



**DWF v DNF & another (Civil Appeal E073 of 2022)
[2023] KEHC 1142 (KLR) (Civ) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E073 OF 2022

DKN MAGARE, J

FEBRUARY 10, 2023

BETWEEN

DWF APPELLANT

AND

DNF 1ST RESPONDENT

JWF 2ND RESPONDENT

JUDGMENT

1. The Appellant filed this appeal against her aging parents over the guardianship of their daughter SWF, a minor born on 7/9/2006. The Respondents attended court and supported the application. I also note that although the parties proceeded under section 102 of the *children's Act* 2001, the same was repealed on 26/7/2022 upon the coming into force of the *children's Act*, No 29 of 2022.
2. The decision was made on 28/6/20212 by Honourable J Kibosia, principal Magistrate, a terse one line ruling. This necessitated this Appeal. However, between the delivery of the Ruling and the filing of the Appeal the new *children's act* came into force. Being a matter relating to children, I shall use the most favourable law to the minor. This is because in terms of rights any expansion or declaration of a right, especially to children applies and is non derogable.
3. I have been called upon to overturn the decision of the lower court declining guardianship of a minor aged 15 years. The appellant is the eldest blood sister of the minor herein. Both parents are alive but their condition is another story.
4. The *new act* has introduced various new rights and responsibilities. Under section 114 of the *Children's Act*, the statute has introduced powers to order maintenance by any other person including a step



- parent. What the law has done is to increase the basket of rights enjoyable by the children, for their best interest.
5. Further, section 115 of the *Children's Act*, 2022 now provides for custody to be granted to any other person other than the parents. The act has extended the role of relatives including grandparents. Further, under section 150 (2) of the *Children's Act*, the law now provides for protection of children in need of care and protection through making of guardianship order.
 6. I have seen the medical reports filed in this matter. I also listened to the parties. The situation the minor is in is not impressive. Although the applicant did not say it, there appears a case where the parents who are in dire need of medical care, prioritize their upkeep at the expense of the minor. The minor therefore requires protection. As a result I am satisfied I have powers under section 150 (2) (d) to grant guardianship, subject to the usual safeguards. These safeguards were not in the *repealed Act*. The magistrate was thus technically correct regarding section 102 of the *repealed Act*. However, the court should take cognizance of the situation, called necessary reports over the minor and make requisite orders in view of the interdict in article 53(2) of the *Constitution*.
 7. I am alive that there is an introduction of new section 122 of the *children's Act* No. 29 of 2022 which replaces section 102 of the retired *children's Act* 2001. The section provides for guardianship as doth-
 - (1) Guardianship means a person appointed by will or deed by a parent of a child or by an order of court to assume parental responsibility over a child on the death of the parent either alone or jointly with the surviving parent of the child in accordance with the provisions of the *Act*.
 8. Therefore the conditions precedent for guardianship is death of a parent.
 9. However section 125 of the *Childrens Act* provides that:-
 - a. In addition to the powers of the court to appoint a guardian under section 122, the court may appoint a guardian on application by any person in the prescribed forms in any of the following circumstances;
 - i. Where the child's parents are deceased or cannot be found and this child has no guardian or other person having parental responsibility over the child or
 - ii. Where the child is one to whom section 121 applies.
 10. The law envisages a scenario where both parents are responsible persons or totally irresponsible and cannot be found or are dead. We have a scenario where both parents are alive and can be found. However, the second limb of the conjunctive in section 125 applies, that is

“ and the child has no guardian or other person having parental responsibility over the child.”
 11. In the present case although the parents are alive and have breathe in their nostrils, what they portrayed to court could not have been anticipated under section 122. It is however anticipated under section 150. The parents confirmed to the court and to my horror, that they are not only unable to take care of the minor but also they themselves. They are hardly responsible for their own lives, or the remaining part of it. The father indicates to the court that he has resigned to his fate and cannot take care of anyone.
 12. Am therefore faced with a case where if the parents were dead, I will have granted the application without much ado. There being alive places the matter in a different pedestal. Both situations do not make any difference in the life of the minor. The parents had given up on her eons ago. The question therefore is, whether circumstances are arisen, where this court needs to exercise its powers to grant guardianship to any person having parental responsibility.



