



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

ADOPTION CAUSE NO. 114 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 AKP alias KP alias

BABY A alias ABANDONED BABY BOY (THE CHILD)

AND

IN THE MATTER OF AN APPLICATION OF ADOPTION BY JWN

JUDGMENT

1. Before this Court is the Amended Originating Summons dated **15th August 2019** by which the Applicant **JWN** seeks the following orders:-

1. SPENT

2. SPENT

3. THAT the Applicant be authorized to adopt BABY AK alias AKP alias BABY A alias ABANDONED BABY BOY to be known as AHK.

4. THAT the child be presumed a Kenyan Citizen by birth.

5. THAT child's date of birth be 2nd of January, 2013 and the place of birth be NYAHURURU DISTRICT HOSPITAL.

6. THAT the Registrar General be directed to enter the adoption in the Adopted Children Register.

7. THAT the Director Immigration be authorized to issue the child with a Kenyan Passport.

8. THAT CNN, be appointed the Legal Guardian of the child in event of the death or incapacity of the Applicant before the child is of age or independent.

9. THAT the court be pleased to make any further orders it deems necessary.

2. The Application was supported by the Statement of even date sworn by the Applicant. The Summons was canvassed by way of viva voce evidence on the online platform.

3. The Applicant **JWN** told the Court that she was a single mother of **two (2)** adult children. She stated that she now wished to adopt the subject-child who was a boy-child born in the year **2013**. The Applicant told the Court that her two children support her intention to adopt the child and have given their consent to the adoption. The Applicant confirmed that she fully understood the legal implications of an adoption order. That she would accord to the subject child all the rights due to a biological child including the right to inherit.

4. **PW2 NMN** was the Applicants daughter. She stated that she was a **4th** year student at **USIU Nairobi**. **PW2** confirmed that she was aware

of and supported her mother's intention to adopt the child.

5. **PW4 GE** was the representative from **LITTLE ANGEL'S NETWORK** the Adoption Agency. She confirmed that the Agency had filed its report on **3rd February 2020** and recommended the adoption.

ANALYSIS AND DETERMINATION

6. I have carefully considered this application for adoption the various Affidavits and Reports on record as well as the relevant law. I have also considered the evidence adduced in open Court. 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 was born on **2nd January 2013** at the **Nyahururu District Hospital**. A copy of his Birth Certificate is annexed to the Summons (Annexure '**JWN-1**'). Therefore the child is now **eight (8)** years old which is above the **six (6)** week age limit provided for in law.

8. **Little Angels Network** which is a Registered Adoption Agency have annexed to their report an original copy of their Certificate dated **20th November 2013, Serial Number xxxxx** declaring the child Free For Adoption. Accordingly I find that all the legal prerequisites for an adoption order have been met.

9 The duty of this Court is to examine the evidence before it and determine whether Applicant is a suitable adoptive parent for the subject-child. The Applicant is a Kenyan citizen as evidenced by the copy of her National Identity Card which is annexed to the Summons (annexure '**JWN-6**'). The Applicant told the Court that she was once married but later separated from her husband and stated that she has raised her **two (2)** children as a single mother for the past **ten (10) years**.

10. The Applicant is a Manager at [**Particulars Withheld**] earning approximately **Kshs. 270,000/-** monthly. She has annexed to the Summons copies of her pay-slips (Annexure '**JWN-10**'). Additionally the Applicant owns plots of land in various places and also owns two houses one in **Lang'ata** and another in **Rongai**. I find that the Applicant is financially secure and is in a position to provide for the needs of the child.

11. The Applicant was examined by a Doctor and found to be in good physical and mental health. She has annexed a copy of her Medical Report (Annexure '**JWN-11**'). The Applicant has also annexed a copy of her **Police Clearance Certificate** issued by the **Kenya Police Service** proving that she has no criminal record (Annexure '**JWN-12**'). The Applicant has appointed her sister **CNN** as the Legal Guardian for the child. The said Legal Guardian has signed a Consent to act as Legal Guardian in the event of the incapacity or the unavailability of the Applicant. The Consent is Annexure '**JWN-14**' to the Summons.

12. The Applicant told the Court that her family were aware of and supported her intention to adopt the child. Both daughters **RN** and **NM** have written letters giving their consent to the adoption. (see pages **21** and **23** of the Summons). Additionally the Applicants younger daughter **NM** testified in these proceedings and confirmed her consent to the adoption. She expressed her excitement and joy to welcome the child as her younger brother.

13. Finally it has not escaped the attention of this Court that the Applicant who is female is seeking to adopt a male child. **Section 158(2)** of the **Children Act** provides as follows:-

“(2) An Adoption order shall not be made in favour of the following persons unless the Court is satisfied that there are special circumstances that justify the making of an adoption order:-

(a) A sole male Applicant in respect of a female child.

(b) A sole female Applicant in respect of a male child.

(c) An Applicant or joint Applicants who has or both have attained the age of sixty-five years.

(d) A sole foreign female Applicant.” [own emphasis]

14. Therefore in order for an order of adoption to be made in the case of a female Applicant adopting a male child, the Court must be satisfied that special circumstances exist.

