In re Baby S (Civil Appeal E001 of 2024) [2025] KEHC 3023 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3023 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E001 OF 2024

JN ONYIEGO, J

MARCH 12, 2025

IN RE BABY S

BETWEEN

KMS ..... APPELLANT

AND

HHA ..... 1ST RESPONDENT

FAD ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an appeal against the Ruling in Wajir Children's Case No. E036 of 2024 delivered on 27.08.2024 by Hon. Baraka X.F. (R.M))

JUDGMENT

1. Vide a plaint dated 01-08-2024, the appellant/ applicant herein moved the Wajir children's court seeking orders against the respondents jointly and severally as hereunder;
    a. A custody order vesting legal custody, actual care and control of the minor (subject herein) upon the plaintiff
    b. The plaintiff be granted legal guardianship of the minor baby ZI
    c. Costs of the suit
    d. Any other relief that this honourable court may deem fit.
2. It was averred that at all material times, the appellant/applicant(plaintiff) was a maternal aunt to the minor a biological child to her late cousin who was allegedly mentally retarded by the time she died. That she was left with other siblings to the subject and now wants the minor herein who was abandoned by the mentally sick mother before she died reunited with them. That the subject was

rescued by a good Samaritan who took her to the 2nd respondent who in turn sought court orders to hand over the baby to the 1st respondent as a foster parent.

3. That the minor's deceased mother suffered mental illness prior to her death and that when she lost the subject herein on 17-02-2019, she was not in her normal mental status although under medication. She deposed that every effort by the relatives to trace the baby born on 25-11-2017 was fruitless. She claimed that their reports to Wajir police station did not bear any fruit either.

4. She stated that, she later discovered from the Wajir children's officer that the subject had been booked at Wajir police station and later presented before Wajir children's court via MCP & CCO No. E006 of 2024 from where she was released to the 1st respondent a person related to a police officer stationed at Wajir police station. That it was after demanding for the release of the baby to no success, that she made a complaint to Wajir DCI'S office vide OB number 57/14/5/2024.

5. Concurrently filed with the plaint was a chamber summons of even date seeking;

    a. Spent

    b. That the application be heard on 9-08-2021 a long side MC & CCO No. E006 of 2024.

        a. That an order to issue against the office of the County Director of Children services Wajir to take over the conduct of this case from the second respondent who was now a party to the suit.

        b. That the court to order the County Director children services to conduct visits and file a social inquiry report to this court.

        c. That the applicant be granted interim custody of the minor pending the hearing and determination of the suit.

6. The application was supported by the particulars set out on the face of it and an affidavit sworn by the applicant on 01-08-2024 which content is a replica of the particulars stated in the plaint already referred to herein above. By consent, prayer 3 and 4 were allowed on 21-08-2024.

7. In response, the 2nd respondent (children officer Wajir County) filed a replying affidavit sworn on 19-08-2024 denying any wrong doing in seeking a lawful court order granting the 1st respondent the minor herein as a foster parent. He stated that, contrary to the applicant's claim that the child was born on 25-11-2017, the same child was handed over to the 1st respondent upon rescue on 04-04-2017 vide Wajir police station OB No.13/19/5/2017. He averred that the applicant did not produce any proof that the child was reported as lost around 2017. That the purported report in 2024 was meant to justify her false claim.

8. He paused the question to the effect that; since the applicant stays with the 1st respondent in the same area, what stopped her from claiming the baby until after about 8years? He dismissed the birth certificate and notification of birth produced by the applicant as forgeries hence requested for DNA test.

9. Further, in response to the plaint, the 2nd and 3rd respondents through the AG filed a joint statement of defence dated 09-09-2024 basically denying the claim and reiterated the content of the 2nd respondent's replying affidavit alluded to herein above.

10. On her part, HH, the 1st respondent, filed a replying affidavit sworn on 14-08-2024 denying any wrong doing in fostering the baby herein. She simply stated that she was a volunteer foster parent who was ready to help a child in need of protection and care after having found her abandoned.

That the child was reported as having been abandoned on 19-05-2017 and abandonment report made vide O.B No. 13/19/05/2017 Wajir police station (See annexture HHA-3).

11. She deposed that in order to enable the baby be enrolled in school and NHIF, she and her husband acquired a birth certificate for her in their names as parents. That it will be traumatizing to remove the child from their custody considering that nobody laid claim over her since the year 2017.

