



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**FAMILY DIVISION**  
**ADOPTION CAUSE NO. 176 OF 2019**  
**IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001 AND THE ADOPTION RULES**  
**AND**  
**IN THE MATTER OF ADOPTION OF BABY J alias JM(MINOR)**  
**AND**  
**IN THE MATTER OF AN APPLICATION OF ADOPTION BY ZAA & NJ SAB**  
**JUDGMENT**

1. Before this Court is the Originating Summons dated **16<sup>th</sup> December 2019** by which **ZAA** (the 1<sup>st</sup> Applicant) and **NJB** seek the following orders:-

**“1. SPENT**

**2. SPENT**

**3. THAT the Applicant be authorized to adopt J alias JM infant.**

**4. THAT upon Adoption, the child be known as JM.**

**5. THAT the Registrar of Births and Deaths do cause an entry to be made in the Adoption Register with regard to this child and that the child be considered as a Kenyan citizen.**

**6. THAT the costs of this application be costs in the cause.**

2. The Summons was canvassed by way of viva voce evidence on the online platform. The Applicants are a married couple who are Kenyan citizens but who currently reside and work in **California, U.S.A.** The couple got married under Kisii Customary Rites in **1996** and later solemnized their union through a wedding conducted on **13<sup>th</sup> June 2012** at the Office of the **Registrar of Marriages in Nairobi**. The couple do not have any children together although the 1<sup>st</sup> Applicant has two adult daughters from a previous union. The 1<sup>st</sup> Applicant's daughters who are independent both reside in the **U.S.A.** The couple commenced this Adoption process in the year **2014** seeking to adopt the subject child who is a boy-child then aged **eight (8) years**.

3. As stated earlier the Applicants are both dual citizens holding both Kenyan and American citizenship. They have both exhibited copies of their National Identity Cards as well as copies of their American Passports. Each Applicant assured the Court that they comprehended the legal implications of an Adoption Order. They both stated that they were ready and willing to accord the subject child all rights due to a biological child including the right to inherit.

4. The child in question **JM** was also interviewed by the Court. He stated that he is **10 years** old and is in **Class Two** at the **[Particulars Withheld] School**. He confirmed that he knew the Applicants and had seen them when they came to Kenya. The child currently lives in Karen with the **elder sister** of the 2<sup>nd</sup> Applicant.

5. The Guardian-Ad-Litem **RBN** having been approved by the Court filed her report dated **2<sup>nd</sup> November 2020** in which she recommended the Adoption. Similarly the Adoption Agency **Child Welfare Society of Kenya** through their officer **FRANCIS NDELEKO** filed in Court their report dated **8<sup>th</sup> October 2019** recommending the Adoption. Finally the **Director Children's Services** through the Principal Children's Officer **EZEKIEL KIMANI** filed their report dated **28<sup>th</sup> October 2020** also recommending the adoption.

#### **ANALYSIS AND DETERMINATION**

6. I have considered the evidence adduced in open court as well as the various Affidavits and reports filed in this matter. The Preliminary requirements for the making of an Adoption Order are set out in **Section 156(1)** of the **Children's Act** which provides as follows:-

**“159(1) No arrangement shall be commenced for the adoption of a child unless the child is at least six (6) weeks old and has been declared free for adoption by a Registered Adoption Society in accordance with the Rules prescribed in that behalf.”**

7. The subject child is believed to have been born on or about **1<sup>st</sup> December 2011**. He is now **ten (10) years old** well above the **six (6) week** age limit provided for in the Act. The **Child Welfare Society of Kenya** which is a Registered Adoption Agency have annexed to the Summons a copy of their Certificate Serial No. **[Particulars Withheld]** dated **8<sup>th</sup> October 2019** declaring the child free for Adoption. Accordingly I am satisfied that the prerequisites for Adoption as set out in **Section 156(1)** have all been met.

8. The Court is required to assess the suitability of the Applicants as adoptive parents. As stated earlier the Applicants are both Kenyan citizens who got married to each other under customary law in the year **1996**. They later solemnized their union through a Civil wedding conducted at the Registrar's Office on **13<sup>th</sup> June 2012**. Annexed to the Summons is a copy of their Certificate of Marriage Serial No. **[Particulars Withheld]** (Annexure **ZAA'8'**). The couple's marriage was not blessed with any issue hence the desire to adopt a child.

9. As earlier stated the Applicants both currently live and work in the **U.S.A**. The **1<sup>st</sup>** Applicant is a trained Pharmacist who now works as a Pharmacist / Teacher at **[Particulars Withheld] School in California U.S.A** whilst the **2<sup>nd</sup>** Applicant who is a trained Psychologist works at **[Particulars Withheld]** also in **California**. Between them the couple earns approximately **USD 10,000** (approx. **Kshs. 1,000,000/-**) per month which is more than sufficient to provide for the needs of the family. Annexed to the Summons is a copy of the **1<sup>st</sup>** Applicants payslip (Annexure **ZAA'9'**) showing a net income of **USD 4,289.66** (approx. **Kshs. 400,000/-**).

10. The Applicants are both in good health. They are practicing Christians who worship at **[Particulars Withheld]** in **California**. Both Applicants have annexed copies of the Certificates of Good Conduct issued by the **Kenya Police Service** proving that neither has a Criminal record.

11. The couple told the Court that their extended family are aware of and have welcomed their decision to adopt a child. Indeed while they are in the **U.S.A** the child is living with the **2<sup>nd</sup>** Applicants elder sister in **Karen** area of **Nairobi** although the Applicants provide for his upkeep, medical and educational costs.

