



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ADOPTION CAUSE NUMBER 19 OF 2018

IN THE MATTER OF ADOPTION OF (MINOR) CP a.k.a. DWM

AND

SMN1ST APPLICANT

BMM2ND APPLICANT

RULING

1. The applicants herein SMN and BMM filed an Originating Summons dated 8th November 2018 on 12th November 2018 seeking orders:-
 1. ***THAT AW of P.O. Box[---] be appointed as Guardian ad Litem of the minor herein during the hearing of these proceedings.***
 2. ***THAT the Director of Children's Services in the Ministry of Gender, Children and Social Development be directed to conduct investigations as to the suitability of the applicants to adopt the minor and submit a report on his findings to court.***
 3. ***THAT the consent of the biological parents of the minor herein be dispensed with since the child was found abandoned near Nakuru Game Park by a good Samaritan and efforts to trace the parents have since proved futile.***
 4. ***THAT the applicants be authorized to adopt the said child and the child be henceforth called DW.***
 5. ***THAT the child be presumed a Kenyan Citizen having been found in Kenya at the time of birth.***
 6. ***THAT the Registrar General do make the appropriate entries in the Adopted Children's Register in respect of the minor and further the Registrar of Births and Deaths do issue a Birth Certificate in respect thereof.***
 7. ***THAT the court does issue such other orders as may be necessary in the best interest of the child.***
 8. ***THAT the costs be in the cause.***
2. Annexed to the Originating Summons was the statement and affidavit in support of the application for an Adoption Order, Affidavit of Consent of Proposed Guardian *ad litem*, Affidavit of Means and annexures, Certificate of Good Conduct issued on 14th March 2014, recommendations made in 2014 and Adoption Register extract from INM of 28th July 2016.
3. Regarding the child there were annexed to the Originating Summons, Certificate of Declaring Child Free for Adoption issued on 21st February 2018, letter from Nakuru Police Station dated 12th May 2017 to Africa Gospel Church (AGC) Baby Centre to take care of the baby who had been found abandoned near the Game Park on 26th March 2017 (OB xx/xx/x/xx), final letter from the same police station dated 17th January 2018 to the effect that efforts to trace the child's relatives had proved futile, and that based on their investigations no one had come to claim the baby.
4. There is a committal order to the AGC Baby Centre via **Protection and Care (P & C) 242 of 2017 Children's Court at Nakuru** on 10th May 2017, for three (3) years, though the child was admitted to the centre on 13th April 2017, the source of admission is NOT stated. The child was placed with the couple on 13th April, 2018.

5. On 12th February 2019 the counsel for the applicants appeared before *Justice Ndung'u* and sought prayers 1, 2 and 3. The same were granted and matter fixed for hearing on 30th May 2019. The matter did not get to the Judge till 8th July 2019, when the record shows that the report from the Director of Children Services had not been filed. The matter was fixed for hearing on 16th September 2019. On that date it landed before me. I noted that there was a report from the Director of Children Services dated 29th August 2019.

6. On perusal of the file I found an order purported to have been given on 8th July 2019 authorizing the applicants to adopt the child. The order was signed by the Deputy Registrar on 22nd July 2019. However the record speaks for itself that no such order was issued by *Justice Ndung'u* on 8th July 2019. The only event on record is that, the Director of Children Services report was not ready and the matter was fixed for hearing on 16th September 2019. Where did that order come from? The order was obviously not issued by the Judge.

7. The report from the Director of Children Services was filed on 29th August 2019. The legal guardian had not been appointed. I note that on 24th January 2020 an Amended Originating Summons was filed seeking the appointment of Ann Wairimu as the legal guardian of the minor.

8. On 17th February 2020 when the matter came for hearing the court had formed the view that there being an order authorizing the parties to adopt the only remaining thing was to consider the report. However having found that there is no record of the Judge issuing the orders of 8th July 2019 allowing the parties to adopt, the matter still was to be heard. The said order calls for its vacation as it appears to have been erroneously extracted to include orders that could only have issued upon hearing of the Originating Summons.