In considering a similar situation **Hon. Justice John Onyiego** in **RE ADOPTION OF BABY P.B [2016]eKLR** stated as follows:-

“The key question is, are there special circumstances that would warrant the Court to allow the Applicant being a female to adopt the baby who is a male. Section 158(2) has donated to the Court wide discretionary powers in determining what entails special circumstances under which it can allow a female Applicant to adopt a male child. What then constitutes special circumstances. Under Article 53(2) of the Constitution and Section 4(2) and (3) of the Children Act, the primary consideration before a Court, anybody, organization or institution makes any decision or order affecting child is the best

interests of a child.

In the case of **IN RE ADOPTION OF BABY JKM (2017)eKLR** Judge Achode allowed a female Applicant to adopt a male child who was found abandoned somewhere in some village. The Court took into consideration special circumstances as per the guidelines of the National Adoption Committee dated 13th January 2010 pursuant to Section 155 of the Children's Act for a female Applicant wishing to adopt a male child. The elements are particularized as hereunder:-

- 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. The applicant is the only person available to adopt the child, and
- 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.”

Similar position was held in the case of; **IN RE BABY J. I (MINOR)eKLR** and **IN RE G. W. (BABY) (2008)eKLR-**

“In the instant case, the Applicant has a biological child on whom she is willingly exercising parental responsibility. It is in the best interests of the baby herein that he gets a home, parental guidance, emotional, social and moral upbringing by a responsible parent. Further, the child is assured of basic necessities like food, shelter, clothing, medical care and education all of which the Appellant is capable of providing.

Considering that this is a local adoption and the baby having bonded very well as evidenced during their appearance and hearing in Court. I am fully persuaded that gender issue cannot be an impediment towards the realization of the best interests of the baby.” [own emphasis]

15. The Applicant herein has raised two daughters single-handedly. She has indicated her capacity to successfully raise children. Moreover the report of the **Director Childrens Services** as well as that of the Adoption Agency indicate that girl-children are more readily adopted than boys, putting boys at a disadvantage for chances of adoption. The subject-child had resided in a Charitable Institution for **four (4) years** and no person had come forward offering to adopt him apart from the Applicant. I am satisfied that **special circumstances** do exist to persuade the Court to allow this adoption.

16. I am satisfied that the Applicant is a suitable adoptive parent for this child. The subject-child was born at the **Nyahururu District Hospital** on **2nd January 2013**. The child's biological mother who gave her name as **DM** absconded from the hospital on **28th January 2013** and abandoned the child at the Post-Natal Ward. The abandonment was reported at the **Nyahururu Police Station** vide **OB Number 41 of 29th January 2013**. Efforts to trace the child's mother bore no fruit and to date no person has come forward to claim the child.

17. Following his abandonment the **Nyahururu Children's Court** committed the child to **New Life Home Trust** for Care and Protection. Thereafter on **29th September 2017** the child was placed into the custody of the Applicant under a Foster Care Agreement (Annexure '**JWN-8'**). Given that the child was abandoned at the hospital shortly after his birth there exists no known person from whom consent for this adoption can be sought and / or obtained. I therefore waive the requirement for consent in line with **Section 159(1)(a)** of the **Children Act**.

18. 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]

19. The subject-child was abandoned by his biological mother. He faced an uncertain future in Childrens Homes and similar Institutions. This Adoption allows the child an opportunity to be raised in a loving and stable home environment. The child has lived with the Applicant in her home since **September 2017** a period of **four (4) years**. This is the only family the child knows and I have no doubt that he has bonded with the Applicant and her family. I was able to see and talk to the child online. He was a happy and cheerful child. He was comfortable in the lap of the Applicant whom he views as a mother. It was obvious that the child is being well cared for.

20. A Home visit was conducted by the **DCS**. The Applicant resides at [**Particulars Withheld**] in a three bed-roomed house which was found to be spacious and is located in a secure environment on close proximity to school, hospitals and shopping malls. The child is able to interact freely and has made friends with other children within the estate. The Applicant has engaged a Nanny to assist in the care of the child.

21. I have perused the Reports prepared and filed by the **DCS**, the Adoption Agency and the Guardian Ad Litem. The said reports are all positive and all recommend the Adoption. All in all I am satisfied that this adoption will serve the best interests of the subject-child. Accordingly I do allow this application and make the following orders:-

- i. The Applicant **JWN** is authorized to adopt the child known as **BABY AK alias AKP alias BABY A alias ABANDONED BABY BOY**.
- ii. Upon adoption the child will be known as **AHK**.
- iii. The Registrar General is directed to make the relevant entry in the Adopted Childrens Register.
- iv. **CNN** is appointed as the Legal Guardian for the child in the event of the death or incapacity of the Applicant.
- v. The Director Immigration is authorized to issue the child with a Kenyan Passport.
- vi. No orders on costs.
- v. Vide this Adoption order the child will be entitled to all rights and benefits under the **Constitution of Kenya** and all applicable laws.

DATED IN NAIROBI THIS 30TH DAY OF JULY, 2021.

.....

MAUREEN A. ODERO

JUDGE