



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY AND PROBATE DIVISION

ADOPTION CAUSE NO. 153 OF 2019

IN THE MATTER OF THE CHILDREN ACT

(ACT NO. 8 OF 2001)

AND

IN THE MATTER OF CTN (MINOR)

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION

BY

JMD & TJ (APPLICANTS)

JUDGMENT

Background:

1. On the 11th of November 2019 the 1st applicant filed in court an Originating Summons pursuant to **Sections 154, 156, 157, 158, 159, 160, 163, 164 & 170** of the Children's Act, seeking to adopt the minor referred to as **BABY CTN** and upon such adoption the child be known as **CNJ**, and for the Registrar General to make appropriate entries in the Adoption Register.

2. On the 19th of December 2019 the court appointed **SKN** as guardian *ad litem*, and directed both the Director of the Children's Services Department in Nairobi and the said guardian *ad litem* to investigate the Applicants' fitness to adopt and file their respective reports.

Reports:

3. Director of Children's Service Report

A report dated 4th March, 2020 was filed in court. The report gave details of the female applicant as follows; She was then 35 years of age. She is Kenyan married to a Norwegian now the 2nd Applicant and they reside in Norway where they both work. The husband is an engineer whereas she works as a cleaner. The two underwent a civil marriage on 29th September 2017. The two do not have children of their own but the 2nd applicant has children from a previous union. The female applicant on her part has financially supported the child herein since birth and would spend time with the child while in Kenya. At the time of writing the report the 2nd applicant had given consent to the adoption and for the child also to adopt his name.

4. The child **CTN** was born to the female applicant's younger sister **CNN** on the 3rd May 2010. The child's father is unknown. **CNN** gave birth while she was a student in college. After birth she left the child with her old parents and returned back to school. The child has since remained under the physical care of her grandparents with the 1st applicant paying her school fees, medical and for her general upkeep.

At the age of three the child was diagnosed with early onset type 1 diabetes. She is on home-based insulin injections. It is said that this is the

only available medication in Kenya despite the risk the child may develop sepsis.

The child was in class five at [Particulars withheld] Academy in Kiminini at the time of writing the report.

5. The child was declared free for adoption by Change Trust Adoption Agency under certificate No. xxxxx.

Further The child's biological mother gave the necessary consent.

Reasons for the adoption are mainly financial, and the fact that she may get advanced treatment abroad. Further the maternal grand mother is old and ailing.

It was also reported that the applicants live in a three bedroomed house in Norway and intend that the child will use one.

The report recommended the adoption.

Guardian Ad litem's Report:

6. The Guardian *ad litem* filed a report on 5th February 2020. On her part she reported that the child has been in the physical custody of her grandmother since birth. Further that the 1st Applicant spent considerable time with the child before moving to Norway. She visits Kenya frequently and still spends time with the child. The 1st Applicant is financially stable and it was observed at visitation that she has bonded very well with the child.

7. The guardian *ad litem* gave a medical history of the child in similar terms as the children's officer, is of the view that the child will benefit from a better healthcare system if adopted.

8. Two things are notable in the application before court, firstly the applicant's spouse is left out of the adoption, secondly no request for the appointment of a legal guardian was made.

9. In an earlier interview with the adoption agency the 1st applicant indicated that the 2nd would adopt the child in Norway. The said statement, and the fact that the child will live with the 2nd applicant and the first in the 2nd applicant's country, and the proposal that the child adopts the 2nd applicant's surname necessitated the court to seek to meet the 2nd applicant virtually to understand his views on the matter. Both the applicants indicated to the court at the virtual hearing that they were advised that only the first applicant qualifies. This may have been so because of the Cabinet's moratorium on inter-country adoptions by foreigners which has been in place since 27th November 2014, and which appears to be indefinite without any further directives coming from the government hampering international adoptions.

10. On the 2nd issue there is on record a consent of one JNN to act as a legal guardian to the minor in the event both the applicants are unable to do so before the minor attains the age of 18 years.

11. In Adoption Cause No. 141 of 2014 the court made the following observation;

“Recently; official communication from Ministry of East African Community, Labour and Social Protection of 14th February 2017 on inter country adoptions indicated that the moratorium arose from;

.....Global Report on Trafficking Persons (UNODC) that cited Kenya as a source, transit and destination Country on human trafficking. the move was also a response to concerns about increased child trafficking through abuse of Kenya's adoption processes by foreigners due to existing loopholes and to a 2014 US State Department Report on trafficking in Persons which ranked Kenya at tier 2 Watch List for non-compliance with minimum standards for elimination of human trafficking.”

12. However, the most unfortunate situation is that the government has gone to slumber since the issuance of the moratorium thus affecting genuine applications that may go along way to alleviate suffering on Kenyan children in situations of need.

13. At the virtual hearing the 2nd applicant expressed his interest in being a co-parent and at the point the 1st applicant sought to amend her application orally in order to include her husband as a co-applicant which application was allowed in the circumstances of the case.

14. This as it were is a kinship adoption, the 2nd applicant who is a Norwegian is the child's uncle as the 1st applicant is a sister to the child's biological mother. Will the court sit back, where a child is in need and there are relatives of the girl ready and available to make it possible for her to access better health care?

15. Against the above background the court considered;

Article 53(2) of the **Constitution** provides the guiding principle on matters children as follows:

“A child’s best interests are of paramount importance in every matter concerning the child.”

Section 4(3) of the **Children Act No. 8 of 2001** amplifies this principle.

“All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”

16. In similar cases the courts have treated such kinship adoptions as domestic adoptions.

In Adoption Cause No. 73 of 2017 the court allowed the adoption based on the best interest of the child by treating the matter as a domestic adoption.

In Adoption Cause 75 of 2017, J.N.A. by Zoo and C.A.N. the court held that:

“According to the guidelines for alternative Family Care of Children in Kenya pg.153, kinship adoption is adoption by adopters who are kin or relatives within the extended family of the child. Kenyans living abroad and wishing to adopt a Kenyan child will adopt as Kenyans by way of domestic adoption. This is therefore considered to be a local adoption.”

17. Based on the above, the court has formed the opinion that the Applicants have met all the legal requirements necessary to allow this adoption. Further it will be in the best interest of the child to have the Applicants as her parents.

18. Consequently, the court orders as follows:

i) That **JMJ & TJ** be and are hereby authorised to adopt **CTN** who will hence forth be known as **CNJ**

ii) **JNN** be and is hereby appointed as the Legal Guardian of **CNJ**

iii) The Registrar General do register the adoption and issue a certificate.

iv) The guardian ad litem **SKN** be and is hereby discharge from the obligation earlier bestowed upon her by the court.

SIGNED DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER, 2020.

.....

ALI-ARONI

JUDGE