



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO. 58 OF 2017

IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001

AND

IN THE MATTER OF THE GUARDIANSHIP OF INFANT RULES

AND

IN THE MATTER OF THE GUARDIANSHIP AND CUSTODY OF BABY A.B.M. (A MINOR)

IN THE MATTER OF THE GUARDIANSHIP

BY Y T AND H N N

JUDGMENT

1. By an Originating Summons dated 20th April 2017 and filed on 21st April 2017, the applicants herein Y T Japanese national and H N N a Kenyan citizen came to court pursuant to Section 102 of the Children's Act No. 8/2001 seeking orders that: they be appointed as joint guardians to baby ABM the subject of these proceedings; that joint custody, care and control of the said minor be awarded to the applicants jointly and; that consent of any other relative to the child if any be dispensed with.
2. The application is grounded upon an affidavit jointly sworn by the applicants on 20th April 2017 and filed on 21st April 2017. It is the applicants' case that, by an adoptive order dated 23rd December 2014, H N (herein referred to as the second applicant) was appointed as legal guardian to the minor herein following adoption proceedings in Nairobi High Court adoption case No. 220/2012, in which R M N now deceased was the applicant/adoptive mother.
3. It is the applicants' contention that in the said case, the 2nd applicant was to assume automatically the role of legal guardian to the baby in the event of the adoptive mother's death, incapacitation or any eventuality that could make it impossible for the adoptive parent to discharge her duties and responsibilities as a parent.
4. That following the sudden death of R M N on 12th April 2016, the applicants proceeded to the Children's Court vide Misc. Case No. 192/16 seeking guardianship orders. However, vide its ruling dated 5th April 2016 the court declined to issue the orders sought arguing that it had no jurisdiction as this was a high court matter.
5. The applicants stated that, the 1st applicant is a widower to the deceased R M having been married to her under Kikuyu Customary Law sometime 1999. They opined that the 1st applicant has been staying with the baby during the lifetime of the adoptive mother and even after her death as the rightful foster father hence entitled to guardianship and custody of the baby together with H N the legal guardian.
6. At paragraph 17, the 1st applicant averred that he was neither a Kenyan citizen nor a resident in Kenya but an investor, operating business in Kenya including managing rental income from houses jointly constructed with the late R M.
7. It is the 1st applicant's averment that he is running an NGO in Kenya by the name of [Particulars Withheld] International which is dedicated to offer parental support to women in small scale business. He further claimed that H N the appointed legal guardian although a relative to the deceased R has no financial capacity to support the child.
8. He claimed to be a person of means who would then meet all basic needs for the baby including paying school fees, provision of shelter,

food, clothing and medical care subject to being recognized legally as a guardian.

9. Simultaneously filed with this summons is a chamber summons of even date seeking similar orders. Upon hearing the application, Justice Musyoka dismissed the same vide his ruling dated 16th May 2017 on grounds that by the time the child was adopted, the 1st applicant had already separated with the deceased adoptive mother contrary to his averment in the supporting affidavit that they were staying together. Justice Musyoka directed the Director Children Services to file a detailed report and then have the Originating Summons substantively heard and determined.

10. Subsequently, this matter was fixed for hearing before me on 3rd May 2018 when M/s Muniafu counsel for the applicants urged the court to adopt the applicants' affidavit in support of the application as their testimony. Learned counsel urged the court to allow the 1st applicant guardianship to the minor arguing that since the adoptive mother died, the baby has been staying with the 1st applicant as the foster father being a husband to the late R. Counsel argued that the child has nowhere to go and its in her best interest that the 1st applicant be awarded guardianship, actual custody, care and control.

11. A perusal of the Director Children Services' report dated 19th October 2017 confirmed that the adoptive mother died on 12th April 2016 leaving a widower by the name of YT who has since been staying with the minor.

12. The report further confirmed that the 1st applicant is more than a father to the baby considering his commitment to the baby hence recommended joint custody of the baby with the legal guardian.