12. In response to the plaint, the 1st respondent filed a statement of defence dated 05-09-2024 literally reiterating the content in her replying affidavit alluded to herein above.

13. It is worth noting that, prior to the filing of the suit herein (E036/2024), the children officer Wajir county had on 16-5-2024 presented the minor before the Wajir children's court and orally sought to get orders placing the minor for protection and care in the custody of one H who alleged to have found the minor abandoned and had made a report vide OB number 13/19/5/2017. The court slated the ruling for 20-5-2024.

14. Before delivery of that ruling, the appellant herein approached the court opposing the prayer to place the child in H's custody arguing that she (appellant) was an aunt to the minor. As a consequence, the court on 21-5-24 allowed Feisal the children officer to file a formal application to have the child fostered.

15. In view of the said directions, Feisal the children officer filed an application dated 07-06-2024 seeking temporally legal and physical custody orders of the minor to HHA the 1st respondent herein pending hearing and determination of the application; the honourable court does issue permanent legal and physical custody orders to HHA the current foster parent to the minor herein and; that the appellant herein be ordered to produce authentic documents concerning paternity of the minor.

16. Aggrieved by the filing of the said application, the appellant through Odiya and company advocates filed a preliminary objection dated 3-7-2024 stating that the applicant who was the children officer had no capacity to file the said application which offends; Section 12(1) of the *government proceedings Act* cap 40; Section 5(1) (i) of the AG cap 47, Section 31(1) of the *Advocates Act* and that there is no suit before the court as contemplated by the *civil procedure Act*.

17. It was counsel's submission that F had no capacity to file the application and that it was the AG who should have filed the suit. Secondly, counsel submitted that the permanent prayers sought could not issue as there was no substantive suit.

18. In response, the children officer relied on Section 38 and 145 of the *children Act* 2022 which he stated empowers a children officer to file such an application and that it was not in the best interest of the child to dismiss the application.

19. In its ruling delivered on 27-08-2027, the court dismissed the preliminary objection arguing that the children officer had locus to file the application as authorized by Section 145 of the *children Act* hence the threshold of a preliminary objection was not met

20. Upon delivery of the ruling, the appellant filed an application seeking the court to recuse itself for being biased. The court however refused to disqualify itself on grounds that there was no sufficient ground set out to justify disqualification.

21. Dissatisfied with the ruling dated 27-08-2024, the appellant filed the instant appeal citing eight grounds of appeal summarized as follows;

    a. The applicant erred by not dismissing the application dated 7-6-2024

b. The trial magistrate erred by failing to find that the notice of motion in question cannot stand on its own without a substantive suit.

c. The trial magistrate failed to find that a guardianship application cannot be disguised as a protection and care application

d. The trial court failed to appreciate that there was a relative to the minor who was entitled to assume custody of the minor.

e. The court has hurried the hearing of the suit without ascertaining paternity from the DNA.

22. When the matter came up for directions, parties agreed to compromise the application seeking stay of proceedings before the trial court in favour of expediting hearing of the appeal. Consequently, the court directed parties to file submissions. Vide their submissions dated 18-11-24, counsel for the appellant reiterated the position that the children officer was precluded from being a party and that a permanent order cannot issue through an interlocutory application. Further, counsel contended that if the children officer intended to be a party, he should only do so through the AG.

23. Learned counsel opined that the trial court should recuse itself from hearing the matter as it had shown bias.

24. On the other hand, the 1st respondent filed her submissions dated 25 -11-2024 opposing the appeal on grounds that the trial court properly found that there was no merit in the P.O. Counsel opined that the minor has been in the custody of the 1st respondent for 8 years hence it is in the minor's best interest that she remains in the 1st respondent's custody.

25. I have considered the grounds of appeal herein and submissions thereof. Issues that arise for determination are;

a. Whether the appellant met the threshold for a preliminary objection

b. Whether the suit filed under file number e006 of 2024 was bad law for being filed through an application

c. Whether the 2nd respondent had locus to file the application dated 7-6-24

d. Whether the AG ought to have appeared on behalf of the 2nd respondent

e. Whether the trial court ought to have recused himself

26. The appellant's preliminary was hinged on the claim that the 2nd respondent had no capacity to seek for permanent guardianship orders over the minor as he was not a party; that permanent orders cannot issue based on an application and that the Ag should have represented him.

