



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Baby CAN (Family Appeal E012 of 2022)  
[2024] KEHC 338 (KLR) (Family) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**FAMILY APPEAL E012 OF 2022**

**HK CHEMITEI, J**

**JANUARY 25, 2024**

**OOO..... 1ST APPELLANT**

**JNJ..... 2ND APPELLANT**

*(Being an Appeal from the Decision of Hon. H.M. MBATI (SRM)  
dated 23rd November 2021 in the childrens case No. E160 of 2021)*

**JUDGMENT**

1. The appellants filed an Originating Summons dated 15<sup>th</sup> November 2021 seeking the guardianship of a minor C. A. N.
2. When the matter went before the duty court for directions the said court dismissed the same citing inter alia that the same did not meet the threshold set under Section 102 of the [Children's Act](#) which defines who was a guardian. The court directed that since both parents of the minor were alive the 1<sup>st</sup> applicant should apply formally for adoption.
3. The parties were aggrieved and they filed this appeal citing several grounds including the fact that the trial court failed to appreciate the scope of Section 102 of the [Children's Act](#); that the court failed to consider the best interest of the child and that the Originating Summons was not contentious.
4. The court has read the proceedings and the submissions by the applicants.
5. Without belabouring the issue I think I would not wish to engage much on whether the suit was meritorious or not. That would be a preserve of the trial court. Suffice to state that the trial court did not grant the applicants an opportunity to be heard. What was before it if I understood the proceedings well was basically giving directions on how the matter was to proceed.
6. To proceed to dismiss the same suo moto was erroneous on the part of the court. It should have given directions on how the suit was to be heard. An Originating summons is a full suit and the court ought to have endeavoured to grant the parties an opportunity of expressing themselves.



7. The issue whether the biological father of the minor gave his consent apart from signing the affidavit was worth considering and subjecting it to a close scrutiny taking into consideration the relationship obtaining between the applicants.

8. The trial court or duty court for that matter breached Article 50 of the Constitution which states that:

“Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

9. In the premises I do not wish to wade into the issues raised by the appellants in their submissions as they for the verdict hereunder shall have the opportunity of ventilating it at the trial court. Suffice to order as hereunder:

(a) The appeal is hereby allowed and the trial court ruling set aside.

(b) The suit shall be heard afresh by another court other than Hon H M Mbathi.

(c) Costs in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**H K CHEMITEL.**

**JUDGE**

