



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ADOPTION CAUSE NUMBER 7 OF 2019

IN THE MATTER OF ADOPTION OF BABY IKN A.K.A. AM AA GKY

AND

GKL ----- 1ST APPLICANT

GC ----- 2ND APPLICANT

J U D G M E N T

1. G and G had a customary marriage in 2013, and solemnized the same on 20th December 2017. They have not been blessed with children of their own.

2. On 4th July 2019 they wrote to the Chief Administrator Kenya Children's Homes (KCH) Adoption Society seeking to adopt a child. Their application was approved on 19th September 2018 by the KCH Adoption Society Committee for adoption of two (2) children.

3. On 5th April 2018 MNK gave birth to IKN at Provincial General Hospital Nakuru. She was discharged on 6th April 2018. By a letter dated 20th April 2018 she wrote to the Chief Administrator KCH Adoption Society.

“RE: KUMPEANA MTOTO WANGU

Jina langu ni MNK mama yake IKN. Nimeamua kupeana mtoto wangu kwa sababu sikuwa nimepanga kupata mtoto. Mimi nimewapa kwa roho savi mtoto sinasinda yeyote kwa mtoto sina uweso hakunahaja ya kutesa mtoto asante sana.

Mimi wenu

MKN”

4. She also signed the “Initial Consent for Parent/Guardian Offering Child for Adoption” and a certificate of acknowledgment that the “Adoption of Children Explanatory Memorandum for Biological Parent/Guardian” had been explained to her and she understood it. On the same date the child was admitted to Africa Gospel Church (AGC) as AW a.k.a. IKN. The admission form bears no details of the mother, but states that the mother offered him for adoption.

5. Vide **Protection and Care (P & C) 358 of 2018 the Children's Court at Nakuru** committed the child to AGC Baby Centre for three (3) years on 6th June 2018. The committal reads, IKN, and there is no alias.

6. On 25 June 2018 MNK swore an affidavit under **Section 158 of the Children Act**, where she gave her consent for this adoption. It is noteworthy that at paragraph five (5) she depones she was; “thirty-one (29) years of age having been born on 23/11/1988”.

A not so clear copy of an identity card is attached.

7. On 26th October 2018 the child IKN was released to the custody and care of the applicants. On 14th May 2019 the applicants filed this Originating Summons seeking to adopt IKN alias AM alias GKY. They sought orders;

1. THAT the minor be presumed a Kenyan Citizen.

2. **THAT the court dispense with the consent of the biological parents to the minor.**
3. **THAT EKL of Post Office [---], in the Republic of Kenya be appointed Guardian ad Litem.**
4. **THAT the Department of Children's Services, Nakuru County investigate the applicants' fitness to adopt and file a report.**
5. **THAT the applicants be authorized to adopt BABY IKN a.k.a. AM to be known as GKY.**
6. **THAT EKL of Post Office [---]in the Republic of Kenya be appointed Legal Guardian of the minor.**
7. **THAT it is directed that the Registrar General shall make in the Adopted Children Register an entry recording the adoption in accordance with the particulars set out in the Schedule to this order.**
8. **THAT the Registrar of Births and Deaths be and is hereby directed to issue the child with a certificate of birth in the name of GKY.**

8. The Originating Summons was supported by several annexures; their joint statement and affidavit in support of the application for adoption, their medical reports, affidavit of means, certificates of good conduct and recommendations from church, friend and family. The signed consents of the proposed guardian *ad litem*, and legal guardian, and the documents from the adoption agency filed on 28th August 2019 though copies were filed with the Originating Summons.

9. The Children Officer's Report filed by the Director of Children Services on 23rd December 2019. The guardian *ad litem* E KL was appointed on 16th October 2019. On 22nd January 2020 and 17th February 2020, I heard oral testimony from G, and the legal guardian, EL.

10. The only issue for determination is whether an adoption order should issue.

11. The requirements are set out by the law. **Section 156(1)** says 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. In this case the arrangements began on 20th April 2018, when the mother to the child was made to sign what is referred to as the "*Initial Consent... for Adoption*". By then the child was barely three (3) weeks old.

12. The final consent is said to have been given on 25th June 2018 through the affidavit deponed on the same before counsel. Hence, from the wording of **Section 156 (1)** the society did not strictly comply with the law. I have noted before that the law allows for the interim period for the child to be committed to a fit person, despite the mother's request for adoption, until the requisite time has passed before the mother is made to sign a consent form for adoption. There is a good reason for the provision to wait six (6) weeks before the process begins.

13. The other requirements are set out at **Section 157**, the child had been in the continuous care and custody of the applicants since 26th October 2018, and the application was filed on 14th May 2019. Under **Section 158**, the applicants fit the legal requirements set out there with regard to age, gender, health, social standing and sexual orientation.

14. With regard to the consents only the consent of the mother was obtained. She is described as a single mother. There is no mention of the father and he is not named in the birth documents. It is not known whether the father was sought, whether he is known, there is nothing on the record yet **Article 53 of the Constitution** speaks to this. That whether the parents of a child were married or not, they are responsible for the child, and the fact that we have jurisprudence where the mother of the child does not require his consent to enter the name of the child in the certificate of birth, it is only in the best interests of a child that the consent of the father be sought. This hurry into getting the consent of one parent without that of the other is not in the best interests of the child. **Section 158 (4) (a)** is very clear on this. There is no evidence that with regard to the father of the child the provisions of **Section 159** were complied with, because there is nothing from him or about him.

15. It is important for any Adoption Society to bear in mind that it is in the best interests of the child that both parents' consent be obtained, and where the same cannot be obtained sufficient evidence be supplied to court to enable the court dispense with the same.

16. There is also the requirement of **Section 160** which requires the guardian ad litem to make a report in accordance with the Adoption Rules.

17. Despite these hitches, the applicants have been assessed and found to be persons who can provide the child herein with a home, love, care and attention any child requires. This court is required to weigh the best interests of the child against the acts of inadvertence on the part of the Adoption Agency, while ensuring compliance with the law, due to the nature of adoption orders.

18. The Children's Home admitted the child to the home under a different name despite being brought to the home with a name from the parent, then proceeded to seek committal of the child in the original name and not the name under which they admitted him. The basis for this curious practice was not explained. In addition, the report by the Children Officer supporting the committal proceedings was not among the documents annexed to the Originating Summons. That is a crucial part of these proceedings as it ought to accompany the committal order.

19. Before I make the final orders, I will need;

- **A written explanation for the change of names on admission of the child to the children home.**

- Clear copy of the biological mother's National Identity Card and a clarification of the details of her age.
- Evidence to support dispensing of the biological father's consent.
- A copy of the Children Officer's Report in Nakuru Children's Protection and Care (P & C) file no 358 of 2018.
- The report of the guardian ad litem as per Rule 9 of the Adoption Rule.
- Mention on the 28th May 2020 to confirm compliance and for further directions.

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

Mumbua T. Matheka

Judge

In the presence of:

Via email by consent of Mrs. Wanderi for the Applicants

Edna Court Assistant