27. It is trite law that a preliminary objection must be pleaded only on a pure point of law. In the celebrated case of Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd (1969) EA 696, Law JA stated as follows: -

> " So far as I'm aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

28. On his part Sir Charles Newbold JA stated;

> " The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

29. Similar position was held in the case of Oraro Vs Mbaja (2005) eKLR Ojwang J. (as he then was) held that;

> " A Preliminary Objection" correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed."

30. Did the 2nd respondent have a locus to file the application. The answer to that question can be traced from Section 145 of the children' Act which provides;

> " Proceedings in respect of children in need of care and protection-
>
> (1) Any person who has reasonable cause to believe that a child is in need of care and protection may report the matter to the nearest authorised officer, who shall take such steps as may be necessary for securing a Court order for the care and protection of the child in a place of safety or other alternative care in accordance with this Act.
>
> (2) An authorized officer or any other person who has reasonable cause to believe that a child is in need of care and protection shall take the child into safe custody and, at the earliest opportunity, place the child in a place of safety in facilities other than those in which children in conflict with the law are held, pending presentation to the Court for appropriate orders.
>
> (3) The Secretary shall monitor and ascertain whether the facilities in which the children are committed to in this section are suitably equipped to ensure the highest attainable standards of hygiene, sanitation and comfort, having regard to the special needs of the children.
>
> (4) Any child in need of care and protection may take refuge in a place of safety, and no person shall turn away a child in need of care and protection from any place of safety.
>
> (5) Where an application is made to a children's Court for an order under section 150, and the child is not in a place of safety, the Court may direct the applicant to bring the child before the Court, whereupon the provisions of subsection (3) of that section shall apply so as to enable the Court to make an interim

order for the temporary accommodation of the child in a place of safety or for his or her temporary committal to the care of a fit person.

(6) Where a Court makes an order under subsection (5), the Court may make such other orders as it considers necessary for—

(a) the establishment of contact between the child and his parent, or between the child and any person who has parental responsibility over the child; or

(b) the enforcement of the order.

(7) Where a child is taken to a place of safety by an authorised officer or other person without reference to the Court, the parent or guardian or any person who has parental responsibility in respect of the child may apply to the Secretary for the release of the child from the place of safety into his or her care:

Provided that if the Secretary refuses an application under this subsection, the Secretary shall notify the applicant in writing of the decision and the reasons for the refusal.

(8) An applicant who is aggrieved by the decision of the Secretary under subsection (7) may apply to the Court for an order discharging the child from the place of safety concerned and placing him or her into the care of the applicant.

(9) Where a child is taken or ordered to be taken to a place of safety in accordance with this Act, the person who takes or brings the child before the Court shall—

(a) lodge with the Court a statement specifying the grounds on which the child is brought before the Court; and

(b) give reasonable notice requiring the child's parent or guardian, or such other person who has parental responsibility over the child, to attend at the Court before which the child is to appear.

(10) Where any person intends to make any application under section 151, the person shall forthwith notify the Secretary or his representative of the name and address of the child and the day and hour when, and the nature of the grounds on which, the child is to be brought before the Court.

(11) On receiving the notice under subsection (10), the Secretary shall investigate and present to the Court a report on the child containing particulars as to the home, circumstances, age, state of health, character and general antecedents of the child, or such other information as may be necessary in assisting the Court in making appropriate orders under this Act.

(12) When it appears to an officer of a county government entity or a charitable children's institution that a child in its local jurisdiction is in urgent need of care and protection, and that its intervention is necessary, the county government entity or charitable children's institution shall receive such child into its care without the need to immediately bring the child before a Court:

Provided that—

(a) the county government entity or charitable children's institution shall notify the Secretary within seven days of receiving the child into its care;

(b) the child shall be brought before a Court within seven days;

(c) the county government entity or charitable children's institution shall submit a monthly report to the Secretary of all children received and accommodated in their respective institutions;

(d) the Secretary or an authorized officer, county government entity or charitable children's institution investigates all cases involving children who are taken under their care and protection;

(e) the county government entity or charitable children's institution shall not retain the child in its care if the parent or guardian of the child seeks to assume the care of the child;

(f) the county government entity or charitable children's institution shall, when it appears to be in the interests of the child, endeavor to secure that the care of the child is assumed by a parent or guardian or a person who has parental responsibility for the child by a relative or friend who shall, if possible, be of the same religion, race, tribe or clan as the child.

