



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

(CORAM: R. MWONGO, J)

FAMILY MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2018

IN THE MATTER OF LEGAL GUARDIANSHIP OF LMK (MINOR)

AND

AKK.....APPLICANT

VERSUS

NNM.....RESPONDENT

RULING

1. The application which is before the court was filed on 17th May, 2018 and seeks, substantively, that the Applicant be authorized to have legal guardianships over the minor child LMK.
2. The application is made under **Section 104 (5)** of the Children's Act.
3. The applicant is the grandfather of the child. The father of the child passed away two years ago. The mother of the child is alive but has been absent from the child's life since he was 4 (four) years old.
4. The court engaged with both parties for substantial periods seeking to effect an amicable arrangement for the visitation of the mother to the child.
5. The circumstances under which the mother ceased to have custody and control of the child are unfortunate. She asserts that she was in a violent relationship with her late estranged husband. That he regularly abused and beat her.
6. Eventually, the grandparents of the child removed him from their home to give the parents space to resolve their issues and to avert any danger to the child. The marital relationship still did not work and the mother left the matrimonial home, eventually going to live in Kitale. However, she made a handful of efforts to see the child. She asserts that some of those efforts were actively rebuffed by the Applicant and his family. She now feels that the time is ripe for the child to have motherly affection and she is willing to have visitation rights accorded to her.
7. When the Applicant filed the application for guardianship, the court ordered that the mother be served. She filed a Replying Affidavit on 4th July 2018 opposing the grant of legal guardianship on the ground that she is the mother and able to take care of the child. She averred that she cohabited with the father of the child for four years on and off because of his temperamental and excessive drinking habits. She also averred (paragraph 9 of the Affidavit) that she has:

“moved on and now married to DO with whom we have a son aged 3 years. That DO has accepted paternity of the subject born before we got married.”

8. She further avers at paragraph 15 of the Affidavit that she has:

“No problem in the Subject being in temporally (sic) custody of the Grandparents with me being granted unlimited access to the Subject.

9. These are the sticking points in respect of the guardianship and visitation rights, now issues in this application.

10. The court requested and obtained Reports from the Children's Department, Naivasha, in which, first interview with the Subject and the guardians were recorded (See Report dated 28th June, 2018). A later Report dated 30th October, 2018) was requested by the court to take into account the mother's situation. It was filed on 6th November, 2018.

11. After various meetings with the parents of the child the Court requested that the child be brought to court. He was brought on 11th March, 2019. Still, the mother and the Applicant were unable to agree on visitation rights. It is noted that the Children's Officer's Report of 30th October, 2018 states that:

“She (mother) said that she did not want to interfere with the subject's schooling and given that she was not stable and the grandparents were capable she allowed them time to mold and educate the subject. She confessed that she is happy with the care that her in-laws have given the subject. She is also not opposed to the application for guardianship but desires that she be granted access as well as visitation rights.”

12. The court also had a discussion with the child. The Applicant and the child's mother were asked to leave the chambers. The court found out that the child was going to be 14 years on 31st March, 2019. He spoke fluently and clearly. He is definitely extremely intelligent and alert. He told the court that he was number 3 in class in a stream of four classes at [particulars withheld].

13. Seeing that the child was so intelligent, alert and assertive, the court asked him to write his thoughts and feelings on the following questions:

- a) His feelings about his mother?
- b) Whether he would want to be with her or not?
- c) If not why not, if so why?
- d) What role should his mum play in his life?

14. The child wrote a three page response to the issues raised. In summary, he feels that at the moment:

“I see it best to remain in my current status for the well-being of my future.”

The court having received the expression of the child's own free-will position in writing directs that the said written response be sealed and placed on the file, to be opened only upon the directions of a judge.

15. The above summarises the factual circumstances surrounding this matter. I now consider the law.

16. The application for custody has been made under **Section 104 (5)** of the **Children's Act**. That section deals with testamentary guardians. That is guardians appointed by will or deed of a person. In this case no will or deed has been shown to be in existence. **Sub-Section (5)** which the Applicant relies on states:-

“If the surviving parent objects to such joint guardianship, or if the guardian appointed considers that the parent is unfit to have legal custody of the child, the guardian or parent of the child may apply to the court.....”

After such application is made, the court may:-

- Refuse to make any order in which case the parent shall remain the sole guardian.
- Make an order that the guardian shall act jointly with the parent.
- Make an order appointing a relative of the child, or a person who is willing to act, a guardian of the child, to act jointly with the parent or guardian or both.
- Make an order that the guardian shall be the sole guardian.

