



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
CHILDREN CASE NO. 3 OF 2020
IN THE MATTER OF THE CHILDREN'S ACT CAP 141

AND

IN THE MATTER OF JK

BETWEEN

AJCK.....PETITIONER/APPLICANT

AND

JK.....RESPONDENT

JUDGMENT

The application

[1] Before the court is an application by Originating Summons dated 5th February 2020 for guardianship order in respect of the child JK seeking specific relief, principally, as follows:

“THAT the applicant herein AJCK be appointed as legal Guardian in respect of the JK.”

[2] The application was supported by the affidavit of facts deponed to in the Applicant's affidavit of fitness as follows:

“AFFIDAVIT OF FITNESS OF GUARDIAN

- 3 *THAT the minor has been under my care since the time she was very young.*
- 4 *THAT I am ready and willing to assume parental responsibilities over the said minor.*
- 5 *THAT I know what entails having parental responsibilities over the minor.*
- 6 *THAT I am well able to take care and provide for her.*
- 7 *THAT I have willingly consented to being appointed guardian JK.*
- 8 *THAT I am well aware of my duties and responsibilities and roles I would play upon being appointed as guardian.*
- 9 *THAT I have no interest adverse to the cause of the said **JK**.*
- 10 *THAT the Respondent herein was left together with her other siblings by their father MK when their mother MK became sick and passed on (**attached herein is the death certificate**).*
- 11 *THAT JK together with her other siblings have been under my care since when their mother was sick until the day of her demise.*
- 12 *THAT this child is under the age of 18 years. (**Attached herein is a copy of her birth certificate and a letter from the school**)*

13 THAT I don't know the where about of her father and has not been seen since the year 2008.

14 THAT I swear this affidavit in support of the application now before court that I be issued with certificate of guardianship."

Opinion of the Child

[3] Pursuant to section 4(4) of the Children Act, set out below, the court heard children subject of the application -

"4. (4) In any matters of procedure affecting a child, the child shall be **accorded an opportunity to express his opinion**, and that opinion shall be taken into account as may be appropriate taking into account the child's age and degree of maturity."

The child aged 15 years who is in Form III at [particulars withheld] said she was born on 5/4/2005 and that she had lived with the applicant since 2008 when her mother died; that she never met her father and only got to know his name by her birth certificate; and she agreed that the uncle be appointed her guardian

Consent of the guardian and surviving parent

[4] The applicant consented to take parental care of the child along with his own children with whom the child has lived since they were born the eldest in 2009 and the youngest in 2019.

[5] The child's father whose whereabouts were unknown to the applicant and the child subject of these proceedings could have his consent obtained for the guardianship order. The applicant testified before the court that although he knew the father of the child, he had not heard of him since 2005 when the applicant had gone to pick the sister from her matrimonial home when she was critically ill.

Power of the court to appoint guardian

[6] The Court has power to appoint a guardian **where the child's parent is 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."

Revocation of the Guardianship order

[7] Should the father of the child who has not seen heard of 2005 come and seek to be appointed as joint guardians with the applicant pursuant to section 103 of the Act, above, the court shall consider the such application and make appropriate determination.

Revocation of guardianship

[8] Alternatively, the father may seek revocation of the Guardianship orders made in favour of the applicant, 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

[9] The order of Guardianship herein shall lapse on the child 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.

(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

[10] Having heard the application and considering the opinion of the child subject to the application for guardianship, and being satisfied that the father of the child cannot be traced, this court makes an order in respect of the child that, unless the applicant, appointed hereby as desired by the subject child, disclaim his 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, the court pursuant to sections 102 and 109 of the Act, appoints the applicant, **AJCK**, guardian over the child **JK** with **“parental responsibility over the child”** and **“powers over the estate and person of the child.”**

Orders

[11] Accordingly, for the reasons set out above, the Court grants the applicant, **AJCK**, Orders of Guardianship in respect of the child **JK** subject of 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.

[12] There shall, therefore, issue, as prayed by the applicant in respect of the child subject of the suit before the court, guardianship orders in terms of section 102 of the Children Act in favor of the said applicant, **AJCK**, the brother to the child’s deceased mother.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF MARCH 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

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