



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**ADOPTION CAUSE NO. 1 OF 2017**

**IN THE MATTER OF CHILDREN ACT**

**AND**

**IN THE MATTER OF THE ADOPTION OF BABY JW**

**RWM.....APPLICANT**

**AND**

**BABY JW.....CHILD**

**RULING**

1. This is the case of the adoption of Baby JW. The Applicant, RWM (who sought confidentiality of her identity) applied in court on 16<sup>th</sup> March, 2017 without legal assistance. But her own engagement with Baby JW began on 5<sup>th</sup> June, 2012 when she entered into an agreement of Foster Parent with The Child Welfare Society of Kenya and took Baby JW under her wing.

2. The record shows that Baby JW was found abandoned on 23<sup>rd</sup> October, 2011 in the grass at Muthurwa Estate Block G4 Nairobi. The report was made vide Police Occurrence Book OB67/23/10/2011 at Kamukunji Police Station by one Tabitha Wangare. On 27<sup>th</sup> February, 2012, Baby JW was committed by Court Order as a child in need of care to Mama Ngina Children's Home under **Protection Care Case No. 13 of 2012** in SRM's Court at Nairobi.

3. This committal was done pursuant to **Section 119 (1) (a)** of the **Children's Act** which provides:

***“(1) For the purposes of this Act, a child is in need of care and protection-***

***(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute.”*** (Emphasis added)

4. The Applicant, a nurse at [particulars withheld] Hospital in her statement in support of her application for adoption reaffirmed that Baby JW had been under her care and possession since 5<sup>th</sup> June, 2012, and stated that if adoption is granted, she proposed that the child be known as HKN; and that the child be presumed to be a Kenyan Citizen.

5. In her originating summons application, the Applicant sought that JKM be appointed as Legal Guardian, and PMK be appointed to act as Guardian *ad litem*.

6. At the first hearing on 17<sup>th</sup> September, 2018, PMK was appointed as Guardian *ad litem* in respect of the adoption of Baby JW. Orders were also issued for the Director of Children Home Services to prepare a Home Study Report for submission to the Court.

7. On 29<sup>th</sup> March, 2019, the Children's Department Naivasha Sub-County filed a Children Officer's Report dated 25<sup>th</sup> March, 2019 following a home visit on 12<sup>th</sup> October, 2018. The report gives the detailed history of the abandonment of the child; and the personal details of the prospective adoption mother, viz the Applicant.

8. In addition, the report notes concerning the Applicant that she is unmarried; that there are no medical reasons for her not having children;

that she is a Christian, enjoys meeting friends, music and nature walks; that her brother is the legal guardian of the child; that although her parents are deceased she has the social support of her brothers; that she has three brothers and seven sisters all but two sisters of whom are married with stable families; that she has tried many times to have children without success, despite medical examinations showing she has no conditions; that she is advancing in age and wishes to show motherly love to a child; that a friend suggested she seek to adopt a child.

9. On her financial ability, she is stable with regular and predictable income from her employment at Kijabe Mission Hospital; that she has her own plot of land and has built a permanent two bedroomed house on it, that has a plastic water tank to harvest rain water; that mains electricity is available and borehole water supplied on the plot; and that when she is off work she does a bit of farming on the plot and on other leased land to supplement her income.

10. The report goes further to state that the Applicant has expressed that the child will have inheritance rights though she has no written will; and that her siblings and legal guardian are aware of this and ready to ensure that happens.

11. The observation of the Child Officer during the home visit was that the child was playful and jovial; she had just arrived home from school and understands that the Applicant is her mother; is unperturbed by the fact that there are no other children in the home, but has made friends with neighbours. She freely interacts with the mother.

12. The report recommends that the Applicant is suitable to adopt and that it is in the Child's best interest that she be adopted by the prospective parent. It notes that the child knows no other home and is unaware of having been to a Children's home; that she is adequately provided for, loved and cared for. The report, however, noted that a certificate that the child is free for adoption had not been provided.

13. Accordingly, the Court on 23<sup>rd</sup> May, 2019 directed that the Children's Officer do make clarification on the absence of a certificate freeing the child for adoption.

