



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**ADOPTION NO. 2 OF 2017**

**MWM.....APPLICANT**

**V E R S U S**

**MVM alias MJ.....CHILD**

**RULING**

1. In this matter the court ordered the Children Officer to file a report before the court could grant orders in the Originating Summons dated 21/9/2017. In the Originating Summons, (OS) the applicant MWM is seeking an order that she be allowed to adopt Baby M.J among other prayers.

2. The Children Officer Kamura Ngeke filed a report in which he raised an objection under **Section 158 (2)(d) of the Children's Act**. The Children Officer is stating that there are no special circumstances which would allow the adoptive parent to adopt the child. This is because **Section 158(2) of the Children Act** provides that adoption order shall not be made in favour of a sole female applicant in respect of a male child unless the court is satisfied that there exist special circumstances to justify the making of an adoption order.

3. The Children Officer submits that there are guidelines which the adoption committee developed highlighting the special circumstances under which a sole female applicant can adopt a male child and the applicant does not have any of them.

4. The Children Officer also raised the issue of ownership of property as the piece of land where she is constructing, Inoi/Kerugoya/[....] is co-owned by the applicant and one Eliud Mbugua Mutura ID. No.[.....]. The applicant did not explain the relationship between her and Mbugua Mutura and what would happen to the child.

5. He further submits that he came across a report by Change Trust Adoption Society entitled Social Inquiry and home report. The report states that upon considering the special circumstances she was approved. That those special circumstances are not enumerated.

6. For the applicant submissions were made by Ms Kabethi. She submits that the report says the applicant was married and later divorced due to childlessness. She also relied on a report by Muteru Njama of Change Trust. He told the court that there is no other applicant. The Children Officer submits that the report does not address the specific issue when a single lady applicant seeks to adopt a Boy child. That the guidelines are to inform court and the parties involved in the whole process. They are supposed to inform and guide the adoption society when linking the adoptive parents and the child.

7. The Children's Officer submits that the report does not address the concerns raised.

8. I have considered the objection raised. The issue for determination is whether this court should allow the applicant to adopt the child M.V.M alias M.J.

**Section 158 Part 26 of the Children's Act** provides:-

***"An adoption order shall not be made in favour of the following person unless the court is satisfied that there are special circumstances that justify the making of the order:-***

***a. A sole make 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.”*

The objection is based on paragraph (b) above.

9. The court was referred to Guidelines for special circumstances for a sole female Kenyan adopting a Male child. These re-guidelines to the Adoption Committee developed by the Ministry of Gender Children and Social Development on special circumstances under which a sole female applicant can adopt a male child. The guidelines are as follows:-

**1. When the child is a relative.**

**2. When the child has special needs and the applicant is willing and has capacity to take care of the child.**

**3. Where the applicant has adopted or has another biological child or children over whom she is willingly exercising parental responsibility.**

**4. Where the child to be adopted has a sibling who is also being adopted by the applicant.**

**5. Proposed applicant is the only person available to adopt the child.**

**6. 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.**

10. Under **Section 158 of the Children Act** it is clear that the intention of the Legislative was that a sole female applicant should not adopt a male child. The proviso to the Section is that the court may refuse to make an adoption order in respect of any person if it is satisfied that it would not be in the best interest of the child.

11. The social inquiry by Change Trust under a sub-heading – Legal requirements it is stated that the special circumstances herein is that no one else has expressed interest to adopt the child who had stayed at the institution for a period of Two years. That she has met the legal requirements. The Children Act has not stated what constitutes the special circumstances. The guidelines have been given by the Ministry of Gender which I have quoted above. These must as far as possible guide this court when determining whether issue the adoption order.

12. The Children Officer’s report states that the Officer did not find or observe any special circumstances which would warrant her to adopt a male child.

13. The Children Act has mandatorily provided that no adoption order shall be made where a sole female applicant wishes to adopt a male child. The question is whether there are special circumstances. In the guidelines quoted above, No-5- it is special circumstance where the proposed applicant is the only person available to adopt the child. The report by the case committee of Little Angels Network was satisfied that the child was available for adoption. The recommendation by the case Committee by Change Trust is that though the child had been in the New Life Home since 8/5/2015, at the time the applicant expressed interest to adopt the child no one else had expressed interest to adopt the child. The report on the applicant are extensive and portray her as a person who is fit to adopt a child.

