



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT No. 2 OF 2019 (O.S.)

IN THE MATTER OF: SECTION 56, 57, AND 65 OF THE TRUSTEE ACT (CAP. 167) LAWS OF KENYA

AND

IN THE MATTER OF: UNIT NO. *** AND GARAGE NO. ***** SITUATED**

ON LAND PORTION NUMBER *** (ORIGINAL NO. *****)**

BETWEEN

VB.....PLAINTIFF

VERSUS

VB (AS TRUSTEE OF CADP).....DEFENDANT

RULING

This application under certificate of urgency dated 28th February, 2019 filed in terms of Order 37(1)(f), 12 and 16, Order 50, Section 1(a) and 1(b) and Section 3A of the Civil Procedure Act is brought by the applicant as the mother V.B. on behalf of the minor C.A.D.P.

The applicant in her chamber summons seeks the following orders:

- a. That this application be certified urgent and service thereof at first instance be dispensed with.
- b. That VB, currently resident at Malindi of Post Office Box Number ***** Malindi *****, be appointed guardian *ad litem* in this case.
- c. That service of this process be dispensed with by reason that the applicant being the person who provided the property subject matter of the trust, needs not be served.
- d. That in the alternative and without prejudice to the foregoing and for reasons to be recorded by the judge, the Honourable Judge be pleased to direct service upon any other person that the Honourable Court deems to be a necessary party.
- e. Directions for the hearing of this application and the Originating Summons be made.
- f. Costs of and incidental to this application be provided.

The application is supported by an affidavit sworn on 28th February, 2019 by Ms VB.

Background

CADP is a minor and daughter to the applicant currently attending and receiving instructions at [particulars withheld] School Malindi.

During the currency of her placement, the applicant has applied to have her transfer to another school capable of providing her with

appropriate education. That around April 2013 the applicant acquired property unit referred as No. ***** and Garage No. ***** situated on L.R. Number [particulars withheld]/Malindi as an investment for the benefit of the minor CCADP) to cater for her education.

The applicant also reports in her affidavit that she has sought admission to move the minor to another school by September, 2019. That the new school requires a deposit of fees on admission hence the need for leave of this court to be appointed Guardian Ad Litem both as the mother and trustee of the minor (AADP) to act on behalf with respect to any matters arising under this title L.R. Number [particulars withheld]/Malindi.

Legal framework

The relief sought for the appointment of Guardian Ad Litem is statutory in terms of Order 37 Rule (1)(f), 12, 16 and Order 50 of the Civil Procedure Rules. The normal principle governing appointment of Guardians Ad Litem in our jurisprudence is because a minor does not have the legal capacity to sue or being sued. The Guardian Ad Litem upon appointment by the court becomes an agent to act on behalf of the minor to protect his or her interest. Nothing in the Civil Procedure Rules authorizes parents to act on behalf of their children to file an action without obtaining leave of the court. This flows from the general duty of the court under Order 37 rule (1)(f), (12) and (16) to protect the interest of minors and incompetences in the cases before the court.

As a threshold matter the applicant has satisfied the criteria under the Civil Procedure Rules that she has standing to be so appointed Guardian Ad Litem to assert the claims on behalf of her minor CADP. The applicant has shown that she has a substantial relationship with the minor as a prerequisite of being appointed as Guardian ad Litem.

In the light of the evidence provided the applicant has demonstrated that she is acting in good faith with a sole motivation to foster the best interest of her daughter (CADP). There is no evidence to the contrary which indicates that the applicant has filed the present suit for reasons other than those in pursuit of her child well-being and protection.

In deciding this case I find the dicta in the persuasive authority of **Dixon v United States 197 FD. Supra 798 W.DSC 1961** on the dates and obligations of guardian ad Litem of significance in which the court held as follows:

“The position of a guardian ad litem or next friend is one of trust and confidence toward the infant as well as the court; hence, it is his duty fully to protect the infant’s interest in all matters relating to the litigation, as the infant might act for himself if he were of capacity to do so.

His duty requires him to acquaint himself with all the rights of the infant in order to protect them, and to submit to the court for its consideration and decision every question involving the rights of the infant affected by the suit.

He should be careful not to do anything or allow anything to be done, to the prejudice of his ward’s, as the court from which he receives his appointment. If in the consequence of the culpable omission or neglect of guardian ad litem the interest of the infant are sacrificed, the guardian may be punished for his neglect as well as made to respond to the infant for damage sustained.”

It is clear in the present case that the minor is incapable of making valid and informed decision as to her welfare. Where the child is incapable of providing the necessary consents parents as guardians step in to deal in a wide range of circumstances in their best interest. Much of the discussion by the above authority is in the context of the main question raised in this application concerning Guardian Ad Litem.

The Constitution of Kenya under Article 53(2) and Section 4(1)(2) of the Children’s Act does provide for the concept of the best interests of the child as a factor to consider in making a decision affecting children. It is therefore one of the foundation stone through which the corpus of our jurisprudence has been developed.

In the instant case I am of the conceded opinion that the best interest of the minor CADP would be served by granting the reliefs sought in the application dated 28th February, 2019. Costs of this application be in the cause. Each party be at liberty to apply.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 22ND DAY OF MAY, 2019.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Mulisho holding brief for Mr. Ole Kina for the Plaintiff