



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ADOPTION CAUSE NO. 72 OF 2019

IN THE MATTER OF THE CHILDREN'S ACT (ACT NO. 8 OF 2001)

IN THE MATTER OF AN APPLICATION FOR AN ADOPTION ORDER IN RESPECT OF BABY J.

FNW.....FIRST APPLICANT

ANN.....2ND APPLICANT

JUDGMENT

1. FNW and ANN (hereinafter referred to as the “1st and 2nd Applicants” respectively) moved to this court through an Originating Summons pursuant to Sections 154, 156, 158, 159 and 160 of the Children’s Act seeking orders to adopt baby J and who upon adoption should be named LN. They further sought orders presuming the said child as a Kenyan; that AWW be appointed as guardian ad litem to the baby; Director Children services to evaluate the applicants and file a report; the Registrar General to enter the adoption order in the adopted children’s register and; JHN and PGW be appointed as legal guardians.
2. The Originating Summons is premised upon facts stated in the applicant’s joint statement dated 7th May 2019 and an affidavit in support jointly sworn on the same day in which they averred that the minor they wanted to adopt was found by a good Samaritan having been abandoned at Kawangware 46.
3. The applicants are Kenyan citizens. The 1st applicant is 60 years old while the 2nd applicant is 59 years. The two are husband and wife having cohabited as such since 1999. They do not have any biological child as the only one they had died not long after their marriage. Due to the second applicant’s medical condition leading to several miscarriages, they have not been lucky to get another child.
4. The 1st applicant is a plumber by profession currently residing and working for United States government in Iraq. The second applicant is working as a support staff with KICD. Their motivation to adopt the child is anchored on the desire to make their family a complete unit.
5. Concerning the baby presumed to have been born on 1st June 2013 or thereabout, he was found by a good samaritan having been abandoned at Kawangware 46. The matter was reported to Riruta Police Station vide O.B No. [xxxx].
6. The child was then taken to Hope House Babies Home as further investigations were being conducted. On 23rd June 2014 the child was presented before Nairobi Children’s Court for a formal committal order which was made vide **Protection and Care Case No. 138/2014** for a period of 3 years.
7. Despite every effort by the Police and Children Department trying to trace the minor’s parents and or relatives, none came to fruition. As a consequence, the process of adoption commenced with the Little Angels Adoption Society carrying out further investigations. This effort is confirmed by the initial letter dated 10th February 2014 and final letter dated 1st September 2014 from Riruta Police Station.
8. Six months having lapsed since the abandonment report, the Little Angels network services held its Case Committee on 8th May 2015 and declared the child free for adoption. A Certificate S/No. 001637 was issued in compliance with Section 156(1). Subsequently, the child was placed under the care and control of the applicants pending further adoption procedures.
9. Upon instituting this suit, the applicants sought the appointment of AWW as guardian ad litem. Consequently, the proposed guardian was appointed on 17th October 2019 and the Director Children Services directed to file his evaluation and assessment report within 45 days.
10. Prior to the hearing, the Director Children Services filed his Assessment and Evaluation report dated 20th February 2020 and filed on 9th

March 2020 thus recommending the adoption. Equally, the guardian ad litem filed her report on 14th January 2020 also recommending the adoption. The Little Angels Network had earlier on filed their report dated 8th May 2015 recommending the adoption.

11. During the hearing which was conducted virtually, the applicants pleaded with the court to grant their prayers. They confirmed and acknowledged that they had understood the consequences of the adoption and that it is permanent in nature. They also stated that they understood their parental obligations to the child and that he had a right to inherit their property just like any other biological child.

12. After the close of their case, the court reserved the file for Judgement. However, while perusing the statement in support of the application, it revealed that the child was born out of an incestuous relationship and not a case of abandonment as averred in their joint affidavit and other stakeholders' reports including that of the Director of Children Services. With this contradiction, the court deferred delivery of Judgment and sought clarification from the applicant and their Advocate.

