



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA T BUNGOMA**  
**CHILDREN’S CASE NO. 5 OF 2014**

**IN THE MATTER OF R A A, CHILD E A..... APPLICANT**

**RULING**

1. Before court is an application by way of originating summons pursuant to Section 105 of the Children’s Act, Rules 3,12 and 13 (5) of the Guardianship of Children (Practice and Procedure Rules, 2002) seeking for two specific orders namely,

- a. That the applicant be appointed guarding of a child R A A now aged 14 months and
- b. The applicant be granted six months leave to travel with the child to the United Kingdom and to return after six months.

2. The application is grounded on the following facts; the child has no known relatives and it is in the interest of the child that the order be made. In her replying affidavit the applicant states that she is director and founder of Kenya Sunbeam Ministries in Kengatuny Teso; the child was referred to the applicant by the Sub-county Children’s Officer for temporary placement; that it is the child’s interest that she takes care of him; the child has been staying with her in her personal home and they have not parted since his arrival, the applicant intends to leave for the United Kingdom given for a period of six months.

3. The documents attached to the application given the following information.

- a. **The applicant is 61 years.**
- b. **She is on a work permit for 2 years beginning 28<sup>th</sup> April 2014.**
- c. **She is single having gone through dissolution of marriage on 23<sup>rd</sup> of June, 2011.**
- d. **The applicant is a mother of two grown up children who help her support the child.**
- e. **She attempted to foster the child but was unable due to restrictions under Section 148 (2) of the Children’s Act.**
- f. **The ministry where the applicant is a director/teacher is a Children’s home/institution (see letter by the Children’s office Teso North.**

4. What is the applicable law herein.

Section 105 of the Children’s Act Chapter 14, of the Laws of Kenya Stipulates,

***“In addition to the prayers of the court to appoint a guardianship under Sub Section (5) of the Section 104 the court may appoint a guardian in the following circumstances;***

***“a). On the application of any individual where the child’s parents are no longer living or cannot be found and the child has no other person having parental responsibility for him.”***

The guardianship of children (Practice and Procedure) Rules 2002 (L.N. 75/2002) provides

***S.13”(a) if the guardianship is in respect of the child only, the guardian must state whether it is a male or a female child and whether the guardian intends to reside with the child.***

***“(b) If the application under Sub Rule (4) states that the guardian intends to reside with the child the court shall in exercise of its discretion pay special regard to the relationship between the child and the guardian and in particular the sex of the child and the guardian.”***

5. There is no doubt that the applicant has for the last 12 months undertaken parental responsibility of the minor who is said to have been abandoned and referred to the Sunbeam Children’s Home/Institution for placement, although the applicant does not explain under what circumstances the child left the institution to stay with her in her house.

I observed both the child and the applicant a few times when they appeared in court. The child appears well taken care of. However a number of things are notable.

- 1. The applicant is currently on a two year work permit. Apart from being a director of the Children’s Home as she says she does not say exactly what she does for a living. The work permit describes her as a pastor/teacher.***
- 2. It is not clear where the applicant derives income from. There is information that the applicant’s grown up children help in the upkeep of the child.***
- 3. The applicant will leave the country and be away for a prolonged period thus Placing the child outside the territorial jurisdiction of this court, in which case in the event the child is in danger this court cannot enforce any orders and too soon after the grant of the orders being sought.***

6. In the English case of **Hadkinson Vs. Hadkinson [1952] ALL ER vol. 2 P. 5 & 7 at 56** and Romer L J observed.

***“..... The court cannot exercise its quasi – parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that applications for leave to take an infant even temporarily out of the country are jealously Scrutinized and are only granted subject to every guarantee that is reasonable being exacted for the return of the child at the end of the authorized period. There is always the danger that a parent will be able, by wrongfully taking a child abroad or by keeping him there after the sanctioned period has expired, to present the court with a fair -accompli and argue that the child having become firmly established outside the jurisdiction, it would be against his interest to bring him back within it.”***

7. The intended guardian if successful in her application for guardianship will acquire parental responsibility which responsibilities are enforceable in a court of law, that aside she has stated that she intends to travel to the United Kingdom with the **minor “and report back after six months with necessary documents”**

It is not clear which documents the applicant refers to needless to say that if the applicant travels to the United Kingdom after say a month since documentation to allow the child travel will have to and be obtained both from Kenya and the United Kingdom by the time the applicant travels back her work permit will have some few months left to expiry.

The applicant argues that she has not one to leave the child with, I take note that from her annexures there is a children’s home where the child was initially referred to. The child can be left in the said home while the applicant travels and she can return early so as not to compromise the child’s interests.

Having stated as above dispute the child being of the opposite sex as the applicant, and the applicant’s

advance age I am inclined to appoint the applicant as guardian of the infant R A A on condition that the child does not leave the jurisdiction of the court.

Dated at Bungoma this 3<sup>rd</sup> day of JULY 2015.

**ALI-ARONI**

**JUDGE.**