



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ADOPTION CAUSE NO. 171 OF 2019

IN THE MATTER OF ADOPTION OF

BABY AR.....THE CHILD

BY

HWPA.....APPLICANT

JUDGMENT

HWPA, the Applicant, seeks to adopt Baby AB (the child). She has filed, through M/s Komu & Kamenju Advocates an Originating Summons dated 3rd December 2019 in which she seeks the following:

1. That the child be presumed to be a Kenyan citizen by birth.
2. That the applicant be authorized to adopt Baby AR and the child to be known as IW.
3. That CLW be appointed as the legal guardian of the child in the event of the death of the applicant before she is of full age and fully self-reliant.
4. That the Registrar General be directed to enter in the Adopted Children Register and entry recording the adoption.
5. That the court be pleased to make any further orders it deems necessary.

The Applicant has filed a Statement and an Affidavit both dated 3rd December 2019 in support of the Originating Summons. In the statement the Applicant gives the history of the child and her background information to the effect that she is a Kenyan citizen; that she has a biological son LWO born on 20th July 2008 and an adopted daughter MHAW born on 15th June 2013 (*birth certificates of both children area attached*); that she operates her own business trading as Mailus Enterprises (*Business Certificate of Registration is attached*); that she is in good physical and emotional fitness to parent the child (*medical report is attached*); that she is financially stable with stable income from the business she runs and that she is able to provide fully for the child's needs (*bank statements are attached*); that she has never been charged nor convicted with any criminal offence or the offence referred to in Third Schedule of the Children Act 2001 (*certificate of good conduct is attached*); that she has proposed her sister CLW as the legal guardian of the child in the event of her death or incapacity before the child is of full age or is fully self-reliant (*consent of proposed legal guardian and her identity card are attached*); that she lives in a comfortable environment which is suitable for nurturing the child and ensuring her full and wholesome development and that it is her desire to take care and secure the interests of the child.

The Applicant has also given the background of the child. From her statement and the reports from Little Angels Network, Department of Children Services in the Ministry of Labour and Social Protection dated 3rd March 2021 and that of the Guardian Ad Litem dated 12th April 2021, Baby AR was born on 9th May 2018 at Coptic Hospital in Kisumu. Her biological parents are SA aged 13 years and HTO aged 17 years. They are related having been born of the same mother and different fathers. Their biological mother left them in the care of their grandparents TMK and AKN. They come from a community that does not allow a child born of an incestuous relationships to be nursed or brought up within the community as this is considered a taboo and bad omen for the family. The grandparents decided to give up the child for adoption. They signed a consent to that effect through the guidance of an advocate. The respective consents of AKN and TMK, the grandparents and guardians of the biological parents of the child are dated 26th June 2018. I have also seen consents to give up the child for adoption signed by the biological children SA and HTO both dated 9th May 2018. Both being under age, the law requires under Section 158 (4) (b) of the Children Act, that such consent be given by the parents or guardians of the biological parent(s) of the child. On the day the child was born on 9th May 2018 he was placed under the care and protection of New Life Home Trust in Kisumu. Through Winam Children's Court the child was committed to New Life Home Trust for care and protection pending adoption vide Care and Protection Case

The child was declared free for adoption by the Little Angels Network Case Committee on 20th July 2018. A report to declare the child free for adoption by Little Angels Network dated 20th July 2018 is part of the documents in the court file. A certificate of Declaring a Child Free for Adoption Serial No. 002007 dated 20th July 2018 was issued. The child was placed with the applicant for foster care vide Foster Care Agreement dated 3rd September 2018 following her application.

I have considered this matter. It is very sad when society refuses to accept an innocent child because of beliefs that are not in the best interest of the child. The child subject of these proceedings was born of step siblings. The child is innocent. The information given to this court is that the child could not be accepted in the community. I can't stop wondering what future such a child would have if the child were to grow up in the community where he/she is born. People would keep pointing fingers at him/her and whispering that he/she is a child born out of an incestuous relationship. Such a child would not enjoy protection from the law and his/her best interests would not be of paramount importance.

I have taken into account all the documents in support of this application. I have seen bank statements of the Applicant. I have seen certificate of clearance dated 11th July 2017 to the effect that she has no criminal records. The reports from the Children's services and Guardian Ad Litem are positive and recommend the adoption. The reports speak of a home where the Applicant lives with her children, a four bedroomed house in a good neighbourhood in Karen End Vilas in Nairobi. By all intents and purposes the Applicant is in good stand in respect of her intention to adopt the child and is able to provide her with the life she deserves. The reports show a child who has been accepted by the other two children and who is loved by the Applicant. The proposed Legal Guardian, CLW, has consented to be appointed legal guardian. Her consent is in the file.