13. The appellant had assumed parental responsibility for some time now. The minor is her sister. The Appellant has not only assumed parental responsibility over the minor, but also some kind of responsibility over the parents who are not in a state to act for themselves. I therefore hold and find that though parents are alive, there is no one who has parental responsibility over the minor. Being teenage girl, alone with octogenarians, doesn't sound right. Let the heavens fall and thunder rumble everywhere, children's interests are of paramount importance.
14. The father addressed the court and confirmed that he is unable to take care of himself leave alone his wife. He has no interest in the minor so far. I therefore hold that the minor deserves to have a guardian appointed for her. The peculiar circumstances are that the minor has been living with the guardian for some time in a foreign country. There is no harm in her keeping doing what she has been doing all along.
15. From the medical report the parents are not able to take care of the minor. I am satisfied that the threshold set out in section 122 of the Children's Act did not envisage this kind of matter. The parents themselves are in need of care and protection. They are not best placed to take care of the minor. The best interest of the matter require this extra ordinary measures be taken. The applicant now stands in a position of *loco parentis* for the sister.
16. The minor is now in grave danger of abandonment if we stick to the black letter law. Given the circumstances I find no reason to not hold that the minor can be subjected to guardianship.
17. Further on part of the applicant I note that she intends to remove the minor from jurisdiction. I must then warn myself of the danger of allowing the minor to remain unprotected out there. However, the applicant is blood sister to the minor and from the report she has working relationship with the minor. She is earning Euro 3000 a month. She has her own children who have bonded with the minor herein. The parents have consented to the guardianship. The best interests of the minor are paramount and must override, all else.
18. Should the parents recover, they ever have option to apply to discharge this order or review. We shall cross the bridge then. As of now we are still wading through a sandy desert looking for water. The appellant has satisfied all the requirements for grant of guardianship.
19. However, a proper injunction is in constitution, article 53 (2) where we have to have the best interest of the child at heart. The question therefore is whether the best interest of the child requires we allow or dismiss the appeal. The black letter law will always not cover scenarios like the present one. The appeal therefore is allowed on a very narrow point, that although the parents have breathe in their nostrils, they do not and have not had responsibility over the minor for some time hence constructively abandoned the minor.
20. They have easily ceded their responsibility to the applicant who is their daughter and sister to the Applicant. The interests of the child are best served by allowing this appeal, which I hereby do.
21. I say to you, DWF , a daughter of your parents, a sister of SWF, you beseeched the court for an order of guardianship, take it. This court gives it to you. Take care of your sister. She is blessed to have you. Thank God for the legislature, that passed the laws in a nick of time. Sing hallelujah for your prayers were heard. Thank the founders of this nation that our courts still work. The court places on you and you alone the cross of taking care of your sister. Go and love her, protect her, care for her. Let me not hear that your sister is suffering because your parents are not dead. That is not justice. Be merciful to your sister and let her grow to be a strong loving woman like you. Take your orders.



22. The Words of Justices CN Madan, CJ, D K S Aganyanya and J E Gicheru, JJA as then they were, in *Stanley Munga Githunguri v Republic* [1986] eKLR, keep ringing in my head when I recall the words of the applicant in court. The good law lords said as doth:-

“Stanley Munga Githunguri! You have been beseeching the court for order of prohibition. This court gives it to you.

When you leave court here raise your eyes up the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya.”

Disposition

23. I therefore make the following orders :-

- a. The appeal is hereby allowed.
- b. The applicant is granted court guardianship of the minor and to assume full and exclusive parental responsibility.
- c. The guardian as appointed is granted leave to stay with the minor to the exclusion of or in addition to the parents but with the Applicants having overriding rights unless the court orders otherwise.
- d. The orders are on condition that she should not let the child be subject any adoption international or otherwise.
- e. The movement in and out of the country is hereby granted but to be strictly monitored by the children’s court and the secretary of the children services till the age of majority. Necessary reports be filed every 6 months in the children’s court.
- f. The primary file is returned to the children’s court for compliance.

24. Each party to bear their costs.

It is so ordered

**DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY ON THIS 10TH FEBRUARY
THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY THREE**

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT MOMBASA

In the presence of;

Agwata for the appellant

The Respondents in person

Wangeci: Court Assistant

