REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ADOPTION CAUSE NO. 5 OF 2014 (O.S)

IN THE MATTER OF THE ESTATE OF DM (CHILD)

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION ORDER BY AIN AND DN

AND

IN THE MATTER OF THE CHILDREN ACT, CAP. 141

JUDGMENT

The applicants, AIN and DI seek to adopt baby DM. They pray for this order in an originating summons dated 18 December 2013 but filed in court on 26 February 2014. In a joint affidavit filed in support of the summons, the applicants have sworn that they are a married couple respectively aged 38 and 30.

They have also sworn that the child they seek to adopt (hereinafter referred to as "the child" or "Baby ") has been in their custody since 10 October 2009 when they got him from New Life Home Trust or Little Angels Network, which is an adoption society registered as such in accordance with **Section 177 of the Children Act**, cap. 141 and the rules made thereunder.

Filed alongside this summons is a report dated 10 February 2010 by the adoption society declaring the child free for adoption and a certificate issued to that effect; in the report, a detailed background of the circumstances under which the child was born and how he ultimately ended in the applicants' custody is given.

As far as it is relevant to the present application, the report says that the baby was born D.M. on 2 February 2009 at Nyeri Provincial General Hospital to one J M. His mother abandoned him in the hospital's maternity nursery on 3 February 2009, just a day after he was born. A report of the abandonment was made to the police and entered in the occurrence book as 27/3/02/2009. On 3 March 2009 he was discharged from hospital and placed at New Life Home Trust; this was after the Nyeri District Children Officer applied for a committal order in the Magistrates Court at Nyeri in Protection and Care Case No. 8 of 2009.

And even after he had been committed to the New Life Home Trust children's home nobody laid any claim on him; in particular, the government children's office confirmed vide its letter dated 28 August 2009 that no one had come up to claim the child as at that date. Similarly, the police department by its letter dated 27 August 2009 confirmed that efforts to trace the mother of the child had been unsuccessful.

Again, for the entire period he was at New Life Trust Home, nobody laid any claim on this child. It did not also receive any information from any source, be it the Department of Children Services, the Police Department or the Hospital where he was born, regarding any persons who might have been looking for or claiming the child.

Against this background, the child was released to the applicants for adoption on 10 October 2009 because he was and is still in need of alternative family care where he would find family love and care, which attributes are unlikely to be found at an institutional care. It is also against this background that the adoption society declared the child free for adoption and issued a certificate to that effect.

Prior to the release of the child to the applicants, a pre-placement report was prepared by Little Angels Network on the applicants. According to this report, the couple had been married for five and half years as at 12 August 2009 when the report was prepared. The first applicant was then employed as a driver at [Particulars Withheld] Primary School while his wife, the 2nd applicant was a food vendor within Nanyuki Town. Their average combined monthly income was then Kshs. 17,000/= which, in the adoption society's view, was sufficient to cater for a family of three.

As at that time, the couple had not been blessed with any children due to a medical condition with which one of them had been diagnosed. Despite being childless, they couple lived harmoniously. They both subscribed to Christian faith and attended the African Independent

Pentecostal Church. They expressed the desire to bring up the child in the same faith if the adoption order was to be granted.

The desire to have a family motivated the couple to seek to adopt Baby D They also want to bring up someone who will inherit their estate upon their demise.

Their proposed guardian is one PMM who also has an adopted child. He resides in Nanyuki where he works as a […] and where his wife runs an […] shop. His wife has no problem with her husband being a guardian to Baby D in the event an adoption order is granted.

As far as the applicants' health is concerned, it was reported that both the applicants had been subjected to medical tests on 20 June 2009 and found to be in good health; they do not suffer from any mental illness or emotional instability.

The couple's house was described as a one bedroom rented house located off Nanyuki Doldol highway. It was one in a plot of five houses sandwiched between two other plots and secured by a metal gate. The living room was described as spacious. The bathroom and the toilets were located outside the house. The house was connected to electricity power and water. In the society's view, the home environment was conducive for the child's upbringing.

Amongst the applicants' assets are one care of land, bank savings and an up country three-bedroomed house.

In the adoption society's assessment, the applicants are fit to adopt the child.

