



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**ADOPTION CAUSE NUMBER 6 OF 2019**

**IN THE MATTER OF ADOPTION OF (MINOR) MMA a.k.a. AH a.k.a ANN**

**PNN**

**MC.....APPLICANTS**

**RULING**

1. PNN and MC formalized their marriage on 15<sup>th</sup> March 2017 having lived together from 19<sup>th</sup> April 2009. They do not have children of their own.

2. On 7<sup>th</sup> March 2018 AM gave birth to a baby boy whom she named MMA at the Provincial General Hospital Nakuru. According to her affidavit sworn on 10<sup>th</sup> May 2018, this was her fifth child and due to her financial and psychological unpreparedness to raise the child she had opted to give up the child for adoption. At the time of giving birth according to her identity card she was born on 2<sup>nd</sup> May 1985, so she was thirty-one (31) years old.

3. Vide a letter dated 12<sup>th</sup> March 2018, AM wrote to the Chief Administrator Kenya Children's Home (K.C.H.) Adoption Society. She stated;

**"RE: KUMPEANA MTOTO WANGU MM**

*Mimi ni AM nimeamua kumpeana huyo mtoto wangu kwa sababu ya kuwa nina mashida nyingi kuwalea nikiwa peke yangu naomba kusaidiwa sina hata mahali pa kukaa."*

The child was admitted at Africa Gospel Church (AGC) Baby Centre on 12<sup>th</sup> March 2018 as **AH** vide a Social Inquiry Report by the center's social worker. On the same date AM signed the "Initial Consent for Parent/Guardian Offering Child for Adoption."

4. On 6<sup>th</sup> June 2018, the **Children Court at Nakuru in Protection and Care (P & C) Case Number 359 of 2018** issued a committal order for one **MM** to AGC Baby Centre for three (3) years. The Children Officer's Report seeking the orders was not annexed to the order.

5. On 4<sup>th</sup> September 2018 the applicants herein wrote to the Chief Executive Officer (CEO) KCH Adoption Society, seeking to adopt a child. The documents filed by KCH Adoption Society dated 22<sup>nd</sup> October 2019 but filed on 30<sup>th</sup> October 2019 indicate that the applicants approached the Agency on 23<sup>rd</sup> May 2018 and filed forms which they returned on 23<sup>rd</sup> August 2018. That they were visited on 29<sup>th</sup> August 2018, and were approved as suitable potential adoptive parents by the Agency's Committee sitting on 19<sup>th</sup> September 2018. They were then placed with **MM** a.k.a. **AH** on 19<sup>th</sup> October 2018. On the same date the child was declared free for adoption. The couple proposed another couple; MN, sister to PNN and her husband IMM as the legal guardians for their son, should they get the adoption order.

6. On 30<sup>th</sup> April 2019 the applicants filed Originating Summons dated 29<sup>th</sup> April 2019 seeking orders: -

**1. THAT MW AND IM, [---]be appointed as Guardian ad Litem of the minor herein during the hearing of these adoption proceedings.**

**2. THAT the Director of Children's Service in the Ministry of Gender, Children and Social Development be directed to conduct investigations as to the suitability of the applicant to adopt the minor and submit a report on his findings to court.**

**3. THAT consent of the biological mother of the minor be dispensed with since said mother abandoned the child immediately**

*after birth hence relinquishing her parental rights, abandoned the minor and to date the child has remained unclaimed.*

**4. THAT the applicants be authorized to adopt the said child and the child be henceforth called ANN.**

**5. THAT the child be presumed to be 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 in the cause.**

Prayers 1, 2, 3 were granted on 8<sup>th</sup> July 2019 by *Ndung'u J* and the matter fixed for hearing on 14<sup>th</sup> October 2019 when I took over the matter.

7. The Children Officer's Report by Director of Children Services was filed on 22<sup>nd</sup> October 2019 and the matter heard on 17<sup>th</sup> February 2020.

