



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ADOPTION CAUSE NO.6 OF 2020

IN THE MATTER OF BABY LW (INFANT)

HKA.....APPLICANT

JUDGMENT

1. Before this court is originating summons dated 15.10.2020 and filed 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 Baby LW (infant)*

2. The application is supported by the applicant's affidavit and wherein she adopted her statement in support of the application for adoption orders. In her said statement, she averred that she is a teacher by profession and a farmer and thus she has a stable income and that she is an adult and unmarried. Further that she is of Kenyan Nationality and of the African race and has been residing in Kenya. Further that the infant was received into her care and possession on or about 21.11.2013. That she has completed the necessary forms with the D.O.E Embu Children's Home and the said home has no objection to her adopting the minor herein.

3. I have perused through the instant application and 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 is merited.

4. Adoption and the procedure thereto is provided for under Part XI of the Children's Act Cap 141 Laws of Kenya. Section 154(1) bestows this court with jurisdiction to make an adoption order. The said Act provides for the conditions pre- adoption and which are that; the said child should be at least six weeks old and should have been declared free for adoption by a registered adoption society in accordance with the rules prescribed in that behalf (Section 156); 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 (Section 157); and in an application for adoption and where there is joint application (as in the instant case) at least one of the joint applicants must have attained the age of twenty-five years and 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(1)}.

5. Further Section 158 (2)-(4) provides for further conditions which applicants ought to comply with in filing the application for adoption which includes consent by the parent. However, Section 159 gives this court the powers to 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.

6. In the instant case, the consent to an adoption order in respect of the minor herein sworn on 1.10.2020 by Sr. Teresia Wanjiku Mburu- the Administrator of D.O.E Embu Children's Home indicates that the minor herein was born on 11.09.2011. As such, at the time of the application (15.10.2020), the child herein was more than six (6) weeks old.

7. The Applicant averred that the child herein was received in their care and possession on or about 21.11.2013 and thus she has been in the continuous care and control of the applicant for a period of three consecutive months preceding the filing of the application (which was filed on 16.09.2020). From the annexed copies of the applicant's Identity Card, it is indicated that she was born in 1962 and hence at the time of the application she had attained the age of twenty-five years and at least twenty-one years older than the child herein. Further it is clear that she is yet to attain the age of sixty-five years.

8. From the record, the letter from the OCS Embu Police Station dated 12.09.2011 and the letter from the Office of the Medical Superintendent- Embu Provincial General Hospital dated 15.06.2012 indicates that the minor herein was abandoned in Dallas/Stadium Sub-location, municipality location of Embu West District on 12.09.2011 and the matter reported to the police and that efforts to trace the mother

or relatives of the minor have been fruitless. As such, this is a proper case where the consent by the parent ought to be dispensed with by virtue of Section 159.

9. However, as I have already noted, the Act (section 156) requires that no arrangement shall be commenced for the adoption of a child unless the 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**. Further, the proviso to Section 157 is to the effect that no application for an adoption order, shall be made in respect of a child unless the child concerned has 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**.

10. In the instant case, there is no evidence of the child having been declared free for adoption by a registered adoption society. Essentially, an adoption society is required to have a case committee and whose function is to consider and make recommendations as to whether a child should be placed for adoption. Once they have made the recommendation, the Adopting Society is supposed to file a report declaring the child free for adoption. A certificate is by practice issued in that respect.

11. In the instant case however, the applicant and/or her advocates on record did not file such a report declaring the child available for adoption. The only report which was filed is a report on the suitability of the applicant herein to adopt the minor and which report recommends that the applicants be approved to adopt. It is therefore in doubt as to whether the minor herein has been declared available for adoption.

12. I note that the minor was found abandoned on 12.09.2011 and committed to Sister in Charge Embu Children's Home vide the orders of 12.10.2012 in **Embu Chief Magistrate Children Case No. 7 of 2013**. The minor was placed in the care and possession of the applicant on or about 21.11.2013. The applicant stated that she is capable of taking care of the minor both emotionally, physically and financially. The report by the guardian ad litem dated 12.04.2021 is to the effect that the applicant and the minor have bonded well and she has great love for the minor and deeply desire to look after and care for her and to provide a suitable home for the minor. Further, from the letter by the OCS, the parents of the minor cannot be traced and neither has anybody come to claim the minor herein.

13. This court in deciding on matters relating to children is obligated to consider the best interests of the child. This is provided for under Article 53 (2) of the Constitution and section 4 (2) and (3) of the Children's Act. (See **in Re A.W alias AN (a child) (2008) 1 KLR (G and F)**). In furtherance of the best interests of the minor herein, this court is obligated to make a decision or take an action which propagates the minor's welfare, growth and future development just like any other child with his or her biological parents.

14. This court takes judicial notice of the rampant cases of child trafficking in Kenya today. As such, it will not be in the best interest of the minor herein to make an adoption order where the child has not been declared free for adoption as the law requires. The application as such is premature. In the circumstances therefore, the application herein is struck out.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF AUGUST, 2021.

L. NJUGUNA

JUDGE

Mr. Ngigi for the Applicant