On behalf of the Director of Children Services, the Children's Department, Laikipia East Sub-County also filed a home visit report; as a matter of fact, it filed two reports, but it is the latter report dated 23 October 2019 that appears more comprehensive.

Of worth noting in the first report is that during the first home visit which, going by the date of the report, was around 15 April 2015, the couple had just had a biological child of their own. At the time of the visit their newly born baby boy was a month old.

In the second visit, Wenslaus Musindayi Agala, the sub-County children officer established that the couple had just constructed a family house at Runda Estate in the outskirts of Nanyuki town. It is a four-bedroom bungalow connected to electricity and piped water. The compound is secured by an eight feet perimeter wall. The applicants live in the house with three other children one of whom is the subject child; the other two is the couple's own biological child and a foster child. They also live with a house help.

The first applicant was now running his own taxi business and the 2nd applicant was keeping poultry and running a business of her own in Nanyuki town. The three children attend a primary school in Nanyuki; the subject child is in class five while his 'siblings'are in preprimary 2 and Primary 1 respectively. All the children are covered under the National Hospital Insurance Fund Scheme and the subject child does not have any chronic illnesses.

The entire family of the applicants is of Christian faith persuasion and attends Glory Christian Church International.

In the children officer's assessment, the applicants are capable and well suited to adopt the child.

The law on adoption is found in **Part XII** of the **Children Act**. **Section 154 (1)** of the Act empowers this Honourable Court to make an order authorising an applicant or applicants to adopt a child once they make an application for such an order in a prescribed form.

As to who may be adopted, **section 157** of the Act says that any child who is resident within Kenya may be adopted irrespective of whether the child is a Kenyan citizen or was or was not born in Kenya. A proviso to this section is to the effect that the application for adoption will only be entertained if the child concerned has been in continuous care and control of the applicant or applicants for a period of at least three consecutive months preceding the application. Even then, the child must have been declared free for adoption and a certificate issued in that behalf by a duly registered adoption society in accordance with section 156 (1) of the Act.

If I may pause here for a moment, there is no doubt the summons before court is such an application contemplated under section 154 (1) of the Act and that under section 157 as read with section 156 (1) of the same Act, Child D is a proper candidate for adoption; he was not only born in Kenya but he is a resident of this country as well. A certificate by a duly registered adoption society declaring him free for adoption has been issued. Before the present application was made in February 2014, he had been in the continuous custody and care of the applicants since October 2009, more than three years since the adoption society handed him over to them. Thus the relevant provisions in sections 154, 156 and 157 have been complied with.

Section 158 (1) prescribes the applicant or the applicants or the sort of person or persons eligible for an adoption order; it states as follows:

> ***158. Adoption applicants***
>
> ***(1) An adoption order may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants—***
>
> ***(a) has attained the age of twenty-five years and is at least twenty-one years older than the child but has not attained the age of sixty-five years; or***
>
> ***(b) is a relative of the child; or***

(c) is the mother or father of the child.

The present application is a joint one by applicants who are spouses, and both are well beyond the age of twenty-five years, but they also still have got a long way to go before they hit the age of sixty-five years. The youngest of them was thirty-one years in April 2015 at which time Baby D was six years old; it is thus obvious that the age gap between either of the spouses and the child is more than twenty-one years. Apart from being the prospective adoption parents of the child, neither of the applicants is related to the child in any way. In short, the applicants meet the threshold set in section 158(1).

Even where an applicant or the applicants meet satisfactorily any of the conditions set in section 158(1), section 158 (2) and (3) lays out circumstances under which the adoption order will be refused; it states as follows:

(2) An adoption order shall not be made in favour of the following persons unless the court is satisfied that there are special circumstances that justify the making of an adoption order—

(a) A sole male 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.

Fortunately for the applicants, none of these circumstances can stand in the way of their application for the adoption order; subsections 2 (a), (b) and (d) do not apply to them for the obvious reason that they are joint applicants and they are Kenyans; 2(c) is also inapplicable to their case because none of them has attained the prohibited age of sixty-five years old.

Section 158. (3) states as follows:

(3) An adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them—

(a) is not of sound mind within the meaning of the Mental Health Act (Cap. 248);

(b) has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule to this Act or similar offences;

(c) is a homosexual;

(d) in the case of joint applicants, if they are not married to each other;

(e) is a sole foreign male applicant:

Provided that the court may refuse to make an adoption order in respect of any person or persons if it is satisfied for any reason that it would not be in the best interests of the welfare of the child to do so.