14. The report by the Children Officer, under heading general observation states –

15. The child is comfortable around the home. There is also a strong bond between the child and the prospective adoptive parent talks highly of the child and is willing to take care of the child. The child was healthy and well provided for, jovial and playful. Generally the child was getting on well.

16. I note from the affidavit of the applicant that child was placed in her custody on 25/11/2015 and he has been continuously in her custody to date, a period of over Four years.

17. I must therefore turn to the question as to what is the best interest of this child. There are two options, deny the applicant the adoption order and return the child to the charitable home. By denying the applicant the adoption order it will be in strict observance of **Section 158 (2) (b) of the Children Act**. The Section in my view gives the court discretion to consider the special circumstances. In doing so the court when dealing with a matter concerning a child must apply the principle of the best interest of the child. It is a principle that ensures that decisions are made with the ultimate goal of fostering and encouraging the child’s happiness, security, mental health and emotional development into young adulthood. When it comes to determining the best interest of a child it is important to consider the evidence laid before me with regards to parenting ability that is the question whether the parent requesting the adoption order is genuinely able to meet the child’s physical and emotional needs. The best interest of the child is a child’s right principle which derived from **Article -3- of the United Nations Convention** on the rights of the child which states that –

**“in all actions concerning children whether undertaken by the 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.”**

18. In assessing the best interests of the child, it calls on the court to evaluate and balance all the elements necessary to make a decision in a specific situation or a specific child(ren). The objective is to reach a decision based on National Law that guarantees the rights of the child and promotes its wellbeing, safety and development. The court must therefore weigh and balance all the relevant factors of the case with a

bias to the rights of the child and the consideration of the obligations of public authorities and service providers towards the child. The determination is therefore a process for the identification of a durable solution expected to have significant implications of the child's present and future life. Each case must be determined on its own special circumstances.

19. Our **Constitution** has recognised the paramourcy of the best interest of the child when making a decision concerning a child. It provides at **Article 53(2):-**

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

20. This is echoed at **Section 4 (2) of the Children’s Act**. There is no standard definition of the best interest of a child it is determined while considering the rights of the child under the **Constitution the Children’s Act** and the International Instruments on the rights of the child.

21. In a case which has similar facts like the present case, in **Baby K. R – Minor and S. M. – Applicant 2018 eKLR** where the applicant a single lady had applied to adopt the child, the court stated that upon satisfying himself that all legal requirements have been adhered to, he was satisfied that the applicant was suitable to adopt the minor.

22. The Constitution and the Children’s Act underscores the best interest of the child under **Article 53(2) and Section 4(2) &(3) of the Children’s Act**.

23. In this case the minor M.V.M alias M.J was on 5/1/2015 at J.C. Church D.K on 5/1/2015 by a certain lady who requested another lady to look after him as she entered the washroom. The good Samaritan agreed to look after the child. The lady went her way in the pretext of going to the washroom never to come back for the child. A report was made at Kilimani Police Station and police conducted investigations but they could not trace her. The child was about one year old at the time. The child was committed to New Life Home after which he was placed in the custody and care of the applicant who has lived with the child for about Five years.

24. Having considered the circumstances of this case, the documentation availed by the various agencies whose reports I have analysed above, the applicant is suitable and fit to adopt the child. It would not be in the best interest to disrupt the life of the child in view of the report by the Children’s Officer. The child has bonded with the applicant and her relatives. The home is safe and provides a suitable environment for the child’s upbringing and growth. There is a special circumstance in this case as the child has bonded with the adoptive parent and there was no other person available or had expressed interest to adopt the child. In the best interest of the child who now knows and refers to the applicant as mother it is in his best interest that his life should not be disrupted or even return him to the Charitable Home to look for an adoptive parent other than the applicant. The best interest is that he grows up in a home set up and in a family. In view of this, I find that the objection by the Children Officer is without merits. I dismiss it and order that the adoption proceedings shall proceed.

**Dated at Kerugoya this 30<sup>th</sup> day of April 2020.**

**L. W. GITARI**

**JUDGE**