



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**ADOPTION CAUSE NO. E013 OF 2020**  
**IN THE MATTER OF CHILDREN'S ACT 2001**  
**IN THE MATTER OF NW**  
**IN THE MATTER OF AN APPLICATION BY WWM**

**JUDGMENT**

1. Before this court is the originating summons dated **14<sup>th</sup> February 2020** by which the Applicant **WWM** seeks the following orders: -

1. "SPENT

2. THAT the Applicant be authorized to adopt NW

3. THAT upon adoption NW be known as NW.

4. THAT the registrar general be directed to enter this adoption into the register of adoption.

5. THAT the child shall be presumed to be Kenyan citizen and be accorded all rights of immigration that accrue to Kenyan citizens".

2. The application was supported by the statement of the Applicant dated **14<sup>th</sup> February 2020**. The summons was canvassed by way of vive voce evidence on the online platform.

3. The Applicant **WWM** Ltd the court that she currently resides in **Boston Massachusetts** in the **USA** where she is a social worker. The applicant has never been married but had two daughters. Her eldest child **DW** who is the mother of the Subject child passed away on **10<sup>th</sup> September 2009** (barely **six (6)** months after the birth of the child). The Applicant now seeks to adopt her said grandchild.

4. **PK** THE Guardian Ad litem. **MR EZEKIEL KIMANI** representing the **Director of children's Services**, both testified online confirming that they had filed their reports recommending the adoption.

5. **PW 4 DW** is the daughter of the Applicant. She too lives and works in **BOSTON USA**. **PW 4** confirmed that subject child was the daughter of her late sister. She confirmed that she was aware of and fully supported the intention of the applicant to legally adopt said child.

**ANALYSIS AND DETERMINAITON**

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 2001** 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 **2<sup>nd</sup> March 2009** as evidenced by the copy of her Birth Certificate (Annixture **WM -2(a)** Serial Number **XXXX** which is annexed to the Applicants statement. Therefore, the child is now aged about **12 ½ years** old and is way above the **six (6)** week age limit provided for in law. Annexed to the Report of the Adoption Agency is the original copy of the Certificate Serial Number **109**

issued by the **KKPI** declaring the child free for Adoption. I am therefore satisfied that all the legal pre-requisites for an adoption order have been met.

8. The duty of this court is to analyze the material placed before it to determine whether the Applicant is a suitable adoptive parent. The Applicant is a Kenyan citizen as evidenced by the copy of her National Identity Card which has been annexed to her statement (Annexure **'WM-1'**).

9. The Applicant though a citizen of **Kenya** currently resides and works in the **United States of America**. The Applicant told the court that she works in the **USA** as a social worker. Annexed to her statement is a letter dated **11<sup>th</sup> July 2019** from the [particulars withheld] **Human Services Inc.** confirming that the Applicant is employed by the said company (Annexure **'WM – 6'**). The Applicant told the court that she earns the equivalent of **Kshs 500,000** which is more than enough to provide for the needs of the child.

10. Additionally the Applicant has annexed copies of Title Deeds for various properties which she owns in Kenya as well as her bank statements (Annexures **'WM-13'**) all of which indicate that she is financially stable.

11. The Applicant was examined by a Doctor and was found to be of sound physical and mental health. The medical report prepared by **Dr John Wairegi** on **8<sup>th</sup> October 2019** at [particulars withheld] **Health Centre** in **Thika** is Annexure **WM-'12'**

12. The applicant has also annexed a report issued by the **Massachusetts Department of Criminal Justice** as well as a clearance certificate issued by the **Kenya Police Service** (Annexures **11 (a)** and **11 (b)**) indicating that she has no criminal record.

13. This is a family (kinship) adoption as the Applicant is the maternal grandmother of the Subject child. The current legal Guardian of the child **JM** who the Applicant's sister has consented to the adoption. Indeed, the Applicant has been providing financial assistance towards the education and upkeep of the child.

14. The Applicants daughter **DW** testified online. She confirmed that she was aware of and fully supported her mother's intention to adopt the Subject child. Indeed the Applicant has appointed her said daughter as legal Guardian for the child. The said **DW** has consented to act as legal guardian in the event the Applicant is unable or unavailable to care for the child. The Guardian letter of consent as well as her passport have been annexed as **WM – 7 (A)** and **7(a)**.

15. All in all based on the foregoing I am satisfied that the Applicant is a suitable adoptive parent.

16. The Subject child is a girl – child who was born on **2<sup>nd</sup> March 2009**. A copy of the child birth certificate serial Number **439115** is Annexure **WM – 2(a)** to the Applicant's statement. The child was born to **DW**, who was the Applicant's daughter and one **E S O O**. The child's biological mother unfortunately passed away about **six (6)** months after the child was born. The Applicant told the court that an inquest into her daughter's death being **Inquest No. XX of 2011** was conducted at the **Nairobi Chief Magistrates** and vide a Ruling delivered on **8<sup>th</sup> June 2018**, **Hon Ooko Chief Magistrate** found that the Deceased had been poisoned. The court further found that the circumstantial evidence implicated the child's father **E O** in the death.