Before I conclude this judgment I need to point out an issue that is disturbing my mind. I have carefully read the reports from the Department of Children's Services. This report, dated 3rd March 2021 gives more details about the Applicant than the one by the Guardian Ad Litem. It gives information to the fact that the Applicant has two children: the biological son LW, 12 years old and an adopted daughter MHAW aged 7 years. It also talks of Baby EM who is the subject in Adoption Cause No. 170 of 2019. The Applicant seeks to adopt Baby EM. This came as a surprise to me because at the time of canvassing this Application in court this issue was not disclosed. The report of the Guardian Ad Litem, which was informed from a visit to the home of the Applicant did not disclose that fact. The Applicant's own document in this file do not mention that fact. This prompted me to call for the file in Adoption Cause No. 170 of 2019. I confirmed that indeed that file exists. The Applicant has made an application to adopt Baby EM in that file. There is nothing wrong with that. The matter is yet to be determined. But this court expects disclosure of all material facts about the Applicant to aid the court in making an informed decision.

The Guardian Ad Litem in this cause is also the appointed Guardian Ad Litem in Adoption Cause No. 170 of 2019. These facts ought to be in her knowledge. The Applicant too, has the facts in her hands and ought to have disclosed this to the court. Failure to do so leaves this court with two reports giving different information. Mr. Kamenju, too, ought to have addressed the court on that issue. For this reason, I will not conclude writing this judgment until this issue is addressed. Ms Lizzie Mmbogo Agala, the Guardian Ad Litem and the Applicant are directed by this court to swear an affidavit to give clarity to that issue before I can conclude writing this judgment. I will hold the conclusion of this judgment in abeyance until these directions are complied with. This will enable me to keep the record of the court in respect of this adoption clean. I will pick up this judgment from this point after I receive those affidavits. The result of this is that this judgment will not be ready to be delivered on 6th May 2021 as scheduled.

As indicated above in this judgment I could not conclude writing this judgment before 6th May 2021 nor could I deliver the same. Today, the 20th May 2021, counsel for the Applicant attended court to receive the judgment. It was not ready because this court was still waiting for the documents requested. Mr. Mulinge who was holding brief for Mr. Kamenju informed the court that his instructions were that the information sought by the court had been provided. It happened that counsel had filed the documents in the E-filing Portal and failed to follow up on the printing and placing them on the court file. Indeed, this was done immediately it became known to the Registry.

I have perused the Supplementary Affidavit by the Applicant dated 18th May 2021. The Applicant admits that indeed she is an Applicant in Adoption Cause No. 170 of 2019 where she seeks to adopt Baby EM. She has explained that her failure to disclose this fact in this matter is because she had been advised by her legal counsel to file separate adoption causes because the children involved in each cause came from a different background. She regretted her non-disclosure. She also stated that she cooperated with the Guardian Ad Litem and the Director of Children Services during their assessment of her.

I have also perused the Supplementary Report by Lizzie Mmbogo Agala, the Guardian Ad Litem dated 18th May 2021. She has explained the reasons behind her omission to mention Adoption Cause No. 170 of 2019 because in her view the children involved are separate and she chose to treat them separately and secondly she thought both adoption proceedings would be handled by the same court. She terms the non-disclosure as an oversight on her part.

I want to be understood to be saying that all the information surrounding an Applicant for adoption is vital. I need to emphasize the need to put the best interest of the child ahead of everything else. Indeed this is what the law dictates. It was not so much as mentioning the other adoption and the child involved in that adoption but the necessity to bring out all the information surrounding the Applicant, her social, economic, physical, medical and mental circumstances must come out. This assures the court that the child the subject of adoption proceedings will have his/her best interest taken into account. Just the same way the information about the spouse where the adoption is by one applicant or the other children of the applicant, it is crucial to inform the court that the applicant in an adoption cause is also contemplating adopting another child and where proceedings are not concluded, the mention of the stage of those proceedings. I am certain that each adoption is considered on its own merit as it should and it does not matter whether the two adoptions by the same applicant for two different children are considered separately on their own merit. I want to believe that the Guardian Ad Litem in any future adoption proceedings will take extra care to bring out all the information about the applicant and the child subject of adoption. The Applicant in this case also should stand guided.

This issue having been resolved I have no reason to doubt that the information provided has been given in consideration of the best interest of the child. My view is that the law on adoptions has been followed and that Part XII of the Children Act has been complied with. Consequently I hereby allow the Originating Summons dated 3rd December 2019 and grant the following orders:

1. That H.W.P.A, the Applicant, is hereby authorized to adopt Baby A. R.
2. That Baby A.R shall be known as I.W forthwith.
3. That the child, I.W, is hereby presumed to be a Kenyan Citizen by birth.
4. That the child's date of birth shall be 9th May 2018 a and the place of birth is Coptic Hospital in Kisumu.
5. That C.L.W is hereby appointed legal guardian of I.W.
6. That the Registrar General is hereby directed to enter this adoption in the Adopted Children Register.
7. That Lizzie Mmbogo Agala, Guardian Ad Litem, is hereby discharged.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF MAY 2021.

S.N MUTUKU

JUDGE