



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**ADOPTION CAUSE NO. 23 OF 2018**

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

**AND**

**IN THE ADOPTION OF BABY AO ALIAS AT (MINOR)**

**TN)**

**EWV).....APPLICANTS**

**JUDGMENT**

1. Vide Adoption Cause No. 12/2015 Milimani High Court one JWN filed an Originating Summons dated 19<sup>th</sup> January 2015 seeking to adopt baby AO the subject of these proceedings. Through a Chamber Summons dated 19<sup>th</sup> January 2015 and filed on 20<sup>th</sup> January 2015, the applicant sought the appointment of MKK as the guardian ad litem to the baby and the Director Children Services to file an assessment report within 45 days.
2. The said application was heard and orders sought granted on 20<sup>th</sup> February 2015. However, the file was marked as closed on 20<sup>th</sup> November 2017 following a notice to show cause why the file could not be closed for want of prosecution. That marked the end of the proceedings under that file. It however emerged through this court file (Adoption Cause No. 23/18) that the original applicant in file No. 12/2015 had died sometime 9<sup>th</sup> April 2015. Following her death, the current applicants (adoptive parents) took over the child's parental responsibility to date. Apparently, the original applicant had proposed the applicants in the instant application as legal guardians to the child.
3. Following the death of JWN the original applicant her nephew TNM and his wife EWW (applicants) filed the instant application seeking to adopt the baby herein.
4. By an originating summons dated 5<sup>th</sup> March 2018, and filed the same day, the applicants sought this courts orders to adopt baby AO alias AT who henceforth shall be known as ATN; that JW be appointed as the legal guardian to the minor and that; the child be presumed to be a Kenyan.
5. Pursuant to a Chamber Summons dated 5<sup>th</sup> March 2018, MK was on 17<sup>th</sup> May 2018 appointed as guardian ad litem to the baby and the Director Children Services directed to file an investigative or assessment report regarding the suitability of the applicants to adopt the baby.
6. The applicants who are husband and wife respectively contracted their marriage relationship sometime the year 2002 under Kikuyu Customary Law. They have been blessed with three children namely MAN (aged 16 years), ZW (aged 11 years) and CW (aged 4½ years).
7. The first applicant is a driver by training who has worked for various organizations and currently working for [particulars withheld]. The second applicant (adoptive mother) aged 35 years is a small scale business lady. Their motivation to adopt the baby has been propelled by the desire to fulfill their mandate as proposed legal guardians originally and also to support the baby and provide the security and necessary documentation required by AO.
8. Regarding the baby estimated to have been born on 1<sup>st</sup> March 2002, he was found abandoned in a thicket behind Tom Mboya Labour College Kisumu on 2<sup>nd</sup> March 2002 by three passersby. A report was then made to the Children Department and later to Kisumu Police Station.
9. The child was then temporarily admitted to New Life Home Trust in Kisumu on 6<sup>th</sup> March 2002. Vide Protection and Care Case No.

256/2006 the Children's Court Nairobi committed the baby formally to New Life Home Trust. Despite every effort to trace the parents and or relatives to the baby, nothing fruitful came forth. This is evident from the police final letter dated 27<sup>th</sup> February 2006. The child was declared free for adoption on 26<sup>th</sup> September 2014. During the pendency of the original proceedings for adoption, the adoptive mother (applicant) one JW died and the baby was taken over by the applicants being relatives to the original applicant.

10. Prior to the hearing, the Director Children Services, Buckner Kenya Adoption Services and guardian ad litem filed their reports dated 3<sup>rd</sup> October 2018, 15<sup>th</sup> May 2018 and 15<sup>th</sup> April 2018 respectively recommending the adoption.

11. However, the Children Department expressed their recommendation subject to availability of a second letter from the police. A perusal of the original adoption file (Adoption No. 12/15) has a letter from the police dated 27<sup>th</sup> February 2006 referring to the same baby among others having been abandoned at New Nyanza Hospital. On 9<sup>th</sup> November 2018, a second letter from Child Protection Unit Kisumu Police Station dated 3<sup>rd</sup> March 2002 was submitted and filed by the firm of Muteshi Muhanda and Co. Advocates on 9<sup>th</sup> November 2018. To that extent, the condition raised by the Children Department has been met.