8. I have carefully considered the Originating Summons and all the requisite annexures: -

- Statement and affidavit in support of the application, Affidavit of means by both applicants dated and sworn on 29<sup>th</sup> April 2019.
- Recommendations by friends dated 18<sup>th</sup>, 23<sup>rd</sup> and 25<sup>th</sup> August 2018, church dated 17<sup>th</sup> August 2018
- the certificates of good conduct dated 27<sup>th</sup> July and 16<sup>th</sup> August 2018
- Consent of legal guardians dated 11<sup>th</sup> August 2018
- The report by the Children Officer recommending the two (2) as suitable adoptive parents.
- Initial consent and Certificate of acknowledgement of the biological mother dated 12<sup>th</sup> March 2018 and affidavit of consent of the biological mother sworn on 10<sup>th</sup> May 2018.
- The report by the adoption agency including the child freeing summary dated 19<sup>th</sup> September 2018 and supporting documents stating that the child was given up for adoption by the mother.

I also heard testimony from PNN who testified in the presence of his wife MC and MWN, the proposed legal guardian.

9. The only issue is whether this matter is suitable for an adoption order.

10. There is no doubt that PNN and MC are ready to give this child the home, the love, care and attention any child deserves. The child was present in court with the adoptive parents and it was evident that they had bonded. There is also no doubt that legal guardians understand fully what it means for them to be legal guardians of the child herein.

11. My only concern in this application and in some of the others I have seen; e.g. HC Adoption Cause no. 19/2018, HC Adoption Cause no. 1/2018, is where the applicants propose the same person(s) as the guardian *ad litem*, and the legal guardian. I think it is important to clarify, for the avoidance of doubt, what these two (2) positions entail.

12. The guardian *ad litem* is required by **Section 160** of the **Children Act**, with specific duties set out there under;

**"Guardian ad litem for the child**

**(1) For the purposes of any application for an adoption order, the court shall upon the application of the applicant or of its own motion, appoint a guardian ad litem for the child pending the hearing and determination of the adoption application.**

**(2) It shall be the duty of the guardian ad litem to—**

**(a) safeguard the interests of the child pending the determination of the adoption proceedings;**

**(b) investigate and apprise the court as to the circumstances pertinent to the adoption of the child in the prescribed manner;**

**(c) make recommendations as to the propriety of making any interim orders or an adoption order in respect of the child;**

**(d) intervene on behalf of the child and arrange for the care of the child in the event of the withdrawal of any consent prescribed by this Act;**

**(e) undertake such duties as the court may from time to time direct or as may be prescribed by the rules made under this**

Part.

(3) Where arrangements for the adoption of any child have been made by an adoption society, neither the society nor any member thereof, shall be appointed guardian ad litem of that child for the purposes of its adoption.

(4) The appointment of a guardian ad litem shall expire upon the making of a final order by the court under this Part unless the court, having regard to the interests of the child, extends the period of the appointment.

(5) Without prejudice to the generality of subsection (4), where an appeal is lodged against a final order by the court under this Part, the court shall have power to extend the appointment of a guardian ad litem until the date of the determination of the appeal.

13. The duties of the guardian ad litem are spelled out in the Rules made under the Repealed **Adoption Act Cap 143** but applicable under **Section 24 of the Interpretation and General Provisions Act Cap 2** which states:

**Effect of repeal of Act on subsidiary legislation**

Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

14. After the filing of the Originating Summons, the guardian ad litem is to be appointed before any other proceedings take place. That is **rule 8**. The duties are set out at **rule 9** 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. These are by no means light duties. It is expected that the guardian ad litem is a neutral person who will report to the court any relevant matters as they are. These duties have been forgotten over time and I have noted in various applications for adoption that the Guardian ad litem simply files an affidavit of consent, and that is it.

16. Regarding the legal guardian, guardianship is generally provided for under **Part VIII of the Children Act. Section 102** states: -

**“(1) For the avoidance of doubt, in this Part, “guardian” means a person appointed by will or deed by a parent of the child or by**

**an order of the court to assume parental responsibility for the child upon the death of the parent of the child either alone or in conjunction with the surviving parent of the child...**

17. However, under **Section 164** of the **Act**, the court is empowered to appoint a **guardian**.

**“(1) The court at the time of making an adoption order *may*, upon the *application of the adopter*, or of *its own motion*, or in the case of applicants for an international adoption, shall appoint any person approved by the adopter and whose prior consent thereto has been given in writing to be the guardian of the child in the event of the adopter, or both of the adopters where two spouses have applied for the adoption order, dying or becoming incapacitated before the child is of full age.”**

This position is also revocable either by the application to court of the adopter(s) or the appointed guardian and the court may appoint another guardian.

