



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

ADOPTION CAUSE NO. 6 OF 2014

IN THE MATTER OF E.G. (T.D. CHILD)

AND

IN THE MATTER OF AN APPLICATION ORDER BY RMN & SG

AND

IN THE MATTER OF THE CHILDREN'S ACT CAP 141

JUDGMENT

By an originating summons dated 1 April, 2014, the applicant sought to adopt child TD, who from the records filed in court is thought to have been born on 1 March, 2012.

According to a report filed in court on 28 May, 2014, declaring child TD free for adoption, Little Angels Network, which is an adoption society registered as such in accordance with **Section 177 of the Children Act** and the rules made thereunder, informed the court that the biological parents of the child or his parent were unknown since he was only found abandoned near Nyeri police station on 1 April, 2012 at 1:00 A.M.

The child was found and rescued by police who were then on patrol; they booked him at Nyeri police station and thereafter took the child to Nyeri Provincial hospital for medical attention.

The child's plight was reported to Nyeri District Children's office for home placement; subsequently, the child was placed at New Life Home Trust at Nyeri. He was formally committed to this home by the order of the Nyeri children's court in Care and Protection Case No. 58 of 2012 upon application by the Children Officer.

In declaring the child free for adoption, the adoption society reiterated that from the very beginning the police were involved in the rescue of the child and were thus aware of the circumstances of the child's abandonment, his rescue and subsequent placement in a children's home.

In addition, the police confirmed vide a letter dated 4 October, 2012 that efforts to trace the biological family of the child or his next of kin had proved fruitless.

For the entire period that the child was at the children's home no one turned up to claim him and neither did the home receive any information from the hospital, the department of children services or the police department on the persons who would ordinarily have claimed the child.

On the 5th June, 2013, the child was put into the custody of the applicants for foster care with the prospects that they will adopt him.

In the adoption society's view, since the child was abandoned and was unclaimed and since he needs family care an adoption would be in his best interest. The society attached a certificate pursuant to section 156(1) of the Children's Act, declaring the child free for adoption. Both the report and the certificate were produced in court by the society's representative, one Simon Macharia.

Besides the adoption society's report, I directed the Director of Children Services to file a report pursuant to the functions of his office as prescribed under section 38 of the Act; of particular interest to the court in making this order was section 38. (2) (g) which requires the director to make such inquiries and investigations and provide such reports and assessments as may be required by the court and also section 38 (2) (h) which requires him to provide all necessary assistance to the judicial process where orders may be issued in relation to children who may need support or any other form of assistance.

The Director filed his report on 14 April 2015; in it he reiterated the circumstances under which the child was rescued and his general wellbeing from that time he was placed in the custody of the applicants pending the institution and conclusion of the present proceedings. Upon conducting a home visit, the director established that child bonds well with the prospective adoptive parents and regards them as 'mum' and 'dad' respectively. According to the report, "*the child is full of life. He is healthy and has no medical complications*".

As far as the family home is concerned, it was noted in the report that it is on an 1/8 of an acre of land. The family lives in a self-contained single bedroom house with a spacious living room and a kitchen. It is connected to electricity and piped water. The director's general observation was that the child was comfortable with the prospective adoptive parents and the home environment was suitable for his upbringing. He concluded his report by recommending an adoption order in favour of the applicants. The report was produced by the children officer from Mathira East Children's office.

At the hearing of the summons, the 1st applicant stated that he was aged 45 and that he married the 2nd applicant in 2003. Together they have not been blessed with any child and it is for this reason that they seek to adopt a child. He understood that if an adoption order is made, the child would be entitled to all the rights his own biological child or children would have been entitled to including the rights to inherit his estate. As far as his financial status is concerned, he said that he is a businessman earning an average income of Kshs. 20,000/- per month. His wife, the 2nd applicant, is employed and earns Kshs. 15,000/= per month. In his estimation, their combined income is sufficient to cater for them as a family and for the child's up-keep and education. The second applicant agreed with him.

One of the reasons why the child here is available for adoption is that he was abandoned at birth. Abandonment for purposes of adoption proceedings is defined under **section 159(1) (a)** of the **Children Act 2001**; according to this provision of the law, "**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.**"

The available evidence shows that the child was abandoned at birth; he was rescued by good Samaritans who found him literally abandoned near a police station. More so, nobody stepped forward to lay any claim on him and neither his parents or any of his next of kin could be located despite police efforts to trace them for the entire period he was with the applicants since his rescue. It is safe to conclude, in these circumstances, that the child is an abandoned child and therefore he is not only eligible for adoption but it is in his best interest that he is adopted.

Again, under section 157 of the Act, 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. Further, the child has 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.

The next question is whether the applicants are the right candidates for adoptive parents generally and whether they are better suited to adopt the child TD in particular.

The requisite conditions which an applicant or applicants for an adoption order and generally the circumstances under which an adoption order may or may not be made are spelt out in section 158 of the Children Act; 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.

(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.

(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.