17. In said Ruling (Annexure **'WM-8'**) the court stated as follows –

**“with respect as to who might have been responsible/or culpable for the deceased's death, I do find as quite imperative the circumstantial evidence tendered by P.W (Olive Mnagi). That circumstantial evidence in my humble opinion tends to implicate the deceased's husband namely E O either with an omission and/or commission on his part towards the deceased's poisoning. Consequently, I hereby recommend that he be investigated afresh by the Nairobi County Criminal Investigating Officer for the possible role he might have played or failed to play towards the poisoning of the deceased. This fresh investigations should establish if the deceased either committed suicide or she was poisoned using the aforesaid pesticide (Karate).”**

18. Following this Ruling the child's father filed suit **No. XXX of 2001** in the **Nairobi Children Court** seeking to be awarded legal custody of the child vide. Vide a Ruling delivered on **4<sup>th</sup> April 2011** the **Children Court** awarded **legal** custody of the child jointly to the Aunt and father of the child. The court award **actual** custody of the child to the Aunt **JW** with unlimited access being granted to the father. **Hon C. A OCHARO, Principal Magistrate** made the following orders with respect to the custody of the child-

**“IT IS HEREBY ORDERED: -**

- 1. THAT the surviving parent of the child (father) having objected to the Applicant (JW) being appointed legal guardian of the minor the Application be and is hereby disallowed.**
- 2. THAT the Applicant JW do have actual custody, care and control of the minor.**
- 3. THAT the child's father and Actual Custodian JW do have joint legal custody of the minor.**
- 4. THAT the child's father do have unlimited access to the minor but with prior agreement with JW.**
- 5. THAT parties do agree on modalities.**

6. THAT the father do have access every weekend with effect from 9<sup>th</sup> day of April 2011.

7. THAT the child's maternal relatives not to remove the minor out of the court's jurisdiction without the father's consent or leave of the court.

8. THAT parties be at liberty to apply.

9. THAT each party do bear their own costs."

19. However from the date of that Ruling despite having been granted joint legal custody and unlimited access to the child the father has made no attempt to visit and/or provide for the child at all. He has effectively abandoned the child to her maternal relatives. Indeed there is evidence vide a marriage certificate serial Number XXXXXX that the child's father re-married on 2<sup>nd</sup> March 2011 which may explain his disinterest in this particular child.

20. Section 158(4)(a) of the Children Act, 2001 provides as follows:-

**"(4) Subject to Section 159 an adoption order shall be accompanied by the following written consents to the making of an adoption order in respect of any child.-**

**(a) The consent of every person who is a parent or guardian of the child, or who is liable by virtue of any order or agreement to contribute to the maintenance of the child."**

21. Neither the Adoption Agency nor the Director of children's services obtained a statement from the child's biological father. This court did however summon the father E S O O and he did appear before the court online on 16<sup>th</sup> September 2021. He confirmed that he was the biological father of the child and confirmed that the child's mother passed away in 2009. The father told the court that a few months after the mother's death the child was taken away by children's officers. The father sought time to obtain legal counsel on the question of adoption. The court adjourned to enable him seek counsel but on the next mention date of 30<sup>th</sup> September 2021 he did not appear to report back to the court.

22. My own opinion is that this is a father who has effectively abandoned his child. The father stated in court that

**"I have not seen my child for the past ten (10) years. I do not even know what she looks like....."**

23. Clearly, this is a father who has no interest in his child. He has made no effort to see or reach out to his for the past ten years. The father has not contributed at all to the child's education and/or upkeep. When given a chance by the court to participate in this adoption process, the father instead opted to disappear proving that he had no interest in the welfare of his child at all. In the circumstances, I find that the father has abandoned the child and that accordingly there is no biological parent from whom consent for this adoption can be obtained. Therefore, I waive the requirement for the father's consent in line with Section 159 (1) (e) Children Act

24. In deciding upon any matter involving a child, Courts are obliged to give priority to the best interest of the said child. Section 44(2) of the Children Act 2001 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 interest of the child shall be a primary consideration". (Own emphasis)**

25. This is a child who lost her mother in infancy and who has been abandoned by her biological father. The child's maternal family took her in and have raised her to date. The child has been living with the Applicant's sister in Nairobi and the Applicant has kept close contact and has made financial provision for the child's education. This is a kinship adoption thus the child will remain within the same family.

26. I was able to see and talk to the child online. She was a healthy, happy and cheerful child. The child confirmed that she knew the Applicant as her maternal grandmother. She stated that she regularly talks to the Applicant and expressed her desire to be adopted by the Applicant.

Section 76(3)(a) of the Children Act which provides :-

**"(3) where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters –**

**(a) The ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding" (own emphasis)**

At the age of 12 years the Subject child was well able to articulate her wishes to the court.

27. The various reports filed in court all recommend the adoption. I am satisfied that the adoption will serve the best interests of the subject child. Accordingly, I do allow this application and made the following orders: -

(1) The Applicant is authorized to adopt the child **NW**.

(2) Upon adoption the child shall be known as **NW**.

(3) The Registrar General is directed to make the relevant entry in the Adopted Children Register.

(4) **NW** is appointed as the legal Guardian for the child.

(5) The child is declared to be a Kenyan citizen by birth and is entitled to all the rights and liberties due to a citizen of Kenya.

**DATED IN NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER 2021.**

.....

**MAUREEN A. ODERO**

**JUDGE**