(13) The Council shall prescribe guidelines for the carrying out of investigations under subsection (12) (d).

(14) A county government entity or charitable children's institution which receives a child into its care under the provisions of this section shall be entitled to recover the cost of maintenance of such child from his parent, guardian or the person who has responsibility over the child".

31. From the above quoted provision, Feisal had powers to file an interlocutory application seeking temporally interim orders for protection and care of the minor. However, he had no capacity to enter into the arena of litigation to seek permanent legal or physical custody on guardianship in favour of H who has already wrongfully assumed custody of the minor by obtaining registration documents in this case a birth certificate for the baby in her name and that of the husband as parents before conducting adoption proceedings if at all she intended to adopt the child. Such an order ought to have been filed through an originating summons by the 1st respondent after following the proper procedure under part XIV of the *Children Act*.

32. The appointment of a guardian sought under section 122 of the *children Act* is not the one contemplated in the circumstances of this case where the child was abandoned. Section 122 (5) is categorical that a court cannot appoint a person as sole guardian to the child unless such person is a relative which is not the case in this case. In the circumstances, the second respondent the children officer had no capacity to apply for such permanent orders of guardianship. The children officer

would only apply for orders of care and protection through foster care placement application which is normally done through an interlocutory application on temporally basis pending further orders.

33. On whether the substantive orders could issue based on an interlocutory application, it is clear that once the issue of permanent orders came into play, a substantive suit by way of originating summons was expected through adoption proceedings under part XIV of the *children Act* as the child was found abandoned.

34. However, the application dated 7-6-24 sought for permanent guardianship orders. Am however curious as to why the children officer decided to file an application seeking for permanent guardianship while the court had directed him to file an application seeking for foster care placement for protection and care order.

35. To seek for permanent orders as in this case, it will amount to circumventing the proper procedure on cases of abandoned children which is adoption and which process has its own clear procedure under part XIV of the children. Although courts should be guided by the best interest of a child, in this case a wrong procedure which is a legal question must be interrogated. On that ground alone the application dated 07-06-2024 cannot stand as the prayer sought could not issue. For those reasons, the impugned application on that point of law is struck out.

36. The consequence of striking out that application would only leave the children officer with the option of seeking temporally foster care placement orders from the trial court for the protection and care of the child as initially directed pending the disposal of the main suit. Meanwhile, in exercise of this court's discretionary powers, the child shall remain in the custody of the 1st respondent for 60 days until further orders from the trial court on foster care placement application to avoid disrupting her from school.

37. On the aspect of recusal, the same was baseless as there was no proof of bias. The fact that the court has made undesirable finding against a party does not make the court biased. In my view the court properly dismissed the application. See METROPOLITAN PROPERTIES CO., LTD v LANNON (1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694 where the court held that:-

> Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias".

38. In the circumstances of this case, bias was perceived rather than being real. Litigants cannot be allowed to choose or forum shop for courts. In BGM HC CONST PETITION NO 3 OF 2012 [2013] eKLR the court held as follows that:

> "It bears restating that the stringent test is more in accord with the constitutional desire to attain the independence of the judiciary as an indispensable facet of the right to fair hearing and access to justice. As parties submit themselves to the court, they do so to [an] independent, thoroughly fearless and impartial judicial officers. What must be avoided therefore is a practice that may encourage parties to 'shop' for the judges who will hear their cases in the belief that those judges will be favourable to their causes. If 'shopping' for judges was to be allowed ... such will be the darkest day in the administration of justice. The values, objects and purposes of the *Constitution* and specifically as enshrined in Articles 10, 50, 159(2) (a), 160 and 259 of the *Constitution* of Kenya, 2010 will be lost, and that shall surely be the death knell of the entire justice system in any civilized society."

39. In the absence of proof of bias on the part of the court, the matter shall continue before the same magistrate who shall expedite the hearing process.

40. As to the AG's appearance, it was not necessary for the children officer to seek legal representation on an issue where the law under section 38 and 145 of the *children Act* bestows him direct powers to move the court as an officer of the court for specified orders among them foster care placement.

41. In a nut shell, the appeal herein partially succeeds and partially fails. This being a children matter; I will order that each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH 2025.

J. N. ONYIEGO

JUDGE