



**REPUBLIC OF KENYA**

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

**GUARDIANSHIP CAUSE NO. 2 OF 2019**

**IN THE MATTER OF THE CHILDREN'S ACT 2001**

**AND**

**IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP TO BJK, BCK, GJK AND NKC**

**AND**

**IN THE MATTER OF TCC.....APPLICANT**

**JUDGMENT**

[1] The application before the court seeks the appointment, by order of the court, of the applicant grandmother of the children subject of the Originating Summons as a guardian within the meaning of the Children Act, section 102 whereof provides:

***102. Appointment of guardian***

*(1) For the 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 of the child either alone or in 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.*

[2] The application seeks specific orders as follows:

**“ORDERS**

- 1. THAT the applicant herein TCC be appointed as legal Guardian in respect of minors **BJK., BCK., GJK. and N.K.C.** all children.*
- 2. THAT the applicant be allowed and be the authorized Guardian in respect of the above mentioned children.*
- 3. THAT upon guardianship is being granted, the Guardian be known as the parent to the children above mentioned.*
- 4. THAT this Court do issue further orders as may be deemed fit in interest of the children above mentioned.”*

[3] The application is expressed to be brought under ss. 102, 105, 108 and 109 of the Children Act and based on facts set out in an affidavit of fitness of the proposed Guardian, the applicant herein sworn on 6<sup>th</sup> December 2019, as follows:

**“AFFIDAVIT OF FITNESS OF GUARDIAN**

*I, T.C.C. of P.O Box Marigat in Republic of Kenya do hereby make oath and state as follows:*

- 1. THAT I am the applicant herein well conversant with the issues raised herein hence competent to swear this affidavit.*
- 2. THAT I am the grandmother of **BJK., BCK., GJK. and NKC.***
- 3. THAT the minors have been under my care since the time they were very young.*

4. THAT I am ready and willing to assume parental responsibilities over the said minors.
5. THAT I know what entails having parental responsibilities over the minors.
6. THAT I am well able to take care and provide for the Minors herein.
7. THAT I have willingly consented to being appointed Guardian for one **BJK., BCK., GJK. and NKC.**
8. THAT I am well aware of my duties and responsibilities and roles I would play upon being appointed as Guardian Ad Litem.
9. THAT I have no interest adverse to the cause of the said BJK., BCK., GJK. and NC.
10. THAT the father of the minors one NCR (deceased) was my son and he used to take care of the children with me before he passed on in the month of February 2019. On 26/02/2019 annexed herewith is death certificate marked TCCI.
11. THAT even before he passed on the children was under my care since he was an employee of Kenya Police Service and left the children under my care.
12. THAT the children are under the age of 18 years annexures are copies of birth certificates marked II (a) to (d).
13. THAT the children were born by different mothers but their father is my late son NCR.
14. THAT I don't know where about of their mothers and some are married elsewhere and I don't know where they are and they have not taken care of the minors.
15. THAT the children who are minors know me and their late father and no other person.
16. THAT I swear this affidavit in support of the application now before Court that I be issued with certificate of guardianship.
17. THAT all what I have stated above is true to the best of my knowledge, information and belief."

#### **Determination**

[4] The father of the children died on 26 February 2019 placing them in the situation contemplated in section 103 of the Children Act as follows:

#### **103. Rights of surviving parent as to guardianship and power of court**

(1) On the death of the father of a child, **the mother if surviving shall, subject to the provisions of this Act, be the guardian of the child** and when no guardian has been appointed by the father or the guardian appointed by the father is dead or refuses to act, **the court may appoint a guardian to act jointly with the mother.**

(2) On the death of the mother of a child, the father, if surviving, shall be the guardian of the child either alone or jointly with any guardian appointed by the mother or if the guardian appointed by the mother is dead or refuses to act, the court may appoint a guardian to act jointly with the father.

[5] In this case, however, the evidence adduced was that the mothers could not be traced and the children confirmed that they could not recall their lives with their respective mothers and had not seen them since they started living with their grandmother to whom their father had brought them, and from where he had in his life provided for them.

#### **Position of the children and their mothers**

[6] The court examined the children pursuant to section 4 (4) of the Children Act, on oath and otherwise, as "appropriate taking into account the child's age and degree of maturity." This court was satisfied on the evidence that the respective children's mothers could not be traced and that the children had been living with their applicant grandmother for long periods since they were brought to her at significantly tender ages by their father, the whose death has prompted these proceedings for guardianship by the grandmother. The children were agreed that the applicant should be appointed their guardian alone

[7] The children had lived with their applicant grandmother for respective periods as shown below:-

1. **BJK aged 17 years since march 2005 when she was two years;**
2. **BCK aged 17 years since 2007 when he was aged 4 years;**
3. **GJK aged 16 years since January 2009 when aged two years; and**

4. NKC aged 11 years since April 2009 aged under 1 year.

**Consent of guardian**

[8] By her affidavit in support of the application, the applicant was aware of the consequences of the appointment and she agreed to abide by the appointment as guardian and to take the responsibility.

