REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ADOPTION CAUSE NO. 1 OF 2018

IN THE MATTER OF THE CHILDREN ACT, (2001) CAP 141 LAWS OF KENYA

AND

IN THE MATTER OF THE ADOPTION OF BABY BM *alias GWG*.....MINOR

BY

JGN (INTENDED ADOPTIVE FATHER) .....APPLICANT

VN (INTENDED ADOPTIVE MOTHER).....APPLICANTS

JUDGMENT

The Applicants, have sought, by the Originating Summons dated 14th August 2018 supported by their joint statement of the same date, orders allowing them to adopt BABY BM alias GWG (hereinafter the baby/ child), and for the Registrar General to make the necessary entry in the Adoption Register in accordance with the particulars set out in the schedule. Annexed to the Originating Summons are the applicants 'affidavit of means', referee information to the Adoption Agency Kenya Children Homes, identity cards, certificate of marriage. There also the consents of the legal guardian, and the guardian *ad litem* and recommendations; evidence that the applicant's own a parcel of land where they farm, and evidence that they are the adoptive parents of one JM whom they adopted in 2016.

In their statement they indicate that they have been married for the last eighteen (18) years and have three daughters of their own who are minors. Further that they took the child into their custody on foster care on 27th April 2017 from Tumaini Miles Of Smiles Children Home Kakamega.

From the record the child was born on 26th September 2016 at the Malava County Hospital to *FIJ* and *AAL*, and there is a certificate of birth to that effect. There is also the certificate of birth for FIJ showing her parents as *NNM* and father as *AJN.*

According to the documents, the baby was born out of an incestuous relationship between two close relatives. There is an affidavit sworn by *NNM* describing herself as the guardian of FIJ, whom she described as a minor. She depones in the affidavit sworn on 14th Nov 2016 that upon the birth of the child she approached the Adoption Society the same day, to offer the child for adoption. She was counselled and taken through the *'Explanatory Memorandum for Biological Parents/Guardians Offering Child for Adoption'* after which she signed the *Certificate of Acknowledgement*. On the same date, she handed over the child to the Adoption Society.

There is a similar affidavit sworn by the said F stating that she gave birth to the child on 26th September 2016 while she was 15 years old as she was born on 4th May 2001. That the father of her child was her cousin and that made her child a *taboo* child unacceptable in the community. Hence on the same date she gave birth she handed over the child to the Adoption Agency.

On 27th September 2016, F wrote a letter to Kenya Children Home Adoption asking for help. In the letter she says she gave birth to a '*taboo baby girl'* and was not allowed to take care of the child because '*it could cause death in the family'*. She pleads, "Please take the baby and find her another family through adoption. I will not come to claim for the baby again."

On the same date there is a letter by PLN to the Ministry of Health, Kakamega North Sub-County referenced **" Volutary (sic) Surrender of the Child"** it states

> "Following the birth of the child at Malava District Hospital, we the parents (himself and M) surrender voluntarily the child to the government authority. The child is an incest (born (btw relatives (sic). No one will dear (sic) ask her again"

On 28th September a letter referenced: **"Voluntary Surrender of a Child born between relatives (Incest)** "was written by the Assistant Chief [….] sub-location addressed to the Malava Sub County Medical Officer of health, stating that the parents of FIJ and the parents of AAL had agreed and were willing to surrender the child born between the two 'because they are close relatives and their culture does not allow them to stay with the inborn (sic) baby because this is termed as incest''. The letter beseeched the Officer to accord them the help they needed.

A similar letter is written by CAN where he and NNM state

> "We the parents have agreed to surrender the child born on 26th September 2016 by FIJ at Malava District Hospital to the Ministry of Health without doubt. This is an abominable child to the society and family. The concern (sic) should bear the child all her needs. Never shall we dear (sic) ask her again all the days of our lives"

There is a letter ref no. CGK/MAL/MOH/RP/1/5 dated 28th September 2016 addressed **'TO WHOM IT MAY CONCERN"** signed by LM - social worker for the Medical Superintendent. It is referenced: **BM (2 days old) OB no 18/28/09/2016**

> 'The above mentioned has been handed over to the hospital by her biological parents having learnt that she was out of incest (sic). The mother of the baby is (FIJ) 15 years old student at […] Girls' Secondary School(form one) the father is 17 years old AAL a student at […] Boys' High School. Please accord her any necessary assistance'

The child was admitted to Tumaini Miles of Smiles Children Home on 29th September 2016. On 21st December 2016 the child was committed to the Home for three years by the PM's Court Butali through **P&C no 139 of 2016,** vide an application by the Children Officer, Kakamega North Sub County. I did not see the social inquiry report that formed the basis of this committal. A medical Report for Kenya Children Homes Adoption Society was completed and signed on 23rd December 2016.

