



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

ADOPTION CAUSE NO. 1 OF 2019

IN THE MATTER OF MM (MINOR)

JM.....APPLICANT

RULING

1. The applicant herein moved this court vide the Originating Summons dated 20/03/2019 and brought under Section 157 (1) and 158(1) of the Children's Act and Rule 4 and 14 of the Adoption Rules and seeking for orders: -

- 1)spent
- 2) *That the consent of the infant's natural parents be dispensed with*
- 3) *That the applicants be authorized to adopt Joseph Munyaka (infant)*

2. The application is supported by the applicant's supporting affidavit wherein she adopted her statement sworn on 20/03/2019 in support of an application for adoption orders.

3. At the hearing of the application, this court gave directions that the reports of the County Children's Officer and Adoption Society of Kenya be filed.

4. Ripples International Adoption Centre in its report dated 12/11/2017 recommended that the child herein is available for adoption and further that adoption would be for his best interest and annexed (to the said report) a certificate to declare the child free for adoption. A report by the guardian *ad-litem* (Edward T. Mwirigi) dated 8/11/2019 was further filed and which report recommended the adoption of the child herein by the applicant as it is in his best interests.

5. I have considered the application herein, the annexures thereto and all the documents filed before this court. It is my view that the main issue for determination is whether the application herein ought to be allowed as prayed.

6. The law on adoption is provided for under the Children Act No. 8 of 2001. Section 154(1) therein donates jurisdiction to this court to make an adoption order. Under Section 156 of the Act, no arrangement for adoption of a child which ought to be commenced unless the said child is at least six weeks old and has been declared free for adoption by a registered adoption society in accordance with the rules prescribed in that behalf. Section 157 requires that the child concerned should have been in the continuous care and control of the applicant within the Republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants, as the case may, be evaluated and assessed by a registered adoption society in Kenya

7. I note that the applicant herein is a sole applicant and pursuant to section 158 (1) of the Act, an adoption order may be made upon the application of a sole applicant but the said applicant must have attained the age of twenty-five years and is at least twenty-one years older than the child but has not attained the age of sixty-five years; or (b) is a relative of the child; or (c) is the mother or father of the child. Section 158 (2)-(4) provides for further conditions which the applicant ought to comply with in filing the application for adoption which includes consent by the parent but the court can dispense with the said consent in the case of the parents or guardian of the child that he has abandoned, neglected, persistently failed to maintain or persistently ill-treated. (See section 159).

8. The applicant in the statement in support of the application for adoption order averred that the minor herein is approximately four (4) years old and was referred from Itabua Police Station through Embu West Children's Office to the DOE Embu Children's Home. The letter dated 24/12/2016 from the OCS- Itabua Police Station indicates that the child herein was found abandoned on 24/12/2016. The report to declare the child fit for adoption by Ripples International Adoption Centre indicates that the child herein is estimated to have been born on 5/01/2015. As such, at the time of the application herein, the child was more than six (6) weeks old. The child was also declared free for adoption by Ripples International Adoption Centre, a registered Adoption Society in the report dated 12/11/2017.

9. The Applicant averred that the child herein was received in their care and possession on or about 18/04/2018 and thus he had been in the continuous care and control of the applicant for a period of three consecutive months preceding the filing of the application. She further annexed to the application, copies of her national identity card wherein it is indicated that she was born in 1966. As such, at the time of making the application herein, she had attained the age of twenty-five years, was at least twenty-one years older than the child and had not attained the age of sixty-five years. From the records, it is clear that the child herein was found abandoned near Rupingazi Inn and was rescued by good Samaritans. The report by Ripples International indicates that the child remains unclaimed and that his family cannot be traced. As such, the consent by the parent is hereby dispensed with by virtue of section 159.

10. However, as I have already noted elsewhere in this ruling, the applicant herein is a sole female applicant. She intends to adopt a male child. Under section 158(2)(b) of the Act, an adoption order ought not to be made in favour of a sole female applicant in respect of a male child unless the court is satisfied that there are special circumstances that justify the making of an adoption order. The Children Act has not stated what constitutes the special circumstances but the National Adoption Committee on 13th January 2010 formulated guidelines where special circumstances may be found for sole applicants, with respect to Section 158(2) and which guidelines must as far as possible guide this court when determining whether to issue the adoption order. The guidelines are as follows: -

i. When the child is a relative.

ii. When the child has special needs and the applicant is willing and has capacity to take care of the child.

iii. Where the applicant has adopted or has another biological child or children over whom she is willingly exercising parental responsibility.

iv. Where the child to be adopted has a sibling who is also being adopted by the applicant.

v. Proposed applicant is the only person available to adopt the child.

vi. Where the applicant is the legal guardian of the child or children appointed by will or in adoption proceedings and the parents die or become permanently incapacitated.