(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 applicants are not the child's relatives and none of them is the mother or father of the child; but they are spouses both of whom are at least 25 years old and neither of whom has attained the age of sixty-five years. The difference in age between them and the child is more than 21 years. Accordingly, they meet the conditions set out in section 158(1) of the Act. They also meet the conditions set out in section 158 (2) because there is no evidence that either of them falls in the category of persons specified in that section.

Again, an adoption order would not be refused on any of the grounds in subsection (3) because, firstly, the applicants are of sound mind; according to the adoption society's report, they both underwent a medical evaluation in accordance with Regulation 18(2) of the Regulations made by the Minister and were established to be of sound mind. Secondly, they produced police clearance certificates showing that they are both of good conduct in the sense that they have not been charged and convicted of any of the offences set out in the third schedule to the Act or similar offences.

It was also never suggested that they are homosexuals; instead they are a married couple having celebrated their marriage in church under the African Christian Marriage and Divorce Act, cap. 151 on 27 September 2003. They are also both Kenyans.

Abandonment, as noted, is presumed considering the circumstances in which the child was rescued and also remembering that neither of his parents or any of his relatives were traced. Thus, the requirement for a consent under subsection (4) can be dispensed with in the spirit of section 159 of the Act.

There is a further condition in the proviso to section 157 (1) of the Act; it says that no application for an adoption order, shall be made in respect of a child unless the child concerned has been in the continuous care and control of the applicant within the Republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants, as the case may be, have evaluated and assessed by a registered adoption society in Kenya.

This condition has been satisfied; a copy of "Care Agreement" executed between the adoption society and the applicants shows that the latter received the child in their custody on 5 June 2013 and it is not until the 8 April 2014 that they lodged the present originating summons. As at the time the summons was filed a pre-placement report had been made by the adoption society on 24 April 2013. Copies of the "care agreement" and the pre-placement report were filed alongside the summons.

Going by the adoption society's report, it is also worth noting that both the applicants have been evaluated by society which is duly registered in Kenya in accordance with the relevant regulations; its report, as earlier noted, has been filed in this court.

On whether the applicants have the means to cater for themselves and the child, they were both in agreement that they do. According to the adoption society's report, the 1st applicant earned Kshs. 80,000/= per month while his wife earned Kshs. 30,000/= per month as at 24 April 2013 when they were evaluated.

In his social enquiry report, the director never made any reference to the applicants' earnings; however, the applicants themselves informed the court that they earn a combined income of Kshs. 35,000/= per month. This was their earnings as late as 25 November 2019 when their summons was heard. If the adoption society's report is anything to go by, it would imply that their financial fortunes have changed for the worse, with their monthly earnings dropping from Kshs. 110,000/= in 2013 to Kshs. 35, 000/= in 2019.

As much as it is the applicants' position that this amount is sufficient to cater for their needs and that of the child, the stability of their income is something that this court would be concerned about in view of the varied figures given by the applicants themselves and the adoption society; I am also concerned that the director of children services could have missed this important aspect of the applicants' social status in his home inquiry report. This is a concern because according to section 163 (1) (b) the court must be satisfied of the ability of the applicant to maintain and educate the child before making an adoption order.

One other thing I have noted in the adoption society's report is that although the applicants were examined and found to be of sound mind, the 2nd applicant was diagnosed with a medical condition in 2007. Medically speaking, it is not certain for how much longer she will endure this condition and still deliver on her parental responsibilities towards the child if the adoption order is made in the applicants' favour.

Notwithstanding these concerns, it is worth noting that the child has been in the custody of the applicants since he was a little over a year old in 2013. For the past seven years or so, he has not known any other family or parents apart from the applicants. As the director noted in his report, the child fondly refers to them as 'mum' and 'dad'. It would be traumatising for him if he was to be suddenly plucked from this family on the basis of the concerns I have raised. In considering whether an order for adoption should be made, the child's best interest is the overriding factor. In these circumstances, an adoption order would, in the language of **section 4(2) of the Children Act, 2001**, be in the best interests of the child.

But considering the concerns raised which, no doubt, are legitimate, a balance has to struck between those concerns and what is now an inevitable adoption. Bearing this in mind, I allow the applicants' originating summons dated 1 April 2014 to the extent that the applicants are hereby allowed to adopt Baby TD who shall hence forth be called EG. The Registrar General is ordered to make appropriate entries in the Adopted Children Register accordingly. The order is, however, subject to the following conditions:

1. The applicants shall file in this Honourable Court financial statements of their income for the last six months within fourteen days of the date hereof.
2. BM who has been the child's guardian *at litem* is now appointed as his guardian and will remain so appointed until the child reaches the age of majority or until further orders of this court.
3. In accordance with section 163(2)(c) of the Act, the applicants shall be under the supervision of the Child Welfare Society of Kenya for the next of five (5) years from the date of this judgment; the applicants are hereby directed to submit to the supervision of the adoption society and accept the advice it may issue from time to time within the supervision period.

Orders accordingly.

Signed, dated and delivered on 5 August 2020

Ngaah Jairus

JDUGE