As earlier noted, both the applicants were examined and found to be not only mentally fit but were also established to be medically fit in every other respect; they produced clearance certificates showing that they have never been charged and convicted of any of the offences specified in the schedule to the Act or any other offences for that matter.

The spouses are heterosexual and there was neither evidence nor any suggestion that any of them could be a homosexual. Again, theirs is a joint application and they are Kenyans in any event and so subsection 3(e) does not affect them in any way.

Subsection 4 of section 158 deals with various forms of consents that are necessary before an adoption order can be made; these are:

(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.

None of these consents is warranted in the Baby D' case because under section 159 (1) (a), he is deemed to be an abandoned child: according to that section, "***abandonment may be presumed if the child appears to have been abandoned at birth or if the person or institution having care and possession of the child has neither seen nor heard from a parent or guardian of the child for a period of at least six months."***

After his mother abandoned him in hospital, neither his father nor his guardian came forward at any time to claim him. Efforts by the Children Department or the police to trace his parents or any of his relatives also proved unsuccessful. Thus, the applicant's case is such a case that any of the prescribed consents can safely be dispensed with.

An applicant or applicants for an adoption order must not only be willing to adopt a child but they must also have the means to sustain the child and provide him with the necessities including food, shelter, clothing and education. Section 163 (1) (b) is to this effect that the court must be satisfied of the ability of the applicant to maintain and educate the child before making an adoption order.

According to a home visit report of 15 April 2015 by the Laikipia East Sub-County Children Officer, the family lived in a one-bedroom house. An earlier pre-placement report by the Adoption Society, more particularly dated 12 August 2009, showed that the first applicant was employed as a driver earning only Kshs. 5,000/= per month; the couple's combined monthly income was then Kshs. 17,000/=.

The Children Officer's latest home visit report on the social wellbeing of the applicants and the child showed that their state of life has greatly improved during the past four or so years. As of October 2019, the couple were living in their own four bedroomed mansion in what I suppose is a middle class neighbourhood, on the outskirts of Nanyuki Town. Their house is connected to electricity and piped water and is secured by a perimeter wall, an environment that the Children officer described as conducive to the wellbeing and upbringing of the child.

Apart from the conducive home environment, the child was in a good school. The subject child together with the rest of the applicants' children have a medical insurance cover by a reputable government insurance firm.

At the time of hearing of the summons, the first applicant informed the court that he is a businessman in Nanyuki Town, and he now earns averagely a monthly income of Kshs. 30,000/=. His wife, the second applicant, said that she earned Kshs. 70,000/= per month from her own business also in Nanyuki Town.

It is therefore apparent that the financial fortunes of the applicants have improved with time.

For present purposes, it is apparent that the applicants have the means to maintain and support the subject child with all that he may require for his upkeep and education.

It is worth noting that they took in Baby D with the prospects of adopting him when had given up on getting a biological child of their own. However, they finally got one by which time the Child D had been with them for close to six years. Despite this later pleasant development, the two applicants were in agreement that they understood the effect of an adoption order. In particular, they understood that once this order is made Baby D would be deemed to be their child in every respect as their own biological child and would thus be entitled to every right their own biological child would be entitled to including inheritance rights.

After all is said and done, the ultimate question that counts is whether it would be in child's best interests to make the adoption order sought for. This is what section 4(2) is all about; it reads as follows:

4. Survival and best interests of the child

(1) ...

(2) In all actions concerning children, whether undertaken by 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.

This theme of the child's best interests is reiterated in section 4. (3) of the Act and states as follows:

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

(4) ...

In the final analysis, when I consider the circumstances in which the subject child was rescued and his life with the applicants since then; his general well-being in a natural family set-up rather than the alternative of growing up in an institution, I am inclined to conclude that it is in the best interests of Baby D to make an adoption in favour of the applicants.

Accordingly, I allow the applicants' originating summons dated 18 May 2013 and allow the applicants to adopt Baby D who shall henceforth be called DNI The Registrar General is ordered to make appropriate entries in the Adopted Children Register accordingly. It is so ordered.

Signed, dated and delivered on 5 August 2020

Ngaah Jairus

JDUGE