14. On 3<sup>rd</sup> September, 2020 the Child Welfare Society of Kenya presented a Report dated 19<sup>th</sup> May, 2020 declaring the child available for adoption. The report details the history of the child. It notes that pursuant to **Section 177 (7) (d)** of the **Children's Act**, the Child Welfare Society of Kenya had conducted investigations to re-unify the child with her family but the effort was futile. **Section 177 (7) (d)** provides:

***“Where the child in respect of whom arrangements for adoption are to be made appears to have been abandoned, to ensure that as far as possible all necessary steps are taken to trace the parents or relatives of the child.”***

15. The Child Welfare Society of Kenya reported that it conducted tracing through local dailies in an effort to find the child's family, and attached publications in the local dailies of 15<sup>th</sup> November, 2015 and 24<sup>th</sup> January, 2015 as proof. Despite the publications no one had come forward to claim Baby JW. Further investigations conducted by Kamukunji Police Station in respect of the child's abandonment, did not result in any positive outcome.

16. The report by the Child Welfare Society of Kenya notes that the best interest of the child in this case would be served by adoption into a stable family environment which is far more desirable than placement in a Children's Home which is institutional in nature. They cite **Article 20 (1) and (3)** of the **United Nations Convention on the Rights of a Child** as follows:

***“A child temporarily or permanently deprived of his or her family environment.....shall be entitled to special protection and assistance provided by the State. Such care could include.....adoption.”*** (Emphasis added)

17. The report concludes that the best interest of the child will be served by placing her for adoption. The Child Welfare Society of Kenya therefore issued a Certificate of Declaring a Child Free for Adoption No 0910 dated 1<sup>st</sup> June, 2012 pursuant to **Section 156 (1)** of the **Children's Act** and the Adoption Regulations. **Section 156 (1)** of the **Children's Act** provides:

***“(1) No arrangement shall be commenced for the adoption of a child unless the child is at least six weeks old and has been declared free for adoption by the national adoption society or any other registered adoption society in accordance with this rules prescribed in that behalf.”*** (Emphasis added)

18. **Section 157** of the **Children's Act** provides:

***“(1) 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:***

***Provided 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 evaluated and assessed by the national adoption society or any other registered adoption society in Kenya.*** (Emphasis added)

This provision has been fulfilled. The child has been in continuous care and control of the Applicant since 2012; the Applicant has been evaluated thrice, once by a Child Welfare Officer and most recently by the Child Welfare Society of Kenya, a registered adoption society in Kenya, which issued the certificate declaring the child free for adoption.

19. The Applicant has fulfilled the provisions in **Section 158** of the **Children's Act** in that the Applicant:

- a) has attained the age of 25 years and is at least over 21 years older than the child and has not attained the age of 65 years.
- b) the child is a female child and the prospective adoptive parent is also a female.
- c) being the prospective adoptive mother is of sound mind, has clear police record; is not a homosexual and is not a foreign applicant.
- d) does not need consent to adopt as the child was found abandoned and has never been claimed by anyone.
- e) seeks to adopt the child who has not attained 14 years of age.

20. Pursuant to **Section 159 (1) (a) (i)** of the **Children's Act**, the Court hereby exercises its power to dispense with consent in any event and hereby notes that:

***“(i) 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.”*** (Emphasis added)

### **Final Orders**

21. The orders the Court deems fit to grant are as follows:

1. That the Applicant is hereby authorized to adopt the child Baby JW.
2. That the consent of the biological parents is hereby dispensed with as the child was abandoned.
3. That upon the making of the adoption orders the said child be and is hereby known as HKN.
4. That the Registrar General do make the appropriate entry of HKN in the Adopted Children's Register.
5. That the child HKN be and is hereby presumed to be a Kenyan Citizen born in Kenya and that the Director of Immigration Services do issue HKN with a Kenyan Passport in accordance with the law.
6. That JKM is appointed Legal Guardian of the child HKN.
7. The Guardian *Ad Litem* JKM is hereby discharged.

22. There is no order as to costs.

### **Administrative directions**

23. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

24. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

25. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 24<sup>th</sup> Day of November, 2020.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ruth - Applicant in person
2. Court Clerk - Quinter Ogutu