REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ADOPTION CAUSE NO. 7 OF 2019(O.S)

IN THE MATTER OF THE CHILDREN'S ACT

AND

IN THE MATTER OF ADOPTION OF CW (A CHILD)

AND

IN THE MATTER OF:

VWK.....APPLICANT

JUDGMENT

The applicant lodged in this honourable court an originating summons dated 27 November 2019 seeking for orders that she be authorised to adopt baby CW alias IWW1; that this honourable court does dispense with the child's mother's consent who abandoned the child at Nakuru General Hospital; that IWW2 be appointed as the legal guardian of baby CW alias IWW1; and, finally that the Registrar-General do make an entry in the adoption register in accordance with the particulars set out in the schedule attached to the application.

The summons was brought under section 158 of the Children Act, cap.141 and it was supported by the applicant's own affidavit sworn on 27 November 2019. She has sworn that she wishes to adopt the subject baby but the consent of her mother cannot be obtained because she was abandoned at Nakuru General hospital.

In her view, she is able to maintain the child because as a farmer, she has an average monthly income of Kshs. 80,000/=. She also swore that she is aged 55 and single. She professes Christian faith and attends catholic church.

The child was placed in her care on 16 November 2016 by the Child Welfare Society of Kenya, a state corporation for care, protection, welfare and adoption of children vide Legal Notice No. 58 of 23 May 2014. The Society is also the national adoption society of Kenya. As at 16 November 2016 when the child was placed in the custody of the applicant, she was 8 years old. Since then she has been in the applicant's continuous custody till 28 November 2019 when she filed her summons.

Further the applicant has sworn that she has not received or agreed to receive, and no person has made or given her any payment of reward in consideration for the adoption. This is her first application for adoption. If the adoption order was to be granted, she prefers to call the child IWW1.

In the report dated 3 December 2019 filed in this honourable Court by the Child Welfare Society of Kenya on 5 December 2019 declaring the subject child free for adoption, the latter is alleged to have been abandoned on 24 August 2006 by her mother at Nakuru Level 5 hospital which was then referred to as Rift Valley Provincial General Hospital. She was then referred to Ian Castleman Orphanage for temporal care and protection. The abandonment was reported to Molo police station and entered in the occurrence book as OB [….].

The child was placed with the Child Welfare Society of Kenya when Ian Castleman Orphanage was closed apparently because of criminal allegations against it. In the course of the transition from this orphanage to Child Welfare Society of Kenya, the child's birth records were misplaced. As a matter of fact, the child's abandonment was only reported during the period of transition from Castleman orphanage to the Child Welfare Society of Kenya and it is for this reason that the report was made at Molo police station rather than Nakuru where the child was abandoned.

The placement of the child with the Child Welfare Society of Kenya was as a result of a committal order in care and Protection Case Number 11 of 2012 filed in the Children's court at Molo by the Children Officer in that region.

In its efforts to trace the parents of the child, the Child Welfare Society established from the hospital where she was born that the child was

born on 22 August 2006 and was abandoned in the hospital's nursery on 24 August 2006. Since then, no one has laid any claim on the child and neither has any of her parents or relatives been traced despite the Society's efforts to trace them.

As part of these efforts, on 8 March 2015, the Society published the details of the child in the Daily Nation of that date but as at the date of its report no one had stepped forward either as a parent or relative of the child.

Again, by their letters respectively dated 18 April 2013 and 25 September 2019, the police had confirmed that nobody had laid any claim on the child and their investigations on who the child's parents or relatives may be had not yielded any fruits.

It is against this background that the Society is of the view that the child is an abandoned child as contemplated under section 159(1) (a) (i) of the Children Act. The child, according to the Society, is in need of a lasting alternative care of parental love, care and attention. Under Section 6(1) of the Children's Act, the child is entitled to live and to be cared for by parents. In the absence of her biological parents, the Society has declared the child free for adoption vide a certificate No. 0951 dated 3 December 2019.

Apart from declaring the child free for adoption, the Child Welfare Society of Kenya also conducted a social inquiry on the applicant and filed its report in court. According to this report dated 13 December 2019, the applicant was born in 1954 in Kiambu but she resides in Othaya, Nyeri County.

