



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

ADOPTION CAUSE NO. 1 OF 2020 (O.S)

IN THE MATTER OF THE CHILDREN'S ACT, 2001

AND

IN THE MATTER OF ADOPTION OF BABY TG ALIAS (HRI) (A CHILD)

AND

IN THE MATTER OF

BABY PO (HRI).....CHILD

AND

MOO AND NGOM.....JOINT APPLICANTS

JUDGMENT

1. The applicants herein **MOO AND NGOM** [full names withheld] lodged in this court an Originating Summons dated 13th March, 2020 seeking for orders that, .PA [full name withheld] be appointed as guardian litem of **BABY TG alias HR1 [full name withheld]** second, that the Director, Children's Department Office Siaya County investigates the applicants' fitness to adopt Baby HRI third, that the applicants be authorized to adopt baby HRI and that the Court be pleased to appoint the 2nd applicant's sister EN to take care of the interests of the Child should any misfortune befall the applicants herein; that the child be renamed HRI; that the child be declared a Kenyan citizen; that the Registrar General do make appropriate entries in the Adopted Children's Register; and that the Registrar of Births and Deaths do issue a certificate of Birth to the Child.
2. The applicants swore a joint affidavit and statement in support of the Originating Summons. They deposed that they are Kenyan citizens and intend to adopt the child herein HRI That they have no blood relationship with the said child and that they have previously in 2014 applied for and been granted adoption orders for another child. That they earn over Kshs 50,000 per month the child in question has been declared free for adoption by the Administrator of the Adoption Society; that the said child is in their custody and that he has never been maintained or seen by his biological parents ever since the applicants took his custody.
3. Annexed to the joint affidavit was a bundle of documents relating to the process by which the child was placed in the foster care of the applicants herein, a statement in support of the Originating Summons herein for adoption order
4. The applicants also exhibited copy of their marriage certificate showing that they are in a monogamous marriage celebrated under the Marriage Act, 2014 on 27th October, 2015 after previously being married under Customary Law.
5. They also exhibited consents of proposed guardian ad litem. They also annexed certificates of fitness of the said proposed guardian *ad litem*. The applicants further annexed a placement file from a registered Adoption Society, **Kenya Children's Home Adoption Society**, declaring the child free for adoption and detailing the process that the applicants have gone through to be declared fit to adopt the child. They further annexed the 1st applicant's biological Children's birth certificates, Referee forms, medical reports, Certificates of good conduct, reference church letter, Case Committee Ratification Form, Care and Placement Agreement, the child's admittance form, evidence that the child was found abandoned at about 5 months by a good Samaritan, initial police letter and OB number, Age assessment report and HIV status report, child's clinic cards and committal orders, tracing reports by the adoption society and final letters by the Children's department. In addition they annexed a certificate declaring the child free for adoption.
6. **When the matter was** placed before me for directions on 5th June 2020, I directed the Siaya County Children's Officer to file a comprehensive report on the applicants' suitability to adopt the child. The said report signed by Mr. Jemin Konyango, County Director, Children Services Siaya County was filed in court on 16th July 2020.

