



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
ADOPTION CASE NO. 113 OF 2019
IN THE MATTER OF BABY EC
AND
IN THE MATTER OF AN APPLICATION FOR ADOPTION
BY
JMM AND MFKI
JUDGEMENT

1. The Applicants herein are husband and wife who have moved to this court under an Originating Summons dated 25th July 2019 seeking orders that:

- 1) **The applicants JMM and MFKI be allowed to adopt the child currently identified as baby EC.**
- 2) **That henceforth, the child be renamed as JIM.**
- 3) **The child's date of birth be declared to be 25th December, 2016 and his place of birth be declared to Malindi.**
- 4) **The child be presumed to be a Kenyan citizen by birth and thus entitled to the rights and benefits thereof.**
- 5) **Consent of the child's parents/guardians be dispensed with.**
- 6) **the guardian ad litem be discharged, and FN be appointed as legal guardian of the child, in the event that the applicants herein are incapacitated or in any way unable to discharge their parental obligations.**
- 7) **The Registrar General be directed to make appropriate entries in the adoption children's register.**

2. The application is supported by a statement of particulars sworn by the applicants on 25th July, 2019. The applicants who are husband and wife contracted a customary marriage sometime in 2004 and thereafter formalized the same through church wedding on 5th December, 2009. They have been blessed with three biological children namely; JM born on the 28th October, 2006, JO born on the 3rd November, 2011 and JM born on 25th October, 2016.

3. JMM herein referred to as the 1st applicant was born 1976. He is currently self-employed after having worked in various local and international organizations as a rehabilitation officer. On the other hand, MFKI hereinafter referred to as the 2nd applicant was born on 19th February, 1986. Professionally, she is a Crop Protection Officer working with KEPHIS as a Plant Crop Protection Officer.

4. The Applicants' intention to adopt the baby is largely motivated by their great love for children; the need to share what they have with a needy child and, the desire to have their children learn on how to accommodate other people in society especially those who are not privileged.

5. Regarding the child herein, he was found abandoned in a pit latrine at M primary school Malindi Sub-County on 25th December, 2016. This was after a young girl named as Mary heard a baby crying from a pit latrine where she had gone for a call of nature. The girl then alerted neighbours who responded by demolishing the pit latrine to save the baby. With the help of a trained mid-wife one Kadzo Baya and

Sr. Rosalia Mugure a nun working within the community, the child was given first aid and then taken to Tawfiq Hospital in Malindi where he was admitted for two days and acquired the name Emmanuel Christmas.

6. The incident was then reported at Malindi Police Station vide OB No. 29/25/12/16. The baby was then taken to Sue Happy House Children's Home where he fell sick and got transferred to Tawfiq hospital for treatment. Due to huge medical bill incurred, Sue Happy Children's home could not manage keeping the child in their custody. The child was subsequently referred to Pope Francis Rescue Centre where he stayed until 8th June 2018 when the children officer recommended further transfer of the baby to Mama Anakuja Children's Home pending processing of adoption report.

7. Vide Malindi Children's Court **Care and Protection Case No. 7/2018**, the child was formally committed at Mama Anakuja Children's Home. Despite every effort by the Police, Children's Office and St. Francis Rescue Centre in tracing the child's relatives, nobody came forward. The police department equally confirmed that they were unable to trace the parents.

8. Subsequently, the child was subjected to adoption process. Through its case committee meeting held on 23rd November 2018, Buckner Kenya Adoption services declared the child free for adoption pursuant to section 159(a)(i) of the Children's Act. A certificate S/No. [...] was issued to that effect. Subsequently, the child was on 8th April, 2019 placed under the care and control of the applicants for a mandatory period of 3 consecutive months preceding adoption proceedings pursuant to section 157(1) of the Children's Act.

9. Upon filing this suit, the applicants sought the appointment of a guardian Ad litem Pursuant to the chamber summons dated and amended on 29th October, 2019. Subsequently, ENB was appointed guardian Ad litem on 23rd April, 2020 and the Director Children Services directed to file an Assessment Report.