The child was declared free for adoption on 19th April 2017 and a certificate issued accordingly.

The care Agreement between the proposed adoptive parents and the Adoption Society was entered into on 20th April 2017.

In their report dated 19th April 2017, the Adoption Society concluded that;

> 'The biological mother is alive and willfully offered her child for adoption since she is not in a position to raise the child. The grandmother N has given consent in support of the offering of the child, being an unwanted child in the community. Considering no one in the family is willing to keep and raise the child, it will be in the best interests of the child to be placed for adoption so that she can have a better future"

TW was appointed guardian *ad litem* on 24th September, 2018.

The Children Officer's report by the sub county children's officer was filed on 20th February 2019. The report covered the background history of the applicants, their current situation, their capacity to take care of the child, and made a positive recommendation.

I also heard the first applicant and the guardian *ad litem.*

The issue for determination is whether an adoption issue ought to issue.

It is noteworthy that the Adoption Society chose to ride on the previous one of 2012, where the parties were allowed to adopt their first child. The bundle of documents presented before me did not have the key documents; marriage certificate, health records, financial records, certificate of good conduct. Even the recommendations relied on were those of 2012.

In my view every adoption application, whether the parents have adopted before, must be dealt with as a fresh application. This is another child. Every effort must be made to ensure that every requirement for each application is complied with. The applicants may have requested for two children in 2012 but they only got one. This one came **five years** later. So much can happen in five years. All the requisite documents ought to have been made part of the record.

Is this child free for adoption?

It must appear strange to be asking this question at this stage. The question begs from my careful consideration of all the documents filed together with the Originating Summons.

The evidence placed before me alleges that she was born by 'close relatives', that she is a 'taboo child', 'an abominable child to the society and the family' who can 'cause death in the family'.

FIJ in her letter states that the reason she is giving out the child is because she is not allowed to keep the child because the child can cause death in the family. Without evidence that this is so these adoption proceedings this court will be upholding this cultural belief that brands a new born with the mark of death. This must be discouraged doing, not necessarily by denying the adoption order but by having all the information presented to the court.

There is everything wrong with the concept of a taboo child in this day and age. The concept is in itself an abomination. It is the height of discrimination of the worst kind of a person because of their birth. BM became a person the day she was conceived. That is **article 26(2) of the Constitution.** She is a person who has the right to equal protection of the law and to the full and equal enjoyment of all rights and fundamental freedoms. That is **Article 27 (1) (2) and (3).** Discrimination against her either directly or indirectly by the state or nay person is expressly prohibited on directly or indirectly against any person on **any ground,** including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. That is **Article 27(4).** In this case BM's birth is the source of her discrimination, labelling her unwanted taboo (offensive, *unmentionable, unthinkable, distasteful, off limits, forbidden, banned*). As a child she has specific rights the ones speaking loudest now being the right;

> (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
>
> (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; …
>
> That is **article 53(1) of the Constitution**.

How would the situation be corrected?

First we have a legal framework through which a person can voluntarily surrender a child to 'the government', or to a health facility. The provisions of the **Children Act,** which spell out what should be done when a child, like BM here is in need of care and protection, and not the manner described hereinabove. It is literally handing over a new born to a third party to do with the baby whatever they wish. This is demonstrated by the letter from the social worker after the baby is surrendered to him where he writes 'to whom it may concern'. This child was eventually taken through the court system but the possibility of that not happening to others is also there.

