



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

ADOPTION CAUSE NO. 18 OF 2019

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

AND

IN THE MATTER OF AN APPLICATION BY SNK AND LWN FOR AN ORDER OF ADOPTION

IN THE MATTER OF ADOPTION OF BABY EC aka TWN

JUDGMENT

1. By originating summons dated 5th March 2019 and filed on the same day, the applicants herein SNK (1st applicant) and LWN (2nd applicant) sought various orders as hereunder pursuant to Sections 154, 159, and 160 of the Children's Act .

- i. That AM of P.O. Box 28122-00100 Nairobi be appointed as guardian ad litem.
- ii. That the applicants be authorized to adopt baby EC.
- iii. That upon adoption the child be known as TWN.
- iv. That the registrar general be directed to enter this adoption into the register of adoptions.
- v. That the child be presumed to be a Kenyan citizen.
- vi. That the director of immigration services do issue the child TWN a Kenyan passport upon application.

2. The applicants who are Kenyan citizens by birth were born on 8th August 1967 and 12th March 1970 respectively. They celebrated their marriage on 11th February 2005 under the Christian marriage and divorce Act Cap 151 at [particulars withheld] Nairobi. The 1st applicant is a businessman as well as a farmer while the 2nd applicant is a Civil engineer working at [Particulars Withheld]. The motivation to adopt the baby was propelled by the inability to get a baby of their own despite medical approval that they had the ability to sire their own biological baby

3. The applicants received the child into their custody on 20th July 2012 and have taken care and control of her ever since. On 7th March 2014 they were blessed with their own biological child a girl now aged 5yrs old. The two girls relate well and have bonded. They have appointed GAM as the child's legal guardian should any eventuality befall them.

4. Baby EC was admitted together with her biological mother (ECS) at Kenyatta National Hospital on 16th April 2011 having been born slightly before arrival at the hospital. They were admitted vide IP No. [particulars withheld] but the mother reportedly abandoned the child on 21st April 2011. The matter was then reported at Kenyatta Police Post and booked vide OB. No.12/23/4/2011 [particulars withheld]. The child was referred to the said Abandoned Baby Centre for temporary care and protection through the provincial Children office, Nairobi as per the placement letter dated 05th July 2011. The child was later formally committed to the said Baby Centre on 21st December 2011 under care and protection case number 382 of 2011.

5. Subsequently, Child Welfare Society conducted both physical and media tracing with an effort to trace the child's family but to no avail. Through physical tracing of the child's mother and having interviewed the village elders of Emetiot Sub-Location and Chief Cheboin Location in Bomet, through barazas, they were not able to trace any relative to the baby. Police at Kenyatta Hospital Police Post finalized their investigations and their effort was fruitless as indicated in their final letter dated 23rd February 2012. Despite the child's abandonment case being published on the Sunday standard of 30th September 2018 and 28th October 2018, nobody came forward to claim the baby.

6. The child was declared free for adoption by Child Welfare Society of Kenya on 26th March 2019 and a certificate Serial Number [particulars withheld] issued. The child was placed with the applicants on 20th July 2012 for foster care pending adoption as confirmed by the care agreement dated 20th July 2017 and signed by the applicants on the same day.

7. Prior to the hearing, the director children services and Child welfare Society of Kenya filed their respective assessment and evaluation reports on 25th March 2019 and 12th April 2019 respectively recommending the adoption.

8. I have considered the application herein, affidavits in support and testimony by both applicants plus materials placed before the court. Issues for determination are:

a. Is the baby herein available for adoption;

b. Have the applicants met the requisite conditions for adoption;

c. Is the adoption in the best interests of the baby.

9. The baby who is the subject of these proceedings was abandoned at Kenyatta National Hospital by her birth mother. As evidenced by police final letter dated 23rd February 2012, their effort to trace the parents of the Child have been futile. To that extent the baby has not been claimed by anybody and the requisite consent as required by Section 159 (1) of the Children's Act is dispensed with. The baby was declared free for adoption on 26th March 2019 by which time she was over 6 weeks a mandatory minimum age limit required of a child before adoption in compliance with Section 158 (1) of the Children's Act.

10. According to Section 157 (1) of the Children's Act, any child who is a 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 a registered adoption society in Kenya.