**Power of the court to appoint guardian**

[9] The Court has power to appoint a guardian where the child's parents are dead or cannot be found under section 105 of the Children Act as follows:

**“105. Appointment of guardian by the court**

*In addition to the powers of the court to appoint a guardian under subsection (5) of section 104 **the court may appoint a guardian in the following circumstances—***

***(a) On the application of any individual, where the child's parents are no longer living, or cannot be found and the child has no guardian and no other person having parental responsibility for him;***

***(b) On the application of any individual, where the child is a displaced child within the meaning of section 119 of this Act.”***

**Joint - Guardianship order**

[10] Should the mothers, who the children confirmed they had not seen since tender ages, come and seek to be appointed as joint guardians with the grandmother applicant pursuant to section 103 of the Act, above, the Court shall make a determination in the best interests of the children as required by the Children Act.

**Revocation of guardianship**

[11] Alternatively, the said mothers may seek revocation of the Guardianship orders made in favour of the applicant grandmother, and the Court shall consider the matter and make appropriate orders in terms of section 106 (6) of the Act, which provides as follows:

**“106 (6) Any appointment of guardian may be brought to an end at any time by order of the court on the application of—**

**a) Any parent or guardian; or**

**b) The child concerned with leave of the court; or**

**c) A relative of the child,**

*In any proceedings if the court considers that it should be brought to an end even though no application has been made.”*

**Lapse of Guardianship order**

[12] As regards, the two children, B and B, who shortly become 18 years of age, the order of Guardianship herein shall lapse on their attaining the age of 18 years, unless the court extends the order in the manner and for the reasons contemplated in section 107 of the Children Act, as follows:

**“107. Extension of appointment of guardian beyond child's eighteenth birthday**

**(1) The appointment of a guardian shall be determined upon the child attaining the age of eighteen years, unless exceptional circumstances exist that would require a court to make an order that the appointment be extended.**

*(2) The exceptional circumstances referred to in subsection (1) are that the child suffers from a mental or physical disability or from an illness that will render him incapable of maintaining himself, or of managing his own affairs and his property without the assistance of a guardian after his eighteenth birthday or such other exceptional circumstances with regard to the child as the court may deem proper to warrant the making of an order under this section.*

**(3) Where an order is made under subsection (1), it shall be made prior to the child's eighteenth birthday and may be made on an application by—**

**(i) The child; or**

(ii) *The parent or guardian of the child; or*

(iii) *A relative of the child; or*

(iv) *The Director:*

***Provided that no order shall be made without the consent of the child, if he is capable of giving such consent, and of the guardian whose appointment is required to be extended.***

*(4) A court making an order under this section may attach such conditions as to the duration of the order and containing directions as to how it shall be carried out, imposing such other conditions that must be complied with and with such incidental, supplemental or consequential provisions as the court thinks fit. [Rev. 2012] CAP. 141 Children 51 [Issue 1]*

*(5) A court shall have power to vary, modify or revoke any order made under this section after the child's eighteenth birthday, on the application of any of the persons named in subsection (3), or where the child marries after his eighteenth birthday, his spouse."*

### **Conclusion**

[13] Having heard the application and considering the opinion of the children subject to the application for guardianship, and being satisfied that the mothers of the children cannot be traced, this court makes an order in respect of each child that, unless the applicant disclaims her appointment as a guardian in terms of section 106 (5) of the Children Act, and unless and until her such appointment is revoked under section 106 (6) of the Act, pursuant to sections 102 and 109 of the Act, the applicant is appointed guardian over each child with ***"parental responsibility over the child"*** and ***"powers over the estate and person of the child."***

### **Orders**

[14] Accordingly, for the reasons set out above, the Court grants the applicant Orders of Guardianship in respect of each of the children named in the Originating Summons herein to last until their attainment of the age of 18 years, unless earlier revoked, or later lawfully extended, by the court in accordance with the law.

[15] There shall, therefore, issue, in respect of each child subject of the suit before the court, separately for each child, guardianship orders in terms of section 102 of the Children Act.

*Order accordingly.*

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF FEBRUARY 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Kipkulei instructed by M/S Tarus & Co. Advocates for the Guardian/Applicant.