



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**ADOPTION CAUSE NUMBER 3 OF 2020**

**IN THE MATTER OF JGN a.k.a JGM.....A MINOR**

**AND**

**SM .....1<sup>st</sup> APPLICANT**

**ENG.....2<sup>nd</sup> APPLICANT**

**JUDGMENT**

1. On 24<sup>th</sup> April 2020 this court in giving directions made the following observations:

*The applicant SM is a 50 year old Kenyan born British Citizen. According to the reports before me he left the country for Britain in 1995, got married to one DCB in 1999, divorced in 2004. There were no children.*

*In 2013 or 2014 he met 33 year old ENG who already had a child, the subject hereof in 2012. She says due to the circumstances under which the child was conceived she does not know his father and has raised the child with the help of her parents.*

*The two began living together and in 2015 had a child RNM. In 2018 they solemnized their relationship at the Registrar of Marriages.*

*On 4<sup>th</sup> November 2019, the couple approached Kenya Children Homes Adoption Society so that SM could adopt JGN.*

*This Originating Summons was filed on 22 January 2020.*

*The two were leaving for London and they appeared before me on 28<sup>th</sup> January 2020. There were preliminary issues; at first a question why they chose to file the matter in Nakuru yet they were Nairobi residents, the age of ENG when she had the child was indicated as 15 years old.*

*After these issues were cleared the court appointed the guardian ad litem and the legal guardian. The court also directed that the report by the Adoption Society and the DCS be filed.*

*The DCS report was filed on 4<sup>th</sup> February 2020 and that by the Adoption Society on 18<sup>th</sup> February 2020. The matter was to come up for directions on 24<sup>th</sup> March but in the intervening period COVID 19 happened.*

*I have now perused the reports and the application.*

*This is ideally a local adoption and the applicants are approaching the court under **section 158 of the Children Act** which provides inter alia;*

*“158 Adoption applicants*

*(1) An adoption order may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants—*

*(a); has 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) ...; or

(c) *is the mother ... of the child.*

The Originating Summons is brought by SM as a sole applicant. The report from the DCS is headed 'Applicant: SM'. Inside it speaks of the two SM and ENG as 'the applicants'. The Report by the Adoption Society also refers to the two as 'the applicants'. The record also shows that they made a joint application to Kenya Children Homes Adoption Society for a joint adoption. It is necessary that the pleadings reflect the intention of the parties.

That besides, DCS report has scanty information about SM's life in the UK. He is a British citizen, hence the court would expect a report about him from where he lives. That has not been availed. There is something called a 'CRB' Direct Background Check Report on the file. However, it contains disclaimers as to its accuracy regarding police reports.

The court has been supplied with what are described as SM's bank statements at NatWest for the period 24<sup>th</sup> August 2019 to 25<sup>th</sup> September 2019. However, they are not authenticated and their origin cannot be ascertained by this court. They also do not support the claims that he runs his own business and can support the child.

2. Thereafter the court issued the following directions:

**I. The OS be regularized to conform with the application made to the Adoption Society and the reports that have issued from DCS and the Adoption Society,**

**II. SM to provide the court with authenticated documents regarding his income and ability to support the child, and police clearance.**

**III. Considering SM has not lived in Kenya since 1995, his Social Inquiry Report ought to emanate from his country of domicile. The Adoption Society and DCS to work on this and avail to court a social inquiry report.**

**IV. The Guardian Ad litem to file his report in accordance with rule 9 of the Adoption Rules.**

**V. The matter be mentioned on 28<sup>th</sup> May 2020 for further directions.**

Thereafter the matter came for mention wherein the court was informed that the applicant had complied with the courts requirements.

3. Finally on 18<sup>th</sup> January 2021 the court was informed that the applicant had complied with all the requirements and a judgment date was sought.