9. Hence the orders of 8th July 2019 allowing the applicants to adopt the baby herein are vacated.

10. That takes the matter back to the point where reports were to be filed by the Director of Children Services.

11. Therein is the report of 29th August 2019 from the Director of Children Services, which points out two (2) gaps; the lack of an affidavit by the legal guardians named as GTN and WWM. These are the two (2) persons named in the documents filed by the Kenya Children's Homes Adoption Society on 18th April 2019. In those documents at page ten (10), the proposed legal guardians are named as WWM and her husband GTN. However in the Amended Originating Summons filed on 24th January 2020 the guardian *ad litem* is now being proposed as the legal guardian.

12. The guardian *ad litem* cannot also be the legal guardian. These are two mutually exclusive positions with very different legal obligations. See **sections 160 and 164 of the Children Act**, and **rule 9 and 10 of the Adoption Rules**.

13. What is clear is that this matter was not ready for any final orders, and the applicants need to put their house in order. For now we have the Director of Children Service's Report. The applicants must address the gaps pointed out in the report.

14. The guardian *ad litem* must file her report. This report is in terms of **Rule 9** of the **Adoption Rules** viz:

"It shall be the duty of the guardian ad litem to investigate as fully as possible all circumstances relevant to the proposed adoption with a view to safeguarding the interests of the infant, and to report to the court in writing in particular on the following matters -

(a) whether the matters alleged in the applicant's statement are true;

(b) in the case of an application by one only of two spouses -

(i) whether the other spouse consents to the application; and

(ii) why he or she does not join in the application;

(c) whether the means of the applicant enable him to maintain and bring up the infant suitably including by the provision of a proper education;

(d) whether the applicant understands that an adoption order is irrevocable and that the order will make him responsible for the maintenance and upbringing of the infant;

(e) who are the parents of the infant;

(f) who is liable to contribute to the support of the infant;

(g) whether the infant has any right to or interest in property;

(h) whether the infant (if of an age to understand the effect of an adoption order, and knowing that he is not the child of the applicant) wishes the order to be made;

(i) whether he considers it desirable that any special terms or conditions be imposed in the adoption order;

(j) what relatives (if any) the infant has, whether they have been informed of the proposed adoption and whether any of them has offered and is able to provide a suitable home for the infant; and

(k) whether the proposed adoption will be in the best interests of the infant, and the guardian ad litem shall attach to his report a certified copy of the infant's birth certificate, or if the infant has been previously adopted, a certified copy of the relevant entry in the Adopted Children Register.

15. **Rule 10** emphasises the need for impartiality confidentiality

(2) *The report referred to in rule 9 shall be made by the guardian ad litem or its officer or agent personally and in his own words and unless the court otherwise directs, shall not be disclosed to any person other than the applicant or his advocate or the adoption society (if any) acting on behalf of the applicant.*

16. Legal guardians must file their affidavits.

17. The applicants need to present up to date Certificates of Good Conduct as well.

18. I also noted that the Director of Children Service's Report did not say anything about the relationship between the applicants and their son INM, and the relationship between INM and his proposed sister CP alias DWM. This omission ought to be addressed as it speaks to the question whether the proposed adoptive child is settled or settling with all the members of the family and how the already adopted child has settled. Hence;

1. **The "adoption order" issued on 8th July 2019 is vacated.**
2. **The applicants to address the gaps in the report within thirty (30) days hereof.**
3. **The Director of Children Services to address the gaps in the report with regard to relationship between the proposed adoptive child and her brother, the status of the already adopted child, in a further report to be filed within thirty (30) days hereof.**
4. **The guardian ad litem who was already appointed must file her report within 30 days hereof.**
5. **Mention on 28th May 2020 to confirm compliance and for directions on hearing.**
6. **Parties are at liberty to seek an online hearing.**

Delivered, Dated and Signed at Nakuru this 23rd April 2020.

Mumbua T. Matheka

Judge

In the presence of:-

Via Email by consent of Muchiri Gatheca counsel for the applicants

Edna Court Assistant