13. I have considered the application herein, supporting affidavit and oral submissions by counsel for the applicant. There is no dispute that the mother to the baby is deceased. It is also not in dispute that during the adoption proceedings, H N was appointed as legal guardian to the baby in the event of death of the adoptive mother or incapacitation that would render discharge of parental responsibility impossible.

14. Under Section 81 (1) (a) of the Children's Act, custody in respect to a child, means so much of the parental rights and duties as relate to the possession of the child. Sub Section (1) (b) goes further to provide that, "care and control" means actual possession of a child whether or not that possession is shared with one or more persons.

15. In this case, the 2nd applicant who is the recognized legal guardian to the baby under the aforesaid adoption proceedings is seeking to have joint legal custody. The argument put forth is that the child is staying with the 1st applicant as a foster father being a widower to the adoptive mother.

16. Although the applicants claim that the 1st applicant was a husband to the deceased, it is admitted in these proceedings that the two had separated by the time the adoption proceedings were conducted. As to their reconciliation later, nobody knows when.

17. This application is essentially seeking courts' orders sanctioning actual custody, care and control of the baby to the 1st applicant under Section 81 and 112 of the Children's Act. The 1st applicant in Paragraph 17 admitted that he is not a Kenyan nor a Kenyan resident and that he is only in Kenya for business. From his own admission, he is temporarily in Kenya. The subject herein is a female child who ordinarily even under adoption proceedings could not be adopted by the 1st applicant being a male and now aged over 75 years old. The mischief intended to be cured by that requirement under Section 158 (1) and (2) of the Children's Act is to avert a likelihood of child abuse. Although this is not an application for adoption, the spirit of Section 158 (1) (2) of the Children's Act cannot be wished away from the application herein.

18. There was no evidence that the 1st applicant was married to the deceased. The ruling of Justice Musyoka dated 26th May 2017 captioned that fact that the deceased RM and the 1st applicant were merely cohabiting. The 1st applicant is seeking actual custody of the baby through guardianship orders.

19. I am alive to the fact that under Section 102 of the Children's Act, a guardian may be appointed either alone or jointly with another person 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. The same provision goes further to provide that a guardian may be appointed in respect of a child who is a resident in Kenya whether or not the child was born in Kenya or is a Kenyan citizen and the guardian appointed under the Act need not be a Kenyan citizen or resident in Kenya.

20. In the wording of Section 102 (3) for a person to be appointed as a guardian, one need not be a Kenyan citizen just like the 1st applicant. In the instant case, there is already a recognized legal guardian one R M a cousin to the child. She was explained her role as a legal guardian in the adoption case. She cannot run away from that responsibility. The 1st applicant has neither wife nor children in Kenya. He is staying alone with some employees whose employment can be terminated any time. It would be risk and not in the best interest of this child to place her actual custody to the 1st applicant who was a mere boyfriend to the mother.

21. If the 1st applicant is willing to support as he claims, he can still do so without any conditions attached. He can always acquire a medical cover for the child privately, pay school fees and provide all necessary requirements for the baby while in the custody of H N.

22. The 1st applicant having admitted that the mother to the child had acquired property to which the child is entitled to inherit, H N M should move with speed and file a succession case in respect of the estate of the deceased to enable the baby as the sole beneficiary inherit the property.

23. The baby should not suffer anything given that the mother left property among them rental houses which generates monthly income. Although the intention to bring the 1st applicant on board is good, there are repercussions which must be taken care of. The best interest of the baby envisaged under Article 53 (2) of the Constitution and Section 4 (2) and (3) of the Children's Act, in my opinion would best be covered under the actual custody of the 2nd applicant H N the legal guardian.

24. For the above reasons stated, application herein is disallowed with orders that the actual custody of the baby shall be with H N N the 2nd applicant herein being the legal guardian to the baby.

Order accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER, 2018.

J.N. ONYIEGO

(JUDGE)