and that the child is likely to suffer harm.

19. Considering ground 3, Mrs. Mbugua opined that, the learned magistrate erred in .....that Section 148 (2) of the Children's Act is mandatory in so far as .....of the child vis a vis the appellant is concerned and that the word used is "may" .....under that Section and rule 13 (6) of the guardianship of children practice and procedure rules or Section 151. Counsel further submitted that, the learned magistrate erred and failed to appreciate that Section 158 (2) was only applicable to adoption cases and not guardianship.

20. Counsel further submitted that Section 102 (2) of the Children's Act is relevant in that a guardian appointed under the Act (Children's Act) need not be a Kenyan citizen or resident in Kenya. As to ...of the child under ....., Mrs. Mbugua asserted that, the child was properly committed to Nest Children's Home by a magistrate's court and thereafter released to the applicant in accordance with Section 147 (1) of the Children's Act for foster care in conjunction with the Director and Manager of the institution for

such period as the director may from time to time.

21. I have considered the grounds of appeal herein, materials placed before me, both oral and written submissions by learned counsel. Issues that fall for determination are:

(1) Is the appellant qualified to apply or entitled to legal guardianship orders in respect of Baby N.N;

(2) Is the custody of the subject herein by the appellant as a legal guardian in the best interest of the child;

22. To start with, I will consider grounds No. 1, 2 and 4 together as they are closely related and in fact intertwined. Counsel alleges that the learned magistrate failed to take into account the best interest of the child (ground 1); and that the court should have taken into account Section 76 (1) (3) of the Children's Act before making the orders she did (Ground 3) and that the child's current .....and his emotional and psychological well being is much catered for by the applicant (Ground 4).

23. There is no dispute that the child herein was committed to Nest Children's Home voluntarily for purposes of adoption by the biological mother and later committed by the Children's Court Limuru on 5<sup>th</sup> June, 2013. It is in the Nest Children's Home that the applicant identified the child and liked him culminating to KKPI Adoption Society undertaking the process of adoption of the child by the appellant after the mother and child's aunt consented but the process never materialized. The child was however placed under the care of the appellant as a foster parent on 11<sup>th</sup> March, 2015 a parental responsibility she has been .....to date.

24. Since she took up the role parental responsibility as foster parent, the appellant did enroll the child at [particulars withheld] Kindergarten where the child continued receiving specialized speech and physical therapy due to his speech medical challenges. This is evident from his medical report of Dr. Heena J Hecker dated 7<sup>th</sup> September, 2015 which was attached to the affidavit in support of the application for stay. In the said report Dr. Hooke identifies ....convulsions severe eczma, low milk protein allergy and drug allergy as some of the serious ..... She also attached a bundle of medical reports from Getrudes Hospital where the child occasionally attends treatment.

25. The appellant also demonstrated through photographing where the child is in school with other children, being baptized by a Catholic priest and a letter from [particulars withheld] Kindergarten confirming that the child is challenged in their school.

26. From the above analysis and evidence, it is apparent without an iota of contradiction or doubt that the child is receiving the best attention and treatment in terms of medical care, excellent education, shelter, clothing, social and emotional wellbeing all of which underscores the best interests of a child principle as enshrined in Article 53 (2) of the constitution, Section 4 (2) (3) of the Children's Act and ....and welfare of a child under the .....convention on the rights of the child.

27. I do agree with Mrs. Mbugua that to remove the child from this environment, parental care, medical care and education will be a kin to considering the child to a state of oblivion and rejection by society.

28. However, for a court to uphold the best interests of a child, same must operate with the .....of the law. In other words the child's best interest must be consistent and in .....with the law to the extent that one cannot breach the law to justify a specific interest of a child to the detriment of the same child on a larger scale.

29. A child's best interest and the law are complimentary and you cannot divorce the two such that one cannot "steal food to feed a hungry child supply because a child is entitled to food as a basic necessity". However, in the current scenario, taking into account guidelines as set under Section 76 (1) and (3) of the Children's Act, it is obvious that returning the child to the Children Home will not be biological to the welfare of the child whose mother is not able to take care of her and biological father abandoned them.

30. Section 76 (1) provides as follows:

**“Subject to Section 4 where a court is considering whether or not to make one or more orders, under this act, with respect to a child, it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the .....of the child than making no order at all”.**

Sub-Section 3 provides further thus

**“where the court is considering whether or not to make an order with regard to a child it shall have particular regard to the following matters:**

**(a) Ascertainable feelings and wishes of a the child came in with reference to the child’s age and understanding.**

**(b) Child’s physical, emotional and material needs and in particular where the child has disability, ability of any person or institution to provide any special care or medical attention that may be required for the child.**

**(c) The likely effect on the child of any change in circumstances.**

**(d) The child’s age,....religious ....and cultural background.**

**(e) Any harm the child may have suffered or likely to suffer.**

**(f) The ability of the parent.**

I do agree with Mrs. Mbugua that had the trial court taken into account the requirements under Section 76 (1) (3) of the Children’s Act objectively, she would not have made the orders she did directing the child to be returned to the Children’s home.