11. The baby has been under the continuous foster care and control of the applicants for over three months in compliance with Section 157(1). However, I wish to point out that the proceedings herein commenced before the child could be declared free for adoption contrary to section 156 of the children's Act. This issue raises questions as to how the applicants got placement of the child before declaration could be made under section 156.

12. When the court and the children office raised this question and demanded for an explanation from the child welfare society of Kenya, no straight answer was forthcoming. It was a clear case of negligence on the part of the society to have allowed such a situation to arise and continued for over 8yrs now. I must say, this is a case under normal circumstances the baby could be returned to the children's home to await regularization of the process.

13. Unfortunately, the baby herein is suffering from autism as a result of cerebral palsy a condition requiring special attention which only the applicants can handle and nobody else. The court was informed of an institution in India who has volunteered to meet all medical expenses for stem cell therapy in India and admission is scheduled for 29th April 2019. Due the urgent medical attention required, and in obedience to Article 53(2) of the Constitution, this court has been forced to accelerate the adoption process in the best interests of the baby by overlooking some formal processes to save the life of the baby. The baby who is below 8 years is presumed to be a Kenyan citizen courtesy of Article 14 of the Kenyan constitution which recognizes any baby below 8 years found within Kenya and whose parents or nationality is not known.

14. Although some necessary steps like declaring a child free for adoption before placement were not followed, the same is not fatal in the circumstances of this case. Having complied with the other necessary conditions before adoption and all stake holders having recommended the adoption, I have no reason not to find that the child is available for adoption.

15. Are the applicants suitable to adopt the baby? The adoptive parents are Kenyan citizens thus qualifying the adoption herein as a local adoption. They are aged between 25 years and 65 years being the mandatory age requirement for both or either applicant before adopting any baby in compliance with Section 158 (1) of the Children's Act. They are fully aware of the consequences of this adoption and appreciate the same. Having been duly assessed and evaluated by the children department, guardian ad litem and Child welfare Society of Kenya, they were found to be medically, emotionally, mentally, morally and economically fit and stable. To that extent, the two are suitable persons for purposes of this adoption.

16. Is the adoption in the best interests of the baby? The best interests of a child principle is aptly captured in the Kenyan Constitution Article 53 (2) which provides:

“A child's best interests are of paramount importance in any matter concerning a child”.

Besides the constitution, Section 4 (2) and (3) of the Children's Act reinforces the same principle.

Sub Section 2 provides:

“In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

(See – In Re A.W alias AN (a child) (2008) I KLR (G and F).

17. Having been abandoned and now unclaimed, the baby has no known relative or family to identify with. She is in need of care and protection. The applicants are both financially able to cater for the baby's basic needs including shelter, food, clothing, education and medical care.

18. They appreciate their responsibilities and obligations towards raising the baby and her right to inheritance. The baby is guaranteed a safe home, economic, moral and psychological growth and support. From the reports by the department of children services and the guardian ad litem the baby has fully bonded with the adoptive parents and to separate them will be prejudicial to the baby's interest.

19. I must however commend the children department for their quick action in carrying out an assessment and filing an evaluation social inquiry report in a record time. To Mrs. Mbanya counsel for the applicants, I commend her too for wearing a motherly and humanitarian face while pushing for speedy delivery of justice the presence of undue technicalities notwithstanding. To the adoptive parents, may God shower them with grace as they undertake this huge parental responsibility with love.

20. From the foregoing therefore, I am satisfied that it is in the best interests of the baby that she be adopted by the applicants and therefore make orders as follows:

i. That the applicants herein SNK and LWN be and are hereby authorized to adopt baby EC and who shall henceforth be known as TWN.

ii. That the baby's date of birth shall be 16th July 2011 and her place of birth shall be Nairobi County Kenya

iii. That the Registrar General be and is hereby directed to enter the adoption order in the children's adoption register.

iv. That the Director Immigration be and is hereby directed to issue the child with a Kenyan passport.

v. That the guardian ad litem be and is hereby discharged.

vi. That GAM a friend to the applicants be and is hereby appointed as legal guardian in the event the applicants dies or are incapacitated by any eventuality before the child attains the age of maturity.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH APRIL, 2019.

J.N. ONYIEGO

JUDGE