7. The applicants are aged 50 years and 36 years respectively. They are Lawyers by Profession and the 1st applicant is in business and a practicing pastor whereas the 2nd applicant works as prosecution Counsel.
8. The 1st applicant is blessed with 2 of his own biological children a boy EBO born on 29/12/2004 and a girl JJA born on 23/7/2010 whereas together they have an adopted child [a daughter] born in 2013 as the medical reports show that the 2nd applicant has primary infertility issue.
9. On 28th July 2020 this court did issue and order appointing ENM as guardian ad litem for the child pending judgment. This was after examining the applicants orally in court and the proposed guardian ad litem
10. From the oral examination of the applicants herein, they wish to adopt the child herein who is a boy and who has been in their custody for a period exceeding three months from 20th February 2019 as confirmed by the Adoptive Society duly registered as such under the **Children Act, 2001, Cap.141** Laws of Kenya and the freeing certificate issued pursuant to section 156 (1) of the Children's Act The other adopted daughter TTA was born in 2013.
11. In a report compiled by the said Adoption Society Kenya Children's Homes filed in court on 30th June 2020, baby HRI was declared free for adoption, and is presumed to have been born on 15th July 2016 as he was found abandoned and his parents have never been traced despite efforts to do so by the police and the adoption society.
12. The Good Samaritan who rescued the child took him to the police station and recorded a statement which is in the file.
13. **On the 20th February 2019** the Adoption Society issued a Certificate declaring the child free for adoption following Case Committee meeting approved vide **Case No. 2 of 2017 at Rongo Law Courts on 6th December 2017** pursuant to section 158 of the Children's Act, 2001.
14. The applicants herein were interviewed by the Adoption Society on several occasions and the Director Children's Services Siaya County. This is because they reside in Siaya County where the 1st applicant does business and runs a church whereas the 2nd applicant is a prosecutor at Ukwala Law Courts.
15. Recommendations from the Adoption Society are that the applicants are prepared to adopt the child as they have experience in raising their own three children, one adopted. That they also have sufficient means to care for their family. That they have shared their desire with immediate family members who have consented to the applicants adopting the child herein without conditions.
16. This Court had the opportunity to see, observe and talk to the child HRI and the other three children 'Siblings' in court and the Child relates well with his prospective adoptive parents and is without any manifest medical or health concerns. He was active, healthy and very close to both prospective adoptive parents.
17. The adoptive parents have no history of any medical complications that can hinder them from giving the child quality upbringing. They annexed copies of medical reports for their other three children who are all healthy, even by physical appearance.
18. The applicants are also said to be committed Christians and the 1st applicant is a pastor. They promise to bring up the child in a Christian and God fearing setting. They are described by the adoption Society as good people with strong social, moral and spiritual ethics ready to continue to provide fully for the well-being of the child and family and have the best interests of the child at heart. That they are hardworking, humble and of integrity.
19. The applicants are also recommended and commended highly by the Director Children's Services, Siaya County who also interviewed them and file his report in court on 16th July 2020. following the Covid 19 situation, the children undergo Home schooling which the DCS found appropriate. The applicants are said to be responsible parents and passionate about children and are highly recommended to be adoptive parents of the child.
20. The attached criminal citation for the year 2014 shows that the applicants have no past criminal record. They have stable income with strong parenting skills having raised the 1st applicant's own two biological children and one adoptive daughter and are ready for any challenges that face every other parent. The Children's Officer was satisfied that the general environment in which the child lives was conducive for his upbringing. The Children's Officer assessed the applicants as people who have positively embraced the adoption process; that they too assured him that they have the support and encouragement from their respective families and friends. Based on the findings and observations, the Children's officer recommended that the applicants be allowed to adopt the child.
21. I have heard the applicant's application, seen the applicants in court and also observed the child HRI who was in court and very fond of his prospective adoptive parents. He easily interacted with both parents and called them mom and dad. He is easy going. I had occasion to hear from the adoptive parents and the court appointed guardian ad litem as well as Mr. Konyango the DCS Siaya County
22. I visually observed how the child freely related with his prospective adoptive parents and I was left with the impression that the applicants are clear of what the process involves and are under no illusion of their responsibilities towards the child once an adoption order is made. For instance they are clear in their minds that they will have to embrace the child as they would have embraced their own biological child; that they are responsible for his parental care and at the very minimum they must ensure that he is nourished, he has a medical insurance, a roof over his head, he is clothed and educated. More importantly, the child has inheritance rights over whatever they own in equal measure as their own biological children.

23. I am satisfied that the applicants can meet the child's needs that may need financial input. My appreciation of their financial capabilities arises from the affidavits filed in court that they hold a bank account at ABSA in Kenya and a pay slip for the 2nd applicant shows that she is indeed an employee of the ODPP.

24. Their combined monthly income are said to be about Kshs 1. 7 million Kenya Shillings annually and their expenditure is about 58,500 monthly.05 million.

25. The Children's Officer attended court in person to confirm the position in their report and the reports from the Adoption Society and were all in agreement that the Originating Summons ought to be allowed. The child too was not restless in the arms of the applicants and kept moving from his 'mother' to his 'father'

26. Therefore, this Originating summons has to be considered in the context of the law applicable to applications for adoption as provided for in the Children Act.

27. Section 158 of that Act which the applicants invoked 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.”

28. Section 158 gives a picture of a person who is eligible to apply for an adoption order; it also provides a picture of one who is not. The section also prescribes the circumstances under which an adoption order will be refused and also lays out the basic requirements in an application for an adoption order.

29. Section 154(1) of the Children Act gives this court power to make an adoption order and the section provides:

“Subject to this Act, the High Court may upon an application made to it in the prescribed form make an order (in this Act referred to as “adoption order”) authorizing an applicant to adopt a child.”

30. Under Subsection (2) of the said section, the proceedings in respect of an application for adoption shall be heard and determined in chambers and that the identity of the child and the applicants shall always remain confidential.

31. These proceedings were held in utmost confidentiality. No names were called out and owing to the tiny chambers at the High Court at Siaya, the public were cleared from the courtroom before proceedings were conducted in camera.

32. Prior to clearance of the courtroom, the applicants and the child were accommodated outside the courtroom and were only called in after the court was fully cleared of other people.

33. One of the pre-requisites for such an adoption order is that before any arrangements for adoption are commenced, the child must be at least six weeks old and has been declared free for adoption by a registered adoption society (See **section 156(1)** of the **Children’s Act, 2001**).