In addition, from the documents before me, the mother who was a minor 'gave her consent'. Can a minor give consent for adoption? The Adoption Society cannot be heard to say that the child gave her consent to the adoption of her child. That consent is null and void as there is nothing to show that the child understood the **finality of an adoption order.** I think the proper course of action where a child's parent(s) is or are minors, that child, who is a child in need of care and protection, ought to be retained in foster care or with a fit person until her mother and father are deemed to have the capacity to give informed consent.

What about the father of the child? There is an indication that he was a minor but no evidence of the same. His parents wrote a letter but unlike FIJ, his views were about the adoption of the child are not on record.

Section 158 (4) of the Children Act provides for the consents:

> (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 Adoption Society applied **subsection (b).** However, the issue of children born in or out of wedlock was dealt with by **Article 27 and 53 of the Constitution.** By classifying children as such that amounted to discrimination. **Article 27** prohibits any form of discrimination. We also have jurisprudence declaring the provisions of the **Children Act** that classify children as such unconstitutional.

In these my thoughts I find resonance in the case of **NSA & another vs Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another [2019] eKLR** where the court made the following declaration;

> **2) A declaration that the definition of a "relative" in section 2(b) of the Children Act and the provisions of sections 27(2), 94(1)(i), 102(1), 158(4)(b) and 158 (4)(c) of the Children Act are inconsistent with article 27(1), Article 53(1)(e) and 53(2) of the Constitution of Kenya and are therefore null and void.**

The Adoption Society ought to be aware of this so as not to perpetuate those notions and to enforce the rights of that child by ensuring that

she was not treated any different from a child born in wedlock. She was born of two parents, and though unmarried, and minors, the Constitutional requirement is that both parents ought to have been involved. There are provisions on how to obtain and treat the views of minors.

Article 2 of the **African Charter on the Rights and Welfare of the Child** to which we are a signatory, provides for the consideration of the views of the child.

> "2. In **all judicial or administrative proceedings** affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for **the views of the child to be heard** either **directly or through an impartial representative** as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."

The child parents herein are alleged to have been fifteen (15) and Seventeen (17) years old. The Adoption proceedings herein affect them in that if the order is granted, it will permanently deny them their child. The consents of their guardians – parents as presented are not from impartial persons. It is these parents who bear the belief that the child could cause death in the family. These two young parents were not given the opportunity to be heard. It is my considered view that every person who spoke to FIJ had a vested interest in her not keeping the baby. This is even more urgent because there was no evidence on the record that this was indeed an incest child. No investigation was conducted to confirm that allegation. The letter from the assistant chief only says that the parents to the child were close relatives. How close? Incest is defined in the **Sexual Offences Act.** If an offence was committed then there ought to have been evidence of the same so as not to stigmatise this child on mere allegations. What if this was just an excuse to give away the child because the child's mother was a minor? Where is the evidence that this child could cause death in the family? No one was charged with any offence. By not taking time to deal with these gaps the Adoption Society acted without due diligence and by declaring the child free for adoption was in violation of the child's and the parents' constitutional rights.

In addition it was affirming a cultural practice that endangers the life of any child who is labelled taboo.

It is noteworthy that there was no Children Officer's report annexed to the *committal order.* This would have informed this court as to the reason for the committal.

I find therefore that this is not a suitable case to grant an adoption order until the appropriate consents are obtained and the proper due diligence is conducted.

From the foregoing I find and hold that:

1. The Kenya Children Homes Adoption Society declared the child herein free for adoption without having conducted due diligence and also filed an incomplete record.

2. The consents on record are in violation of Article 27 and 53 of the Children Act, and Article 2 of the African Charter on the Rights and Welfare of the Child. Proper Consents ought to be obtained.

3. There is no report from the Guardian *ad litem*. This must be made and filed as required.

5. **This court cannot issue an order of Adoption on the alleged ground that the child herein is a 'taboo' child. That amounts to uphold and affirming a cultural belief that is repugnant as it brands the innocent new born baby with the mark of death, while the real culprits just go on with their lives.**

6. The Adoption Society is given time to put its house in order.

7. The child will remain in the care and custody of the proposed adoptive parents. The Guardian *ad Litem* and the Children Officer will carry out regular checks and file their separate reports every 5th day of the month until the issues raised herein are dealt with.

8. Mention on 4th of June 2020 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 Muchiri Gatheca, counsel for the Applicants

Edna Court Assistant