18. Clearly therefore the duties of the two are different, and are mutually exclusive. The appointment of a guardian *ad litem*'s role is mandatory. It may expire upon the making of the final adoption order or may be extended by court. One can only be one and not the other, and it is important for counsel making these applications on behalf of applicants to make sure that these two (2) positions are clear. A guardian *ad litem* may even be required to report on a legal guardian, may have to make adverse reports, where that is the situation, with regard to the applicants, and should not be in a place where there could arise a conflict of interest.

19. For instance, in this case, there is no report from the guardian *ad litem* though they swore to act in accordance with **Section 160** of the **Act**. They have not filed any report or recommendation and it was clear from MWN's testimony that she thought they had sworn to be the legal guardians of the child. Hence the child has no legal guardian, as the affidavit sworn by MW and her husband, their consent is to become guardian *ad litem*.

20. Clearly therefore while these two (2) applicants are suitable adoptive parents their application was marred by these.

21. In addition, the report from the adoption agency creates an inconsistency in terms of dates when the applicants approached the agency. Their application is dated 4<sup>th</sup> September 2018. There is no evidence of prior contact with the agency and such inconsistencies beg questions, of why?

22. The Children Officer's Report that the Children's Court relied on to issue the committal order did not accompany the committal order. This ought not to be the case. The court documents from the Children's Court regarding committal must be complete as it creates a consistent thread of information, without which there are gaps, and in this case, confusing ones. And here is one reason why. The child is MMA at the hospital and birth documents. On 12<sup>th</sup> March 2018 he is admitted to the Charitable Children Institution (CCI) as AH. This is before the committal order is issued by the court. A committal order is then sought in the name MMA, without an alias of the name in the CCI's register AH? This needs to be explained before it leads to an adverse inference on the part of the CCI.

23. One of the prayers sought in the Originating Summons creates more confusion. It seeks ;

***3. THAT consent of the biological mother of the minor be dispensed with since said mother abandoned the child immediately after birth hence relinquishing her parental rights, abandoned the minor and to date the child has remained unclaimed.***

How is this possible? The application is supported by documents filed and purported to come from the biological mother of the child. These documents include her consent. Either the child's mother was one AMW who gave birth to the child and gave him up for adoption or the child was abandoned at birth. Surely it cannot be both!

24. In my view, these are not issues that the court can just sweep under the carpet. An adoption order is a life changing order, not just for the child but for the adopting party. It is an order that should not issue if the process of arriving there begs many questions, especially because the key person is a child who cannot speak for him/ herself and cannot confirm facts set out about him. S/he must depend on those in those positions to ensure that the process is without any taints.

25. Hence, in this case, I find that I am unable to grant an adoption order, before these issues need to be settled.

**(1) A guardian *ad litem* for the child must be appointed to file the requisite report.**

**(2) The Adoption Society to clarify whether there was consent of the mother or was the child abandoned by the mother?**

**(3) The issue of change of names on admission to the Baby Centre from MMA to AH be explained.**

**(4) The Adoption Society to clarify when the Adoption Process started.**

**(5) The court be supplied with the Children Officer's Report that was relied on by the Children's Court to admit the baby to AGC Baby Centre?**

**(6) The Adoption agency has 30 days within which to supply this information to enable this court make the requisite orders.**

**(7) In the meantime, the child to remain in the custody of the proposed adoptive parents under the regular supervision of the**

Children Officer who will file a report thereof every month until a guardian *ad litem* is appointed.

(8) The Deputy Registrar to serve the order 7 above on the County Co-Coordinator Children Services Nakuru for Compliance.

(9) Mention on 28<sup>th</sup> May 2020 for compliance and further orders.

Delivered, Dated and Signed at Nakuru this 23<sup>rd</sup> April 2020.

Mumbua T. Matheka

Judge

In the presence of:-

Via Email by consent of Muchiri Gatheca counsel for the Applicants

Edna Court Assistant