4. I have perused the court file. There is an Amended Originating Summons amended on 20<sup>th</sup> September 2020 filed on 12<sup>th</sup> August 2020. It is brought by two (2) applicants – SM and ENG. It is brought under **Section 154, 156(1), 157 (1), 158, 1(a) 4(a), 159 (4) (6) (7) (8) (9) 160(1), (2), 162, 163, 164(1) and 170** of the **Children Act No. 8 of 2001** and **Section 24** of the **Interpretation and General Provisions Act Cap 2 Laws of Kenya** and all the enabling laws.

5. The Amended Originating Summons seeks the following orders;

1. *THAT the minor be presumed a Kenyan Citizen.*

2. *THAT AWG of Post Office Box Number..., NAIROBI in the Republic of Kenya be appointed Guardian ad Litem.*

3. *THAT the consent of the biological father of the infant be dispensed with.*

4. *THAT the Department of Children's Services, Ministry of Labour, Social Security and Services Affairs, Nairobi County investigate the Applicants' fitness to adopt and file a report.*

5. *THAT the Applicants be authorized to adopt BABY JGN to be known as JGM.*

6. *THAT MGG of Post Office box Number..., NAIROBI in the Republic of Kenya be appointed Legal Guardian of the minor.*

7. *THAT it is directed that the Registrar General shall make in the Adopted Children Register an entry recording the adoption in accordance with the particulars set out in the Schedule to this order.*

8. *THAT the Registrar of Births and Deaths be and is hereby directed to issue the child with a certificate of birth in the name of JGM.*

6. It is supported by the amended statement of SM & ENG filed on 12<sup>th</sup> August 2020, dated 17<sup>th</sup> June 2020.

7. The amendment now includes ENG, the mother to the subject as an applicant. At paragraph 5 of the statement it states;

***“That we are Kenyan citizens born in 1970 and 1987 respectively and wish to adopt the infant herein.”***

They depone that they have attached copies of their identity cards marked “SMENG” 4. I did not see these annexures, and a paragraph 18, their Basic Disclosure Report and Police Clearance Certificate respectively makes SMENG 11(a) & (b).

8. They have also filed an Amended Affidavit in support of the application which states:-

*“We, SM & ENG holders of ID Card Numbers XXXX respectively of Care of P.O. Box..., NAIROBI.”*

They confirm that what they have stated in their statement is true to the best of their knowledge and belief. Be that as it may their affidavit is sworn before one Michael Okolo (Solicitor) of TOWIS SOLICITORS 295(a) Healthway, Dagenhan, Essex, RMG, SAQ. There are also bank statements from [particulars withheld], Account in name of SM of 79, Chaplin Road, Dagenhan Essex for 26<sup>th</sup> November 2019 to 24<sup>th</sup> December 2019 and 17<sup>th</sup> March, 2020 to 23<sup>rd</sup> March 2020.

9. The report from the Adoption Society states that both applicants live at [particulars withheld], despite the fact that they had both moved to the United Kingdom and as at the time the report was filed on 18<sup>th</sup> February 2020 when the Originating Summons was amended no further report was filed.

10. The report by the guardian *ad litem* as filed on 12<sup>th</sup> November 2020 does not comply with the rules. **Rule 9** states:

*“It shall be the duty of the guardian ad litem to investigate as fully as possible all circumstances relevant to the proposed adoption with a view to safeguarding the interests of the infant, and to report to the court in writing in particular on the following matters -*

*(a) Whether **the matters alleged in the applicant's statement are true;***

*(b) in the case of an application by one only of two spouses*

*(i) Whether the other spouse consents to the application; and*

*(ii) Why he or she does not join in the application;*

*(c) **whether the means of the applicant enable him to maintain and bring up the infant suitably including by the provision of a proper education;***

*(d) Whether the applicant understands that an adoption order is irrevocable and that the order will make him responsible for the maintenance and upbringing of the infant;*