{See **In re Adoption of Baby JKM [2017] eKLR** and **MWM –vs- MVM (2020) eKLR**}

The question therefore is whether there are special circumstances warranting the grant of the adoption order to the applicant herein.

11. I note that the applicant is not related to the child; neither does the child have special needs but the applicant has one biological child.

12. The orders sought by the applicant relate to a child. In law, in any matter concerning a child, the best interests of the child are paramount. (See **Article 53(2) of the Constitution and Section 4(3) of Children Act**). The principle of the best interest of the child ensures that decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health and emotional development into young adulthood. When it comes to determining the best interest of a child it is important to consider the evidence laid before the court with regards to parenting ability that is the question whether the parent requesting the adoption order is genuinely able to meet the child's physical and emotional needs. The court in assessing the best interests of the child is mandated to evaluate and balance all the elements necessary to make a decision in a specific situation or a specific child(ren).

13. The objective is to reach a decision based on National Law that guarantees the rights of the child and promotes its wellbeing, safety and development. The court must therefore weigh and balance all the relevant factors of the case with a bias to the rights of the child and the consideration of the obligations of public authorities and service providers towards the child. The determination is therefore a process for the identification of a durable solution expected to have significant implications on the child's present and future life. Each case must be determined on its own special circumstances. (See **MWM –vs- MVM [2020] eKLR**).

14. It is clear that the options available to me are either denying the applicant the Adoption order and return the child to the charitable home and thus strictly observe **section 158 (2) (b) of the Children Act and which section gives the** court discretion to consider the special circumstances and allow a sole female applicant to adopt a male child or to allow the orders prayed herein. I must therefore turn to the question as to what is the best interest of this child.

15. I note that the applicant herein deposed to the fact that she has a daughter of her own (FLK) and she has always wished to have another child beside the said daughter and hence opting for adoption. I further note that the applicant is a teacher and hence has stable income. Form C5 indicates that the court was satisfied that the child herein needs protection and care and thus was committed to the care of Sister-in-Charge Embu Children's Home. The applicant further deposed that she received the child herein into her care and possession on or about 18/04/2018 and that the child had shown very positive progress and is coping well and thus they have been together for more than 2½ years now.

16. The report by the guardian ad litem dated 8/11/2019 indicates that the applicant and her own daughter have bonded well with the child herein and that they have great love for him and deeply desire to look after and care for him and that the applicant is prepared to provide for and present in providing a suitable home for the infant and she understands that an adoption order is irrevocable and that the order will make her responsible for the maintenance and upbringing of the said child and the applicant has the means and income to maintain the child.

17. The report by Ripples International Adoption Centre notes that the child herein is in need of alternative family care and that he stands to benefit from family love, care and provision as opposed to being in institutional care and that adoption would be in his best interest.

18. Having considered the circumstances of this case, the documentation availed in court and the pleadings herein, the applicant is suitable and fit to adopt the child. It would not be in the best interest to disrupt the life of the child who has bonded well with the applicant and her own daughter since 18/04/2018 when the child was taken to the care and possession of the applicant. There are special circumstances in this case as the child has bonded with the adoptive parent.

19. It is in the best interest of the child that his life should not be disrupted or even return him to the Charitable Home to look for an adoptive parent other than the applicant. The best interest is that he grows up in a home set up and in a family. It is evident that the applicant will be able to provide a suitable environment for the child's upbringing and growth. She has the will and the desire to adopt the child herein and it is clear that she shall treat the adopted child as if he was born to her.

20. I am satisfied that the sole female applicant is not disqualified from adopting a male child in the circumstances, and should be permitted to adopt the child in this case. As such the instant application is allowed in terms of prayers 2 and 3.

21. Orders accordingly.

Delivered, dated and signed at Embu this 20th day of January, 2021.

L. NJUGUNA

JUDGE

.....**for the Applicant**