She is the fourth born child in a family of five children; she relates well with her siblings.

The applicant is illiterate but she is a commercial farmer; she grows maize, potatoes and beans in her one-acre farm in Kieni. She also grows tea, coffee and bananas at her other farm in Mweiga. At Kinamba, she has tea on a two-acre land.

She was once married to one NK but they separated in 1997 because of her inability to get children. She seeks an adoption order because she wants to become a mother and have a family of her own. She is also interested in having someone to inherit her estate. She is ready and willing to provide for the child if the adoption order is granted.

As far as her income is concerned, the applicant earns Kshs. 25,000/= from the sale of tea; she receives tea bonuses from Iriani Tea factory where she supplies her produce. She earns Kshs. 160,000/= annually from her other farms. She operates a savings bank account in which she keeps her income from all these proceeds. The society is satisfied that the applicant is financially able to adequately provide for the financial needs of the subject child.

The applicant owns two acres of land, one at Mweiga and the other at Kieni. She has two other acres at Kiria-ini where she lives. She is aware that the child will inherit these properties if she dies.

She has not been convicted of any offence and was described by her chief as honest, hardworking and a law-abiding citizen.

As regards her health, the applicant has been well until she suffered a motor-cycle accident in January 2017; she was admitted at Mathari Referral Hospital for a cumulative period of nine and half months. She was later admitted at Mt Kenya hospital in Nyeri before she was discharged.

She now walks on crutches though the healing of her leg has greatly improved. Apart from the leg injury, her health is generally good.

On matters religion, the society established that the applicant attends [Particulars withheld] Catholic church where she is also a choir member. She is also a member of a Christian community within her church. The subject child has been introduced to the catholic faith and was baptised on 4 December 2018.

She has community ties and to this end she is a member of a local women's group.

The child was placed in her custody on 16 November 2016 and for the entire period she has lived with her they have bonded well. Apart from maintaining her the applicant has enrolled the child in school and she is determined to educate her to the highest level of education. While she was in hospital the child was under the care of the proposed guardian who is also the applicant's niece.

The applicant's home is a friendly environment; both the applicant and the child live in a two-bedroomed house. Each one of them has their own bedroom. The kitchen, bathroom and the toilet are detached. The residence is connected to electricity. The source of water is mainly rain which is harvested and stored in a water tank. The compound is spacious enough for the child to play in.

The applicant's extended family has welcomed the child and accepted her. The designated guardian, as noted, is a relative who took care of the child while the applicant was hospitalised. The child has bonded well with members of the applicant's family.

With the company of the child, the applicant feels more fulfilled as a mother. She expects the child to grow into a responsible member of the society and she, on her part, is determined to do all she is capable of to see that the subject child becomes such a person.

Based on its inquiry, the society recommends that the applicant adopts the child.

The Children Services Office in Nyeri also conducted an inquiry on the prospective adoptive parent of the child and came out with findings more or less similar to those of the Child Welfare Society of Kenya. Its report dated 3 December 2019, however, highlighted what the children's officer who conducted the inquiry thought were inconsistencies in the application for adoption; for example, he is of the view that

if the child was born in hospital then there ought to be records of her birth for example a birth certificate, a notification of birth and discharge notes; that there is no proof that any report was made to the police and there are conflicting dates of when the child was born.

At the hearing of the summons, counsel for the applicant reiterated the depositions in the applicant's affidavit in support of the summons and urged the court to allow the prayers on the face of the summons. She added that the applicant would be turning 65 years by 31 December 2019 hence the need for urgency in disposal of the matter.

Francis Ndeleku, a representative of the Child Welfare Society of Kenya presented the society's report and adopted it. Similarly, Faith Tures represented the Nyeri Children's office at the hearing and adopted the report from that office in respect of the subject child.

On her part the applicant informed the court that she wanted to adopt the child as she has never had a child of her own. She confirmed that she is ready and willing to support the child, and most importantly embrace her as her own child if the adoption order is granted. She said that she is also aware that once the order is made, she will assume parental responsibility over the child who in turn will be entitled to every right a child deserves from her parents including the right to inherit property.

