



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL CASE NO. 4 OF 2019

AMI.....1ST APPLICANT

JWM.....2ND APPLICANT

VERSUS

ANI.....FATHER/1ST RESPONDENT

TMN.....MOTHER/2ND RESPONDENT

RULING

1. This is a ruling for the application dated 17th May 2019. The applicants seek the following orders;

a) That this Honourable Court be pleased to grant an order vesting the legal custody, care and control of the subject minor SWN to the applicants.

b) That the applicants be allowed to take the minor out of the jurisdiction of this Honourable Court to any country of their permanent or temporary residence.

2. The application is not opposed by either of the respondents who are parents to the minor.

3. I have perused the application dated 17/5/2019 and considered the oral arguments by the counsel for the applicant, perused the affidavits of the respondents as well as the report of the County Coordinator for Children Services. I am aware of the provisions on survival and best interest of the child as provided by the Constitution Article 53 and the Children's Act. **Article 53(2)** provides that **"A child's best interests are of paramount importance in every matter concerning the child."**

4. Section 4(1), (2) (3) (a) (b) (c) of the Children Act provides: -

"S.4(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as it necessary for the welfare of the child and in the public interest."

5. Further to the above, the Children Act provides for principles that are to be applied in making orders for custody.

6. Section 83 of the Children's Act provides: -

(1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—

(a) the conduct and wishes of the parent or guardian of the child;

(b) the ascertainable wishes of the relatives of the child;

(c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

(d) the ascertainable wishes of the child;

(e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs;

(g) the religious persuasion of the child;

(h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) the best interest of the child.

7. In the cases of **EWM v RKK [2019] eKLR** and **M A A v A B S [2018] eKLR** the court emphasised that when considering matters concerning children's custody and welfare, the Constitution requires that the best interest of the child be of paramount importance.

8. In the instant case, the respondents who are the biological parents of the minor separated when the minor was seven months old and surrendered her custody and care to her late grandmother. The report by the County Coordinator for Children Services reveals that the minor's father, the 1st respondent, was an alcoholic and drug abuser, irresponsible and unable to take care of the minor.

9. The minor's biological mother, separated with the 1st respondent and later remarried. The care of the minor thus fell to the minor's late grandmother who sadly passed away on the 29th December 2018. Following the minor's grandmother's death, the applicants undertook the custody and care of the minor. I also note that the respondents are not opposed to the application to grant the applicants custody over the minor and take her out of the Kenyan jurisdiction.

10. I have carefully considered the affidavits of the respondent who are the biological parents and their representations in court during the hearing of this application.

11. I am convinced beyond doubt that not one of them is interested in looking after their own child who is the subject of these proceedings. The child is now aged seven (7) years and it is the grandmother who has been looking after the minor since the couple separated. The applicant took over the care of the minor after the death of her grandmother in January 2019.

12. The applicants have taken care of the subject for the last six (6) months. The couple have shown interest in giving the subject the best care they can afford as confirmed by the County Children's Officer in his report. They are preparing to travel abroad to the United States where the 1st Applicant has secured a job.

13. In my view, it would be a setback for the welfare of the minor to hand her over to another relative as the couple leaves the country. So far no one else has shown interest in giving the minor care and protection. Due to the close relationship of the 1st applicant to the biological father of the minor, I find that the applicants are best suited to look after the minor.

14. Having considered all the above, I find that it is in the best interest of the minor to stay with the applicants in legal custody.

15. I find the application merited and allow it in the following terms:-

a) That the legal custody, care and control of the minor SWN be and is hereby vested in the applicants.

b) That the applicants are hereby allowed to take the minor SWN outside the jurisdiction of this court to any country of their permanent or temporary residence.

c) That the respondents shall have a right of visitation on consultation with the applicants both locally and abroad.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for R. Njeru for Applicants

Applicants present

Respondents present