REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ADOPTION CAUSE NO. 8 OF 2012 (O.S)

IN THE MATTER OF THE CHILDREN'S ACT

AND

IN THE MATTER OF ADOPTION OF FW ALIAS NP ALIAS NW (A CHILD)

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION ORDER BY:

1. BWK.....1ST APPLICANT

2. PME.....2ND APPLICANT

JUDGMENT

The applicants lodged in this honourable court an originating summons dated 28th September, 2012 and made under section 158 and 170 of the Children Act, cap.141 praying for three orders the first of which is that JWE be appointed as guardian ad litem of baby FW alias NP; secondly, that the applicants be allowed to adopt baby NP; thirdly, that the court dispenses with consent of the baby's mother as she was an abandoned child; and finally, the Registrar General be directed to make the appropriate entries in the Register.

The applicants swore a joint affidavit in support of the summons; in it they deposed that as at the time they filed the summons, they were aged 41 and 40 respectively and had lived together since 1992. They also exhibited a copy of a certificate of marriage showing that their marriage was solemnized under the Marriage Act, cap. 150 at the Laikipia District Commissioner's office on the 6th day of May, 2011.

They also deposed that the child whom they sought to adopt was put into their custody in their capacity as prospective adoptive parents through a Foster Care Agreement executed between them and New Life Home Trust, a children's home, at Kilimani in Nairobi.

In a report filed in court on 22 May, 2013 by Little Angels Network, an Adoptive Society duly registered as such under the Children Act, cap.141, baby NP was declared free for adoption pursuant to section 156(1) of the Children Act. According to that report, the child was born on 22 July, 2010 at Samaritan Medical Services, Nairobi County to one FWN.

Upon delivery, the child's mother informed the nurses that she was not willing to keep the baby due to her inability to maintain her and went further to sign initial consents on 26 July, 2010 willingly surrendering the child willingly for placement in a children's home for adoption. Subsequently, the child was placed at the New Life Home Trust, for care and protection vide a court order dated 8th December, 2010 issued in Nairobi Senior Resident Magistrates Court Care and Protection Case No. 441 of 2010.

Although the child's mother had willingly surrendered the child for adoption, she couldn't sign the legal consent that was due to be signed on 9 February, 2011; apparently, she could not be found to sign this legal document and so on 27 September, 2011 a report of the abandoned child was made at Dandora police station and booked as O.B. No. [xxxx].

On 16 September, 2011, the Officer in Charge of Dandora police station wrote to the Children Home's administrator advising that since no one had come forward to lay claim on the child, the police had no objection to any other legal steps being taken to secure the interests of the child in accordance with the law; this information, no doubt, paved the way for the Children's Home to free the child for adoption.

In a nut shell the child was, in these circumstances, found to be in need of alternative family care where she could find family love, care and necessary provisions that ordinarily would not be found in an institution such as a children's home.

Against this background, Little Angels Network recommended that it would be in the child's best interest if she was adopted; accordingly, on

21 September, 2011, it issued the requisite certificate declaring the child free for adoption.

The Children Officer from Nyeri District Children's office, made a social inquiry on the applicants and filed his report. In the course of his enquiry, he established that the prospective adoptive father, the 1st applicant is a Kenyan citizen and was aged 45 as at 5 December, 2016 when he made his report. He also established that he is married to the 2nd applicant and that both applicants profess Christian faith. The 1st applicant was also established to be a supervisor at [Particulars Withheld] and his place of residence is in Kamakwa Sub-location, 2 kilometres from Nyeri town.

As far as the prospective adoptive mother is concerned, the Officer established that she too is a Kenyan citizen and aged 44. She is married to the 1st applicant and the two have been married since the year 1993. She is a housekeeper at [Particulars Withheld] Hotel, Nyeri.

The officer conducted the home visit on 2 December, 2016 and it is on this particular date that he interviewed the applicants. In the course of this interview, he established that the prospective adoptive parents have no biological child of their own and it is unlikely that they will have any in future because of a medical condition diagnosed on the 2nd applicant.

The officer also confirmed that the child was placed in the custody of the applicants on 13th October, 2011 while she was only 1 year and 2 months old. He established that the child attended [Particulars Withheld] Kindergarten. He observed that the child relates well with her parents and communicates with them in Swahili and English languages. He found the child to be healthy and without any manifest medical or health concerns and during the visit, she was in a jovial and merriment mood. The child is looked after by a house help when the applicants are at work. The child also related well with the house help.

The officer also observed that the house in which the applicants and the child live is a rental two-bed-roomed self-contained house. It is serviced with piped water and electricity. It is one among several other units surrounded by a perimeter wall. The officer was satisfied that the general environment in which the child lived was conducive for her upbringing.

As far as the financial status of the applicants is concerned, the officer established that they have a stable income from their employment. Their combined annual income is about Kshs. 360,000 which translates to a monthly income of Kshs. 30,000. Apart from their earnings they own an undeveloped half-acre piece of land at Mweiga. With this income, the officer was of the view that the applicants are capable of providing for the basic needs of the child.