The proposed legal guardian, IWW2 stated that the applicant is her aunt and she is ready to step in and take over the applicant's responsibilities over the child should anything happen to the applicant.

I also had the chance to talk to the child in the absence of everybody else except the court assistant. She said that she started living with the applicant in 2016 and since then she regards her as her own mother. She has never had any problem with her and it was her wish that she should continue living with the applicant since she has no other place she can call home. As far as she is concerned, the applicant's home is her home.

The power of this honourable Court to make an adoption order is found in **section 154(1)** of the **Children Act**. It says:

> ***Subject to this Act, the High Court may upon an application made to it in the prescribed form make an order (in this Act referred to as "adoption order") authorising an applicant to adopt a child.***

Subsection (2) of the same section reminds all and sundry that the proceedings in respect of an application for adoption shall be heard and determined in chambers and that the identity of the child and the applicant or applicants shall always remain confidential.

Section 158 of the same Act, on the other hand, lays bare the prerequisites of an applicant for this sort of an order and also the circumstances under which that order will be refused. In addition to the conditions for the adoption order, this provision of the law also provides that the application must be accompanied by the relevant consent; it reads as follows:

158. Adoption applicants

> ***(1) An adoption order may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants—***
>
> > ***(a) has attained the age of twenty-five years and is 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.***
>
> ***(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.***
>
> ***(3) An adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them—***
>
> > ***(a) is not of sound mind within the meaning of the Mental Health Act (Cap.248);***
> >
> > ***(b) has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule to this Act or similar offences;***

(c) is a homosexual;

(d) in the case of joint applicants, if they are not married to each other;

(e) is a sole foreign male applicant:

Provided that the court may refuse to make an adoption order in respect of any person or persons if it is satisfied for any reason that it would not be in the best interests of the welfare of the child to do so.

(4) Subject to section 159 an adoption application 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;

(b) in the case of a child born out of wedlock whose mother is a child, with the consent of the parents or guardian of the mother of the child;

(c) in the case of a child born out of wedlock whose father has acquired parental responsibility in respect of the child under the provisions of this Act, with the consent of the father;

(d) on the application of one of the spouses, with the consent of the other spouse;

(e) in the case of two spouses who are not Kenyan citizens and who are not resident in Kenya, with the consent of the court of competent jurisdiction or of a government authority situated in the country where both or one of the spouses is ordinarily resident, permitting the spouses to adopt a foreign child;

(f) in the case of a child who has attained the age of 14 years, with the consent of the child.

The applicant's application, must be considered in light of these legal provisions; of course, as will be clear in due course, these are not the only provisions; there are others that are equally relevant.

For instance, according to section 156(1) of the Act, before any arrangements for adoption are commenced, the child must be at least six weeks old and has been declared free for adoption by a registered adoption society. The subject child in the present application was well beyond six weeks old before the arrangements for her adoption began. She was born on 22 August 2006 but it was not until September 2012, more than six years later, that a placement order was made by the Children's Court in Molo. She was ten years old when she was placed in the custody of the applicant in anticipation of the present application.

It is also apparent that before the commencement of the adoption process the child was available for adoption. Section 157(1) of the Act is to the effect that any child who is resident within Kenya may be adopted irrespective of whether the child is a Kenyan citizen or was not born in Kenyan. The available evidence points to the fact that the child was born in Kenya and she was a resident of this country at the material time.

There is a proviso to section 157(1) which has to be taken into account; it states as follows:

"…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."

The applicants' Originating Summons was filed in court on 28 November 2019 by which time the applicant had been in continuous care and control of the child for more than three years. It has also been noted that both the child and the applicant have been assessed by a duly registered adoption society and the office of the Director of Children Services; save for some reservations by the Children's office on inconsistencies in the child's documentation they have, by and large, recommended that the child be adopted. The reservations about the notification of birth, birth certificate and the report to the police have been explained to my satisfaction by the Child Welfare Society of Kenya and in my view, they shouldn't be an impediment to the making of an adoption order in favour of the applicant.