12. I have considered the application herein, affidavit and statement of particulars in support and the applicant's testimony. It is incumbent upon the court to determine whether the baby herein is available for adoption, whether the applicants are fit to adopt the baby and lastly, whether the adoption is in the best interest of the baby.

13. The minor who is the subject of these proceedings was found having been abandoned in a bush near Tom Mboya Labour College Kisumu. Every effort to trace the relatives has borne no fruit. This is evidenced from the first letter dated 3<sup>rd</sup> March 2002 and final letter dated 27<sup>th</sup> February 2006 authored by Kisumu Police confirming that nobody has laid claim over the baby. To that extent, the requisite consent pursuant to Section 159(1) of the Children's Act is dispensed with.

14. The baby who is now schooling in high school is way above the six weeks being the minimum age requirement and below 18 years hence meets the age bracket for adoption in accordance to Section 158 (1) of the Children's Act. The baby who is presumed to have been born on 1<sup>st</sup> March 2002 is presumed to be a Kenyan citizen courtesy of Article 14 of the Constitution which provides that a child below 8 years who is found within the Republic of Kenya and whose parents or nationality is not known shall be presumed to be a Kenyan citizen.

15. The child has been under the custody, care and control of the applicants since 9<sup>th</sup> April 2015 when the original adoptive parent died. The baby has fully bonded with the applicants who also have exhibited tremendous attachment by taking care of all her needs. MAN first born daughter of the applicants has also given consent dated 14<sup>th</sup> April 2016. The baby has equally consented to the adoption. Having been declared free for adoption, and this being a local adoption, it is my finding that the baby is available for adoption.

16. As concerns the adoptive parents, they are both Kenyans by birth aged 40 and 36 years respectively thus satisfying Section 158 (1) requirement of age bracket of between 25 to 65 years. They are married with three biological children all minors. They fully understand the consequences of the adoption herein including inheritance of their property. They have demonstrated their love to the baby by taking care of her after the original adoptive parent died.

17. After assessment and evaluation by all stake holders, they were found to be staunch Christians, free from any criminal record, economically stable as evidenced from ownership of a three bedroomed house at [Particulars withheld] estate. The first applicant is a driver working with an organization known as [particulars withheld].

18. The second applicant is working as a social worker with [particulars withheld]. Secondly, morally and medically, they are fit thus providing a conducive environment for growth, parental care and mentorship. I have no doubt the applicants are suitable to adopt the baby given their experience in parenting.

19. Is the adoption in the best interest of the baby? Article 53 (2) underscores the best interests of a child a principle as a cardinal consideration in any action or decision undertaken affecting a baby. Section 4 (2) and (3) of the Children's Act reinforces the said principle.

20. Considering that the baby has no known relative, her life is actually dependent on willing adoptive parents to providing mentorship, spiritual support, food, shelter, clothing, education and medical care.

21. For the above reasons stated, the application herein seeking the adoption of the baby is hereby allowed with orders as follows:

**(a) That the applicants herein TWM and EWM be and are hereby authorized to adopt baby AO. who henceforth shall be known as TAO.**

**(b) That consent of the biological parents is hereby dispensed with.**

**(c) That the baby is presumed to be a Kenyan citizen.**

**(d) That his date of birth shall be 1<sup>st</sup> March 2002 and place of birth Kisumu County Kenya.**

**(e) That the Registrar General shall enter the baby's name in the adopted children's register.**

**(f) That the Director of Immigration shall issue the baby with Kenyan passport.**

**(g) That the guardian ad litem be and is hereby discharged.**

**(h) That JW be and is hereby appointed as legal guardian in the event of death and eventuality befalling the applicants.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF APRIL, 2019.**

**J.N. ONYIEGO**

**JUDGE**