10. Prior to the hearing, the guardian Ad litem, Director children Services and the adoption society filed their respective assessment and evaluation reports thus recommending the adoption. They described the applicants as suitable people with stable economic base, Christians with no criminal record, caring, responsible parents and medically fit.

11. During the hearing, the applicants sought court's authority to adopt the baby whom they fondly referred to as their child. They acknowledged that they understood the consequences of adoption and that it is permanent in nature.

12. I have considered the application herein, materials in support and witnesses' testimonies. Issues that arise for determination are:

- a) **Whether the child is legally available for adoption.**
- b) **Whether the applicants are suitable to adopt the baby.**
- c) **Whether the adoption herein is in the best interests of the baby.**

13. The child herein was found inside a pit latrine having been dropped there by an unknown person. It took the effort of the community by demolishing the pit latrine to rescue the baby who was by then crying from inside the latrine thus attracting the attention of a young girl who had gone to use the toilet.

14. Despite every effort by the police, children's department and St. Francis Rescue Centre in tracing the child's relatives, none came to fruition. This is evidenced by the Malindi police station initial and final letters dated 18th January, 2019 and 27th March, 2019 respectively.

15. The child has since been declared free for adoption. He has been placed in the custody, care and control of the applicants for all this time. He has fully bonded with the adoptive family. He is aged above six weeks and below 18 years which is the legally recommended age bracket for any child to be adopted.

16. Pursuant to Article 14(4) of the Constitution, the child is presumed to be a Kenyan citizen. For avoidance of doubt, Article 14(4) of the Constitution provides that:

“A child found in Kenya who is, or appears to be, less than eight years of age and whose Nationality and parents are not known, is presumed to be a citizen by birth.”

17. Section 157 of the Children's Act goes further to state 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. By dint of the two provisions quoted above, the child herein is legally available for adoption. Since there is nobody claiming the baby, consent is dispensed with.

19. Regarding the applicants' suitability to adopt, they have been described as economically stable which is evident from their own four bedroomed house located Utawala Estate. Socially and morally, they are Christians with no criminal record, physically and mentally fit. They are both Kenyans aged between 25 and 65 years thus qualifying the adoption to be a local one.

20. The applicants have exhibited their care and love to the child by providing all basic necessities which is a sign of parental responsibility. I

have no doubt the applicants have met conditions precedent for adoption of the child.

21. Considering the question whether the adoption is in the best interests of the child, the court is guided by Article 53(2) of the Constitution and Section 4(2) of the Children's Act which provides that in any decision taken or made touching on the welfare of a child, the paramount consideration should be the best interests of the a child. I have no doubt, the child who was found thrown into a pit latrine was intended to die.

22. Nobody has come forward to claim the baby. It was by sheer lack that the child survived. The innocent angel has gotten a family who have embraced him by providing basic necessities like food, shelter, clothing, medical expenses, and education. He has fully bonded with the applicants' family. To deny him the opportunity for adoption will be tantamount to condemning him to permanent suffering.

23. He needs love and care. Further, he needs parental guidance, mentorship and generational identity. In my view, the best interests of the child dictates that he be adopted. Accordingly, it is my holding that the applicants have met the conditions necessary to adopt the baby and therefore order as follows:

- a) That the applicants are authorized to adopt baby EC who shall henceforth shall be known as JIM.**
- b) That his date of birth shall be 25/12/06 and place of birth Malindi.**
- c) That the child be and is hereby presumed to be a Kenyan citizen.**
- d) That consent of the biological parents is dispensed with.**
- e) That the Registrar General is directed to enter adoption in the Adopted Children's Register.**
- f) That FN is appointed as a legal guardian in the event of any eventuality befalling the applicant's or death.**

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF NOVEMBER 2020.

J. N. ONYIEGO

JUDGE