The two offices are also in agreement that the child bonds well with the applicant. It follows that the applicant's application satisfies the proviso to section 157(1) as well.

Section 158 (1) (a) and (2)(c) of the Act sets 65 years as the maximum age beyond which a person cannot make an application for adoption. The applicant turned 65 on 31 December 2019. So that she is not caught by time, and most importantly, for the sake of what I believed to be in the child's best interest, I made the adoption order on 17 December 2019 and reserved my reasons for allowing the application.

And even if the order was not made then, it would still have been possible to make the order now despite the fact that the applicant would have been overage, so to speak; my reading of section 158 (2) (c) is that it provides for such a window as long as the circumstances are peculiar. It says:

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) …

(b) …

(c) an applicant or joint applicants who has or both have attained the age of sixty-five years;

As much as the law says that an order for adoption would ordinarily not be granted to an applicant who is 65 years old, it also suggests that the age notwithstanding, the order would still be made in special circumstances justifying the order. Special circumstances would obviously vary from one case to another but in this case I consider these as special circumstances that would have justified the grant of the order: the fact that the child was brought into the custody of the applicant at the age of 10 years old; that the applicant has lived with the child for more than three years; and, that the child herself considers the applicant as her mother and the applicant's home as her home. Considering all these factors, it would have been in the best interest of the child that the adoption order be made irrespective of the applicant's age.

Besides the age factor, section 158(4) requires an application for adoption to be accompanied by a written consent of the parent, guardian or a person who is liable by virtue of any order or agreement to contribute to the maintenance of the child or parents or guardians of the mother of the child or the court. If the child has attained the age of 14 years, his or her consent is required.

However, under section 159(1) the court has power to dispense with the consent if it is satisfied that the parents or guardian of the child has abandoned, neglected, persistently failed to maintain or ill-treated the child. As far as abandonment is concerned, **section 159(1) (i)** states that it may be presumed if the child appears to have been abandoned at birth or if the institution or person having the care and possession of the child has neither seen nor heard from a parent or guardian of the child for a period of at least six months.

If the report by the Child Welfare Society is anything to go by, the subject child was abandoned on 24 August 2006 at Nakuru Level 5 hospital. A report of her abandonment was made to the police and despite all their efforts to trace her parents or relatives, neither the police nor the Society ever succeeded in finding them. It has also been demonstrated that nobody has come forward to lay claim on the child between the time she was abandoned and the time the applicant filed the present application. It would be reasonable to presume abandonment in these circumstances and in my view, such presumption is consistent with the provisions of section 159(1)(a)(i) of the Act. I would therefore dispense with the consent for the child's adoption.

Finally, section 158(3) (b) says that no adoption order shall be made if the applicants or an applicant has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule to the Act or similar offences. The applicant has satisfied this honourable court she has not fallen short of the requirements of this section in the sense that she has not been charged and convicted of any of the specified offences. In proof of this fact she has produced police clearance certificates from the Directorate of Criminal Investigations of the National Police Service certifying that there are no records that the applicant has previously been convicted of the prescribed offences or any offence for that matter.

In the final analysis, I would conclude that the applicant has not only complied with the legal requirements necessary for making of an adoption order but she also understands the consequences of making that order. I am satisfied that besides being sincerely motivated to adopt the child and embrace her as she would have embraced her own biological child, the applicant has also demonstrated that she has the means to provide her with shelter, clothing, food, education and, most importantly, the parental care and protection that she needs and deserves. Most importantly, it is also in the best interest and the welfare of the child that the adoption order is made in their favour.

It is for the foregoing reasons that I allowed the applicant's originating summons dated 27 November 2019; accordingly, the applicant is allowed to adopt Baby CW who shall henceforth be named as IWW1 and the Registrar General is hereby ordered to make the appropriate entries in the Adopted Children Register accordingly.

Should anything happen to the applicant rendering her incapable of taking care of the subject child, I appoint IWW2 as the guardian of the child. For avoidance of doubt, this order is effective from 17 December 2019 when the application was allowed. It is so ordered.

Signed, dated and delivered in chambers this 13th day of March, 2020.

Ngaah Jairus

JUDGE