34. From the evidence available on record, there is no doubt that this provision has been complied with and when applicants took custody of the child with the intention of adopting him in February 2019, he was about 2 ½ years old. A certificate declaring the child free for adoption was duly issued on 20th February 2019 by the Adoption Society KCH.

35. It is also apparent that before the commencement of the adoption process the child was available for adoption. Section 157(1) of the Act provides that any child who is resident within Kenya may be adopted irrespective of whether the child is a Kenyan citizen or was not born in Kenya. The available evidence on record points to the fact that baby HRI was born in Kenya and he was a resident of this country at the material time.

36. There is a proviso to section 157(1) which has to be taken into account; it states as follows:

“...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 evaluated and assessed by a registered adoption society in Kenya.”

37. The applicants’ Originating Summons was filed in court on 13th March 2020 by which time the applicants had been in continuous care and control of the child for one year and one month from February 2019.

38. It has also been noted that both the child and the applicants have been assessed by a duly registered adoption society and the office responsible for the Children’s Services in the County of Siaya, and they have, in their respective reports, recommended that the child be adopted. They have also established that the child bonds well with the applicants. It follows that the applicant’s application satisfies the proviso to section 157(1) as well.

39. Section 165(2) (c) of the Children Act sets **65** years as the maximum age beyond which a person cannot make an application for adoption. The applicants have demonstrated that they were way below this age at the time the application was made; as noted, they were aged 50 and 36 respectively. Accordingly, the applicants are eligible adoptive parents as far as the requirement as to age is concerned.

40. Besides the age factor, section 158(4) requires an application for adoption to be accompanied by a written consent of the parent, guardian or a person who is liable by virtue of any order or agreement to contribute to the maintenance of the child or parents or guardians of the

mother of the child or the court. If the child has attained the age of 14 years, his or her consent is required.

41. However, under section 159(1) of the Act, the court has power to dispense with the consent if it is satisfied that the parents or guardian of the child have abandoned, neglected, persistently failed to maintain or ill-treated the child.

42. There is evidence that the child was found abandoned outside a bar and taken to the police by a Good Samaritan and a statement recorded. The Police also issued OB number and therefore consent of the child's parents is not required. However, the adoption Society confirmed that the child is available for adoption after failing to trace his parents.

43. Finally, section 159(3) (b) of the Act provides that no adoption order shall be made if the applicants or an applicant 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. The applicants swore an affidavit and annexed certificates of good conduct showing that they have never been convicted of any offence or charged before a court of law and have never received or paid money for the child in issue for purposes of these proceedings. They have also adopted another child whom the court had occasion to see and interact with in court. An adoption order issued on 6th November 2015 by the High Court at Kericho vide HC Adoption Cause No. 9 of 2015 in respect of **BABY GM alias TTA** was annexed. They have also deposed that they have no adverse interests to those of the child.

44. In my humble view, the applicants herein have satisfied this court that neither of them falls short of the requirements of this section in the sense that they have not been charged and convicted of any of the specified offences.

45. In the circumstances, I find and hold that the applicants MOO and NGOM have not only complied with the legal requirements necessary for making of an adoption order but they also understand the consequences of making that order; as they are not mistaken as to their legal, social and moral duties and responsibilities towards this child.

46. I am also persuaded that the applicants not only have the will to adopt the child as their own biological child, but they have also demonstrated that they have the means to provide him with shelter, clothing, food, education and, most importantly, the parental care and protection that he needs and deserves. The report by the adoption Society and the Director, Children's Services, Siaya County established that they have sufficient shelter, a three-bedroom rental house.

47. I am therefore inclined to conclude that besides the fact that the applicants intend to adopt the child as one of their own and to whom they can bequeath their inheritance, it is also in the best interest and the welfare of the child that the adoption order is made in the favour of the applicants herein MOO and NGOM.

48. For the foregoing reasons, the applicants' originating summons dated 13th March 2020 is hereby allowed in the following terms:

- 1. ENM-ENM the sister to the 2nd applicant be and is hereby appointed as guardian of baby TG [TG] alias HRI [HR.] in the event of any eventuality;**
- 2. The applicants MOO and [MOO] and NGOM [NGOM] are hereby authorized to adopt Baby TG [TG] who shall from the date of this Judgment be named as HRIO [HRIO] with full name to be withheld in the publication of this Judgment;**
- 3. The Registrar General is hereby ordered to make the appropriate entries in the Adopted Children's Register accordingly to reflect Baby HRIO [HRIO], the child's legal identity;**
- 4. A formal Adoption Order duly sealed to issue.**

Orders accordingly.

Signed, dated and delivered in chambers at Siaya this 16th Day of September, 2020.

R.E. ABURILI

JUDGE