12. Although they hold dual citizenship the Applicants maintain close ties with their family in Kenya and have invested in buying land and property in Kenya which they consider to be their home. The couple have a home in **Ongata Rongai, Kajiado County**. This home was visited and was found to consist of a three bed-roomed house built on three quarter acre of land. The house is fenced and gated.

13. Aside from this residence the Applicants also own a two bed-roomed Apartment near **Fatima Hospital in Rongai**. The Applicants also own other rental properties in **Nakuru County** and have a five-acre farm in **Kisii County** where they farm tea. Copies of the Title Deeds for the said properties are annexed to the Summons (annexure **ZAA'4'**). The **2<sup>nd</sup>** Applicant's brother is the designated caretaker of all the properties while the couple are working in the **U.S.A**.

14. It is quite evident by the extent of their investment in this country that the Applicants consider **Kenya** to be their home and have maintained close ties with the country and their family who are still in Kenya. The Applicants have appointed **RBM** a relative of the Applicants as Legal Guardian. The said **RBM** has signed a consent dated **15<sup>th</sup> December 2020** confirming her readiness to step in as legal guardian for the child in the event the Applicants are incapacitated or are otherwise incapable of caring for the said child. On the whole I find that the Applicants herein are suitable adoptive parents.

15. The subject child who is believed to have been born on or about **1<sup>st</sup> December 2011** and is now **ten (10) years old** was found by a Good Samaritan on **5<sup>th</sup> December 2013**. At that time the child who was only **two (2) years old** was trying to cross the road by himself. The good Samaritan took him to her home and the next day, reported the matter at **Kamukunji Police Station** where the report was booked vide **OB No. 49 of 6<sup>th</sup> June 2013**. Thereafter the **Nairobi Children's Court** committed the child to the **Child Welfare Society of Kenya** for care and protection.

16. To date **ten (10) years** after his abandonment no person has come forward to claim this child. The Adoption Agency made efforts to trace the parents / relatives of the child by having his photograph and details published **four (4) times** in the local Daily Newspapers on **22<sup>nd</sup> December 2013, 31<sup>st</sup> January 2014, 27<sup>th</sup> April 2014** and on **25<sup>th</sup> May 2014**. Copies of those newspaper adverts are annexed to the Summons. However the said Adverts did not elicit any response and nobody came forward to claim the child. Other efforts made by the Police to trace the parents/relatives of the child have not borne any fruit. The Final Police Letter dated **18<sup>th</sup> July 2007** written by the **OCS Kamukunji Police Station** reveals that the parents / relatives of the child had not been traced.

17. **Article 14** of the **Constitution of Kenya, 2010** deals with the question of **Citizenship**. **Article 14(4)** provides as follows:-

**“(4) A child found in Kenya who is, or appears to be, less than eight years of age and whose nationality and parents are not known, is presumed to be a citizen by birth.”**

18. The subject child was found abandoned in Kenya being only **two (2) years old**. This child was found on his own at only age two (2) trying to cross the road in the **Majengo** area. The child was unaccompanied and was rescued by a Good Samaritan. It is clear that the child had been abandoned in Kenya. Accordingly said child is presumed to be a citizen of Kenya by birth. Therefore in line with the provisions of **Article 14(4)** I hereby declare the said child to be a citizen of Kenya by birth.

19. The child herein faced an uncertain future being raised in children’s homes and / or other similar institutions. This Adoption will allow the child the opportunity to be raised in a loving and secure home environment like other children. The subject child was interviewed by the Court. He was an intelligent boy and was able to answer the questions put to him by the Court. The child is attending school for which the Applicants are paying. He is currently living with the 2<sup>nd</sup> applicants **elder sister** in **Karen**. This is proof that the child has already been embraced and accepted by the Applicants family members. The Children’s Officer visited the home in **Karen** where the child is currently living. It was reported to be a large five-bedroomed house standing on two (2) acres of land. The child slept in his own bedroom which was found to be neat and well-kept.

20. **Section 76(3)(a)** of the **Children Act** provides as follows:-

**“(3) Where the Court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters-**

**a. The ascertainable feelings and wishes of the child concerned with reference to the child’s age and understanding.” [own emphasis]**

21. The child though young (only ten years old) told the Court that he was aware of the Applicants desire to adopt him. He stated that he knew the Applicants having met them during their previous visits to Kenya. He stated that he was happy and willing for the Applicants to be his parents.

22. In deciding upon any matter involving a child Courts are obliged to give priority to the best interests of the said child. **Section 4(2)** of the **Children Act** provides:-

**“(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of Law administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” [own emphasis]**

23. The child has been in the custody of the Applicants since **20<sup>th</sup> December 2017** under a Foster Care Arrangement. I find that this child has already bonded with the Applicants and their family. I have considered the reports filed by the **Guardian Ad Litem**, the **Adoption Society** and the **Director of Children’s Services**. All the reports recommend the Adoption without any reservations. Given the fact of abandonment of said child there is no person from whom consent for the adoption can be sought and obtained. In the circumstances I do away with the need for any consent in line with **Section 159(1)** of the **Children Act**.

24. Finally I have no doubt that this Adoption will serve the best interests of this child. Accordingly I allow the present application and make the following orders:-

1. The Applicants herein **ZAA** and **NJB** are authorized to adopt the child known as **“Baby J.”**
2. The child shall henceforth upon adoption be known as **JM**.
3. The child is declared to be a citizen of Kenya by birth.
4. The Registrar-General is directed to make the relevant entry in the Adopted Children’s Register.
5. No orders on costs.

**Dated in Nairobi this 26<sup>th</sup> day of February, 2021.**

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**MAUREEN A. ODERO**

**JUDGE**