The report also notes that the applicants are Christians who attend the Catholic Church; they informed the children officer that they are committed to raising the child in a godly manner. He assessed them as people who have positively embraced the adoption process; they too assured him that they have the support and encouragement from their respective families and friends. Based on his findings and observations, the children officer recommended that the applicants be allowed to adopt the child.

I had occasion to hear from the applicants, the representatives from the offices of the Director of Children Services and the Adoptive Society and even the child herself in the course of the adoption proceedings. The impression I got is that the applicants are clear of what the adoption process entails 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 her parental care and at the very minimum, they must ensure that she is nourished, she has a roof over her head, she is clothed and educated. More importantly, the child has inheritance rights over whatever they own.

The Children Officer and the representative of the Adoptive Society confirmed that they filed their respective reports to which I have analyzed and apart from reiterating the contents thereof, they were in agreement that the Originating Summons ought to be allowed.

The child herself appeared to be intelligent, healthy and happy. She regards both the applicants as her parents; she refers to them as 'dad' and 'mum' respectively; she acknowledged loving them in equal measure.

The Originating summons has to be considered in the context of the law applicable to applications for adoption as provided for in the Children Act. Section 158 of that Act which the applicants invoked states as follows:

> ***158. Adoption applicants***
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> ***(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.

It is apparent that, among other things, this provision of the law prescribes who is and who is not eligible for an adoption order, and the circumstances under which an adoption order will be refused and also lays out the basic requirements in an application for an adoption order.

One of the pre-requisites for such an order is that before any arrangements for adoption are commenced for adoption 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 Act).

From the evidence available, there is no doubt that this provision has been complied with when the child was placed in the custody of New Life Home. By 13 October, 2011 when the applicants took custody of her, with the intention of adopting her, she was about 1 year and 2 months old. Again, a certificate declaring the child free for adoption was duly issued on 21 September, 2011 which was approximately a month before the applicants took her in.

Before the commencement of the adoption process the child was available for adoption. Section 157(1) of the Act is to the effect 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 points to the fact that baby NP was born in Kenya and she was a resident of this country at the time material to this application.

The same section has a proviso to the effect that:

…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.

The applicants' Originating Summons was filed in court 28 September, 2012 by which time the applicants had been in continuous care and control of the child for close to 12 months. It has also been noted that both the child and the applicants have been assessed by a duly

registered adoption society and the office of the Director of Children Services; they have, in their reports, recommended that the child be adopted. They have also established that the child connects and relates well with the applicants.

Section 158(1) (a) of the **Children Act** sets 65 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 41 and 40 respectively. They still have got a long way to reach this age limit. Accordingly, the applicants are eligible adoptive parents as long as the requirement as to age is concerned.

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.

However, under section 159(1) the court has power to dispense with the consent if it is satisfied that the parents or guardian of the child has abandoned, neglected, persistently failed to maintain or ill-treated the child. As far as abandonment is concerned, **section 159(1)** states that:

> **159. Power to dispense with consent**
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> **(1) The court may dispense with any consent required under paragraphs (a), (b), and (c) of subsection (4) of section 158 if it is satisfied that—**
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> **(a) in the case of the parents or guardian of the child, that he has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child:**
>
> **Provided 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;**
>
> **(ii) persistent failure to maintain may be presumed where despite demands made, no parent or guardian has contributed to the maintenance of the infant for a period of at least six consecutive months and such failure is not due to indulgence;**

Baby NP was willingly offered for adoption by her biological mother and she was officially placed in the care of New Life Home Trust-Kilimani. She, however, failed to sign the six weeks legal in which event a report of abandonment was made at Dandora Police Station; apparently, the child's matter could not be traced after she signed the initial forms surrendering the child for adoption.

Despite all their efforts to trace her parents or relatives, the police never succeeded. Indeed, nobody has since attended the police station to lay any claim on baby N. It will be logical to presume abandonment in these circumstances and in my view, such presumption is consistent with the provisions of section 159(1) (i) of the Act. This court would therefore dispense with the consent for baby N's adoption.

Section 158(3) (b) says 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 the Act or similar offences.

The applicants have satisfied this honourable court that neither of them has fallen short of the requirements of this section in the sense that they have not been charged and convicted of any of the specified offences. In this respect, they produced police clearance certificates from the Directorate of Criminal Investigations of the National Police Service certifying that there are no records that the applicants or any of them has previously been convicted of the prescribed offences or any offence for that matter.

In the ultimate, the applicants have complied with the legal requirements necessary for making an adoption order and it is reasonable to conclude that they understand the consequences and the responsibilities arising from making such an order. They have demonstrated their will and motivation to adopt the child and that they are financially capable of taking care of her. Most importantly, they have shown their capability to provide her with the parental care and protection that she needs.

Undeniably, it is in the best interest and welfare of the child that the adoption order is made.

In view of the foregoing, the applicants' originating summons dated 28 September, 2012 is allowed. The applicants are therefore allowed to adopt Baby N who shall henceforth be named as FW; the Registrar General is hereby ordered to make the appropriate entries in the Adopted Children Register accordingly. It is so ordered.

Dated, signed and delivered in Chambers this 29th March, 2019

Ngaah Jairus

JUDGE