17. In my view the above provision was not the correct provision for the Applicant to rely on, because the applicant was not appointed by any will or deed, and none has been exhibited.

18. Does that leave the situation on guardianship vacant or exposed? Not at all. **Sections 3** and **4** of the Children's Act demand that all steps must be taken to ensure the full realization of the rights of a child; and further, in **Section 4 (2)** of the Children's Act it is provided as follows:-

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

19. **Section 76** of the Children's Act provides the general principles applicable in regard to proceedings in Children's courts. **Section 76 (3)** of the Children's Act is critical in that it requires as follows:

"(3) 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) the ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding.

b) the child's physical, emotional and educational needs and in particular, where the child has a disability, the 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, sex, religion personality and cultural background.

e) any harm the child may have suffered or is at risk of suffering.

f) the ability of the parent or any other person in relation to whom the court considers the question to be relevant, to provide for and care for the child

g)

h)

i) the range of powers available to the court under this Act."

20. **Section 13** of the Act enjoins courts amongst others to ensure protection of a child from psychological abuse, neglect or other form of exploitation. **Section 17** entitles a child to leisure play and recreation. **Section 19** gives a child the right to privacy subject to parental guidance. All these are matters a court must have in mind when making a decision concerning a child.

21. **Section 32** of the Act defines a guardian as follows:-

" 'guardian' in relation to a child includes any person who in the opinion of the court has charge and control of the child."

On the basis of that definition, it is not disputed by any party that the Applicant has had "**charge and control of the child**" since he was four (4) years old. The Applicant has brought up and educated the child, and the child has lived happily in the home of the Applicant.

"Home" is defined in **Section 2** in relation to a child mean:-

"the place where the child's parent, guardian, relative or foster parent permanently resides."

22. So, the child has lived for ten (10) uninterrupted years with the grandfather who is a relative and guardian. The child is now fourteen years old. That means over seventy percent of his livelihood has been spent with the Applicant. He has picked up and established certain personality, character traits and norms of living whilst at the Applicant's home.

23. This court by law recognizes that the Applicant is and has been the guardian of the child. The Applicant now seeks legal custody, but has applied under a provision which is inapplicable in his case. The application would properly have been made under **Section 81** and **82** of the Children's Act. In the circumstances, the court will not make an order for legal custody in light of the improper application. However, the Applicant as the lawful guardian has been exercising all the parental rights and duties in respect of the child that a parent is, in law, required to exercise.

24. With regard to the question of visitation rights and access to the child by the mother, the court is guided by the principles outlined in **Section 76 (3)** of the Act. To this end, the court has:-

a) Ascertained the wishes of the child to remain in his current environment and status as he put it:

"I see it best to remain in my current status for the well-being of my future."

b) Noted that the child is 14 years, and in good health, appeared alert and emotionally stable; that he is currently in Standard 8 a pivotal year of his education and is performing very well at [particulars withheld]. His environment should not be disturbed at this critical time.

c) Considered that given the child's clear wishes any change in his circumstances may emotionally affect the child.

d) Noted that the child is a boy in his early teens, he has lost contact and connection with his mother, his father is deceased and he has no father figure but his grandfather, the Applicant, and that his mother coming into his life at this age and stage may destabilize the child and the norms he has come to associate his life with.

e) Noted that the applicant as the guardian has been and continues to be able to fully provide and care for the child.

25. The court considers that the best interests of the child, as the primary consideration, is that there should be no disturbance of his present status.

26. Accordingly, the court orders that the status quo should, and shall, be maintained until January 2020, when the child will have completed his Standard eight exams and obtained his results. Thereafter the issue of visitation rights and the question of legal custody may be revisited.

Disposition

27. In summary the court orders as follows:-

a) The application by the Applicant for legal custody under **Section 104 (5)** fails.

b) The Applicant shall continue to be the legal guardian of the child and continue to provide parental responsibility towards the child in all respects under law.

c) The present status quo shall remain, which includes the absence visitation to the child, except as may be mutually agreed between the guardian and the mother.

d) The child's letter dated 11th March, 2019 shall be sealed and opened only on the orders of the court.

28. Orders accordingly.

Dated and Delivered at Naivasha this 12th Day of March, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Amos Kit Karanja the Applicant
2. Ms NN (the child's mother) Respondent
3. Miss LK - N's Aunt
4. Court Clerk - Quinter Ogutu