*(e) who are the parents of the infant;*

*(f) who is liable to contribute to the support of the infant;*

*(g) whether the infant has any right to or interest in property;*

*(h) whether the infant (if of an age to understand the effect of an adoption order, and knowing that he is not the child of the applicant) wishes the order to be made;*

*(i) whether he considers it desirable that any special terms or conditions be imposed in the adoption order;*

*(j) what relatives (if any) the infant has, whether they have been informed of the proposed adoption and whether any of them has offered and is able to provide a suitable home for the infant; and*

*(k) whether the proposed adoption will be in the best interests of the infant, and the guardian ad litem shall attach to his report a certified copy of the infant's birth certificate, or if the infant has been previously adopted, a certified copy of the relevant entry in the Adopted Children Register.*

11. His report simply states that both SM and ENG relocated to the United Kingdom leaving the child with his sister one MGG. His report was around the care the child is receiving from his sister MGG. He is not in a position to report on the situation of the applicants upon their relocation. The report from DCS dated 3<sup>rd</sup> February 2020, still states that the home environment of the applicants is at [particulars withheld].

12. The issues for determination are:

1. *Whether the applicants complied with the court's directions.*

2. *Whether the minor ought to be presumed a Kenyan Citizen.*
3. *Whether AWG of Post Office..... in the Republic of Kenya ought to be appointed Guardian ad Litem.*
4. *Whether the consent of the biological father of the infant be ought to be dispensed with.*
5. *Whether the Department of Children's Services, Ministry of Labour, Social Security and Services Affairs, Nairobi County has investigated the Applicants' fitness to adopt and filed a report.*
6. *Whether the Applicants ought to be authorized to adopt BABY JGN to be known as JGM.*
7. *Whether MGG of Post Office box Number ....NAIROBI in the Republic of Kenya ought to be appointed Legal Guardian of the minor.*
8. *Whether the Registrar General ought to make in the Adopted Children Register an entry recording the adoption in accordance with the particulars set out in the Schedule to this order.*
9. *Whether the Registrar of Births and Deaths ought to be directed to issue the child with a certificate of birth in the name of JGM*

13. **Whether the applicants complied with the court's direction of 24<sup>th</sup> April 2020.**

(i) The applicants have provided only the 1<sup>st</sup> applicants bank statements for about 2 months. *No evidence has been provided to demonstrate the statements in the social inquiry report that the 1<sup>st</sup> applicant runs his own business in the UK, and has the capability to support this child once the child gets there. Nothing has been placed before this court to support SM's business and source of income.*

(ii) *The DCs and the Adoption Society have not availed a Social Inquiry Report from the place where the applicants and in particular SM is domiciled, this is despite the fact that both applicants relocated to the United Kingdom. There is nothing in the Social Inquiry Report in respect to Applicants situation in UK.*

(iii) *The guardian ad litem is not in a position to carry out a proper assessment of the two parents together as to whether they would be able to provide for the child accordingly.*

14. This court is bound to act in the best interests of the child. The court can only do so if supplied with the requisite information as directed. While it is in the best interests of the child herein to be with his mother, siblings and adoptive father. It is noteworthy that the adoption order would see his removal from the jurisdiction of this court, from the scrutiny of the guardian *ad litem* and the legal guardian. Currently the court has nil information about the place where the child will be taken to, the ability of the parents out here to take care of his needs, and the fact that I also note that the first applicant in the Amended Originating Summons describes himself as Kenyan Citizen, I have not seen his identity card, but the record will show that he is a British Citizen, that is where he lives, and works, and that is where the child will be going. It is only in order for this court to receive the Social Inquiry Report from where he lives.

15. Hence, until the directions are fully complied with I am unable to issue the prayers sought.

**Dated this 5<sup>th</sup> day of February 2021.**

**Mumbua T. Matheka**

**Judge**

**Delivered virtually on 11th day of February 2021.**

In the presence of:

Edna Court Assistant

Karen Wanderi & Co. Advocates for the applicant

**Mumbua T. Matheka**

**Judge**