31. Having held as above with respect to the best interest of the child, I will turn to the ground No. 3 as to whether the magistrate applied. Extraneous issues n making reference to adoption law. According to the trial magistrate the appellants being a female is not allowed to be a guardian of a male child contrary to Section 148 (2) of the Children’s Act. As correctly observed by Mrs. Mbugua counsel for the appellants and Judge Achode in her ruling aforementioned that the word used is “may” and not shall.

32. The word may presupposes a situation where a court may apply its discretion into consideration of guidelines provided under Section 76 (1) (3) to allow a female applicant take legal guardianship of a male child if circumstances are such that the best interest of a child will be taken care of and more particularly a child of tender age (4 years) like the current case. The mischief of child abuse intended to be cured by Section 148 (2) is not very relevant when it comes to an infant aged 2 years (male) against a female applicant. Each rule except where concerned in mandatory terms, has an exception hence the term “may”. Had the trial court addressed her mind to the exception rule including the discretion given under rule 13(6) of guardianship practice rules, she would have arrived at a different conclusion in the in the interest of the child. ....absence therefore has been committed and Section 5 is not applicable.

33. The law relating to guardianship is Section 102 of the Children’s Act which provides:

**“Section 2 – 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. Sub-Section 3 – A guardian appointed under this Act need not be a Kenyan citizen or resident in Kenya”.**

Once again the issue of gender is not a ....requisite under this section nor is the nationality of the applicant. (See in Re APRE (a child) 2005) eKRL) where Justice Koome held that:

A foreigner can apply for a guardianship of a child court held:

**“As stated earlier, I need not .....the spirit the applicant’s spirit of sharing which he can continue doing and which should not at all be prejudiced by the provisions of the Act if his intention is to remain within Kenya. Indeed if he were to leave the jurisdiction that is when he would have held the order of adoption in order to be able to leave the country with the child”**

Since he stated that he intends to continue living in Kenya, the law has other avenues which he can apply such as guardianship of the child.

.....and welfare of a child Article 7 and 9 of the ... convention on the rights of the child has under Section 148 (2) CA no single under in foster another child and vice versa.

Rule 13 (6) of guardianship of children (practice and procedure) court to consider such as – Section 151 of the Act.

34. Section 102 (1) defines word guardian as follows:

**“For avoidance of doubt, in this part “guardian means 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 for the child or either alone or in conjunction with the surviving parent of the child either alone or in the 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”**

35. The appellant is an American who has been having control and care of the subject since 11<sup>th</sup> March, 2015 as a foster parent with the consent of Director Children Services and the biological mother and aunt. She is residing in Kenya and working for the [particulars withheld] on contract which is renewable from time to time. She has been a foster parent in accordance with Section 147 (1) of the Children’s Act and Sub-Section (3) which provides:

**“A foster parent in whose care the child is committed shall while the child remains in his care, have the same responsibilities in respect of the child’s maintenance as if he were the parent of the child”.**

36. It is this sections of foster parent which confers parental responsibility hence qualified to apply as a guardian as defined under Section 102 (2) and (3) of the Children’s Act.

37. In any event under Section 104 (5) (d) of the Children’s Act, a court can appoint a sole guardian if special circumstances exists. In the instant case, the child is suffering from a special medical condition of convulsions, severe eczema and delayed physical and speech development as evidenced by Dr. Hookes’s evidence. This is a special circumstance to warrant consideration of the applicant as a guardian in the interest of the child. Equally rule 9 (iv) of the guardianship of children (Practice and Procedure) rules 2002 a person who has parental responsibility of the child to apply as guardian. The applicant has been engaging parental responsibility of the child hence qualified to apply as such in the interest of the child.

38. Obviously adoption rules as provided under Section 58 (2) of the Children’s Act are not applicable in respect of adoption and guardianship proceedings as the rules of the same are different. Although the original intention of the child’s mother was to offer the child for adoption which has not been undertaken, one would only have that the application herein is not intended to circumvent a .....cruelty in force prohibiting inter country or .....adoption.

39. Having taken judicial notice of the existence of a .....affecting adoption, and considering that the mischief intended to be .....cannot be ignored without addressing the dangers of .....leaving the jurisdiction of theirs court hence became impossible to supervise in the event the appellant’s contract is

not renewed and then leave the country with the child.

40. In the best interest of the child, this court finds that the applicant is qualified for appointment as a guardian to baby W.N. but with no orders for issuance of a passport as prayed both before the trial court and this court. This is intended to guard against the child leaving the jurisdiction of this court. The appellant shall be at liberty to apply for adoption at the appropriate time as originally intended.

41. For the above reasons stated, the finding of the trial magistrate dated 14<sup>th</sup> February, 2015 be and is hereby set aside and the same shall be substituted with orders that the appellant herein shall be the sole guardian of Child R.W.R. That the child shall not leave this court's jurisdiction unless specifically authorized by the court.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2017.

**J.N. ONYIEGO (JUDGE)**

In the presence of

..... Counsel for the applicant

.....Court Assistant