



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ADOPTION CAUSE NO 10 OF 2013

IN THE MATTER OF THE ADOPTION OF MNM

MNK1ST APPLICANT

FNK 2ND APPLICANT

VERSUS

CNNRESPONDENT

RULING

Introduction

Judgment was delivered herein on 18th November 2015 in which an adoption order was made with regard to the child now known as MNM(hereinafter referred to as “the subject child”) upon application by FKM, the adopter. CNN, a sister of the adopter, was also upon application appointed the legal guardian of the child should such eventuality arise. On 23rd November 2016, the Applicants herein filed an application by way of Chamber Summons of the same date seeking an orders that the appointment of CN be brought to an end for reason that:

- a) CN has failed to bring the relationship between the son (MMN) and the family of the late PM as shown in a letter by the Assistant Chief dated 10/08/2016.
- b) CN has neglected her responsibilities of adequate diet, medical care and education of the child MM by staying far away from the child leaving the child to domestic workers that threaten and expose the life of the child as shown in the affidavit dated 15th October 2012 which was attached.
- c) It is controversial on how the decision was reached for CN to be guardian of the child without the consent of the family of the late PM, and the decision was done through the backdoor without the involvement and consent of the family of the late PM which denies the family parental care and responsibility as shown in a letter dated 10th August 2016 which was attached
- d) CN has left her responsibilities as a guardian and she has involved herself in misusing the properties left by the deceased parents of the child Michael NM to be inherited.
- e) The court ruling on 15th October 2012 on the guidance of the child ,did not specify correctly the names of the said sister to the deceased F to be the guardian of the child.

The chamber summons was accompanied by a verifying affidavit dated 23rd November 2016 sworn by

the Applicants, and a supporting affidavit sworn on the same date by FNK in which he avers that he would like BMK to be appointed guardian ad litem with respect of the subject child. The Applicants also reiterated the contents of their application in a further affidavit dated 6th February 2017 filed on the same date in which they stated that their application is brought pursuant to the provisions of section 106(6) of the Children Act. The Applicants also filed a special power of attorney on 27th April 2017 in which they appointed one Lincoln Otakwa M'Meli to be their attorney and represent them in the application.

On 9th December 2016 Odiya & Associates Advocates for the Respondent filed a notice of preliminary objection of the same date objecting to the said application on the grounds that it is incompetent, misconceived and bad in law, as the suit herein having been determined by the judgment delivered on 18th November 2015 renders this court *functus officio*, and is incurably defective having been brought by person with no locus. The Respondent also filed a replying affidavit to the application sworn on 9th December 2016.

The Issues and Determination

The issue before the Court is whether the Respondent's preliminary objection has merit and particularly whether the Applicants' application is competently before this Court. It was submitted by the Respondent's Advocates in submissions dated 24th February 2017, that all the requisite procedures required by the law were followed before the judgment herein was entered appointing the respondent as the legal guardian.

Reliance was placed on the decision in **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)**, [2014] eKLR on the application of the doctrine of *functus officio* and the principle of finality in that a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter and once such a decision has been given, it is subject to any right of appeal to superior body or functionary final and conclusive.

Therefore, that this Court became *functus officio* upon delivery of the judgment on 18th November 2015, and the said judgment cannot be reopened in the manner the applicants have approached court. Further, that if the Applicants have issue with the way and manner the legal guardian is performing her duties, they ought to move the court in the right manner.

The Respondent in addition submitted that the pleadings filed in this Court are fatally defective based on the fact that they involve persons who were not parties to the adoption proceedings, as the said proceedings were commenced by FKM (deceased) as a sole applicant. However, that the Applicants herein are purporting to file the application as brother and mother to PM respectively, who at the time the adoption cause was filed was deceased

The Applicants filed submissions dated 21st April 2017 in which they reiterated the reasons for their application and contended that the Respondent's preliminary objection is barred by virtue of section 106 (6) (c) of the Children Act 2001. Further, that they fear that the property left to be heritage of the subject child are in the hands of guardian CN without any next of kin.

I find that I have to agree with the submissions made by the Respondent for the reason that the legal guardian sought to be removed was appointed by this Court in adoption proceedings and pursuant to the provisions of section 164 which gives this Court the power to appoint a guardian in such proceedings as follows:

“(1) The court at the time of making an adoption order may, upon the application of the adopter, or of its own motion, or in the case of applicants for an international adoption, shall appoint any person approved by the adopter and whose prior consent thereto has been given in writing to be the guardian of the child in the event of the adopter, or both of the adopters where two spouses have applied for the adoption order, dying or becoming incapacitated before the child is of full age.

(2) The court may, at any time before the child is of full age, on the application of the adopter, or of the guardian appointed under subsection (1) or of the child, revoke such appointment and appoint any other person to be the guardian of the child.”

The said section also provides the procedure for the removal of a guardian appointed in adoption proceedings which can only be on application of the adopter, the guardian or the child. The Applicants therefore have no locus in this respect to bring an application for the removal of the guardian in these adoption proceedings, and the Court having finally pronounced itself on the issue of the adoption and appointment of the legal guardian can only appeal the said decision as provided by section 167 of the Children Act.

The Applicants have relied on section 106(6) of the Children Act which provides as follows:

“(6) Any appointment of a 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 the 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.”

While the Applicants may have locus to bring an application to remove a guardian with respect to the subject child under this section, the applicable procedure is provided by the Guardianship of Children (Practice and Procedure) Rules 2002, which require any application to be by way of Originating Summons in the Children Court. Rules 9 and 15 of the said Rules specifically provide who can make an application pursuant to section 106(6), the persons on whom such an application is to be served, and its contents. The Applicants have therefore brought their application in the wrong forum and using the wrong procedure.

These findings notwithstanding, this Court was of the view that it would be in the best interests of the subject child to confirm his situation, and to this end examined the child *in camera* at a hearing held in chambers on 7th March 2017, and also directed the Directorate of Children Services and the Child Welfare Society, which was the Adoption Society in the adoption proceedings, to undertake home visits and file the report of their findings on the circumstances of the subject child in Court.

The Court during its examination observed that the subject child was healthy, well taken care of, outgoing and aware of his circumstances in terms of the death of his parents and his relationship with the Applicants. He was happy to continue staying with CN. These observations were reinforced by the reports filed by the Child Welfare Society dated 17th March 2017 and by Mercy Muli, the Athi River Sub-County Children Officer on 2nd March 2017. This Court also notes with concerns reports of hostility by the Applicants to the subject child arising from their perceived right to inherit the child’s adoptive parents property.

The sum total of the above is that the Applicants’ Chamber Summons dated 23rd November 2016 is incompetently before this Court, and is hereby struck out with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in open court at Machakos this 12th day of June 2017.

P. NYAMWEYA

JUDGE