13. It was later confirmed vide a supplementary report of the Director Children Services and an affidavit sworn by David Kamau Githinji Advocate sworn on 11th June 2020 in which they confirmed that paragraph 10 of the statement in support of the application was erroneously lifted from another adoption file or pleadings and has no relevance with this case. Both parties reiterated the position that, the subject herein is an abandonment case and not a child born out of an incestuous relationship.

14. According to the evaluation and assessment reports of all stakeholders, the applicants are suitable and qualified to adopt the baby. That they are; financially stable, Christians with no criminal record and are physically, mentally and emotionally it.

15. I have considered the application herein, material in support and testimony by both applicants. The issues for determination are;

(a) Whether the minor is available for adoption.

(b) Whether the applicants have met the requisite conditions to adopt the baby.

(c) Whether the adoption is in the best interest of the baby.

16. The minor herein was found having been abandoned at Kawangware 46 on 9th February 2014. The child presumed to have been born around 1st June 2013 was about 8 months by the time he was found. Every effort by the Police, Children Department and Little Angels Network in tracing the parents and or relatives did not bear any fruit. This is confirmed by the Police initial and final letters dated 1st February 2014 and 1st September 2014 respectively.

17. In the absence of any further information regarding the origin of the child whether born in Kenya or not, this court will only seek guidance and direction from Article 14(4) of the Constitution which recognizes any child below 8 years who is found within Kenya with no known parents or nationality as a Kenyan citizen by birth. Further, Section 157(1) of the Children's Act does provide that:-

“Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was or was not born in Kenya.”

18. Guided by the two provisions above and further considering that the child is above six weeks and below eighteen years who does not have any known parent or relative, it is my finding that, the child who has since been declared free for adoption is qualified and available legally for adoption. To that extent, the requirement for consent from the parents or guardians under Section 159 of the Children's Act does not apply.

19. Touching on the adoptive parents' suitability to adopt, they are both adults aged between 25 and 65 years being the age limit within which the adoptive parents must fall pursuant to Section 158 of the Children's Act. They are Kenyan citizens thus satisfying the adoption criteria.

20. They have been described as being financially stable. They are all in gainful employment. They are socially and morally upright, Medically, physically, mentally and emotionally fit. Both stake holders' reports recommended the applicants. From my assessment during the hearing, and taking into account that the child has been under their care and control for about 5 years now without any complaint, I am satisfied that the Applicants have met the conditions precedent to adoption.

21. As regards the question of whether the adoption is in the best interest of the child, the court ought to take into account the critical and paramount consideration of the child's best interest principle as underscored under Article 53(2) of the Constitution and Section 4(2) and (3) of the Children's Act.

22. The subject herein was left at a bus stage commonly known as Kawangware 46. Since he was rescued on 9th February 2014, about six years down the line nobody has bothered to look for him. Every endeavour by the Police, Children Department and Adoption Society to trace his parents or relatives have not born any fruit. It would appear the intention in abandoning the child was to expose him to every possible danger including death.

23. Having found a home, provision of basic necessities e.g food, shelter, food, clothing, education and clothing, it calls for any right thinking person to conclude that, it is in the best interest of this child that he be adopted by a caring person for the sake of his safety and wellbeing. Society is duty bound to come to the aid of an abandoned kid through adoption where applicable.

24. The child has fully bonded with the adoptive family. He is assured of a home, inheritance and generational identity free from any social stigma like being homeless besides provision of necessary basic necessities.

25. Accordingly, it is my finding that the application is merited and the same is allowed with orders;

(a) That the applicants are hereby authorized to adopt baby J who henceforth shall be known as LN.

(b) That the child is presumed to be a Kenyan citizen.

(c) That the child's date of birth shall be 7th June 2013 and place of birth Kawangware Nairobi County Kenya.

(d) That consent from the biological parents and or guardian is hereby dispensed with.

(e) That the Registrar General is directed to enter the adoption order herein into the adopted children's register.

(f) That the guardian ad litem is hereby discharged.

(g) That JHN and PGW are hereby appointed as legal guardians to the child in the event of death or eventuality befalling the applicants.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2020.

.....

J. N. ONYIEGO

JUDGE