



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIVASHA**

**ADOPTION CAUSE NO. 1 OF 2019**

**IN THE MATTER OF THE CHILDREN ACT (Act No. 8 of 2001)**

**AND**

**IN THE MATTER OF EWM, MINOR**

**AND**

**IN THE MATTER OF AN APPLICATION FOR KINSHIP ADOPTION**

**STW.....APPLICANT**

**J U D G M E N T**

### **Background**

1. This adoption was initiated by way of a Certificate of Urgency dated 9<sup>th</sup> April, 2019, to which was annexed a Chamber Summons application dated 18<sup>th</sup> April, 2019. Both were filed on 9<sup>th</sup> April 2019. The court certified the application urgent and appointed GWK as the Guardian *ad litem* of the child EWM.
2. The application emanated from a previous application filed by the Applicant on 24<sup>th</sup> November, 2017, in HC Adoption Cause No. 1 of 2018. That earlier application was eventually determined to be incurably defective, and was withdrawn. Accordingly, that adoption file was closed, and the present file opened.
3. The hearing of the Originating Summons took place on 20<sup>th</sup> May 2019. At all previous mentions the Applicant, the Guardian *ad litem* and the child had attended court. The application seeks the following orders:
  1. That the Applicant, **Fr STW**, be authorized to adopt the child currently identified and known as **EWM**.
  2. That henceforth, the child be renamed as **EWT**.
  3. That the guardian ad litem be discharged; and SWW and MWM (the Applicant's sister and mother) be appointed as the Legal Guardians in respect of the child.
  4. That The Registrar General be directed to make the appropriate entries in the Adopted Children's Register and do issue a Certificate to that effect.
  5. That this Honourable Court do issue such further orders as are in the interest of justice.

### **The Child**

4. The child is a Kenyan born on 11<sup>th</sup> September, 2002 and is the Applicant's niece. Her parents DMW. and SKK. are casual worker at [particulars withheld] and have eight children aged between 8 and 24 years old. EWM. is now seventeen years old. Her birth certificate shows that she was born on 11<sup>th</sup> September, 2002.
5. Like her last born brother, Samuel, EWM. was born with spinal bifida and hydrocephalus, serious medical condition. However, unlike her

brother, she was not able to benefit from urgent medical care, and still suffers from the disease. Consequently, EWM. has never been able to walk on her own, has been in and out of hospitals and has foot ulcers and a complex right ovarian cyst. A medical report from AIC Kijabe Hospital was attached showing the medical status of EWM.

6. EWM. and her parents, together with the Applicant, visited Buckner Adoption Society, and over a period of time underwent counselling and investigations were carried out on the general capacity, status and ability to adopt and be adopted.

7. EWM's parents then wrote a consent letter dated 31<sup>st</sup> January, 2018 citing reasons for giving up EWM. for adoption and consenting to her adoption. Similarly, EWM's elder siblings issued letters consenting to her adoption. EWM's parents indicated their background, their financial challenges and inability to care for EWM.

8. EWM. is currently in class 4 in Naivasha after having been transferred from Ol Kalou and Narumoru Disabled Children's Homes. Both homes provided detailed reports on her educational and personal management abilities, which were filed in court.

### **The Applicant**

9. The Applicant filed a statement in support of his application and exhibited numerous documents in support thereof.

10. The Applicant is aged 54 years and is the uncle of EWM. He is an ordained Catholic Priest, sworn to single servitude. He serves in the [particulars withheld] Diocese of Kenya and [particulars withheld] Diocese in Sweden. He travels frequently and availed letters from his respective Diocesan Bishops consenting to his adopting the child. Accordingly, pursuant to **Section 158 (1)** of the **Children's Act**, he satisfies the age criteria of between 25 and 65 years, the maximum and minimum ages permitted for adoption.

11. The Applicant exhibited his bank statements, title deeds, Police Clearance Certificate, medical particulars and referee information, all pursuant to the Eighth Schedule Part B and Regulation 19 Form 3 of the Adoption Regulations, 2005. These disclose that he is financially, socially, physically and mentally fit to adopt EWM.

12. In addition, pursuant to **Section 164** of the Children's Act, the Applicant provided letters of consent from both his sister and mother, agreeing to be appointed as the Legal Guardians of the child in the event that anything untoward happened to him.

13. The motivation of the Applicant to adopt EWM. is contained in his statement in support of the application signed on 18<sup>th</sup> March, 2019, as follows:

***“29. That my motivation to adopt stems from my desires to give my niece a better quality of life and better medical care, to enable her to walk again and eventually gain independence as she enters into adulthood.***

***30. That there are extenuating circumstances that bring me before this Honourable Court, as would allow me, a single man, to adopt a girl as; as follows:***

***(a) It is a kinship adoption. The child is my niece.***

***(b) The child has Spinal Bifida and Hydrocephalus and has always required specialized treatment, which is quite expensive to pay out of pocket.***

***(c) Her parents cannot afford to take care of her, I stepped in, and now require more permanency to ensure that she gets the medical care she needs and to enable me to have the authority to enroll her in quality specialized schools.”***

### **The Adoption Approval Process**

14. On 28<sup>th</sup> January, 2019, the Applicant applied to Buckner Kenya Adoption Services, a duly registered Adoption Society, to adopt the child. Having keenly been taken through the adoption process, he signed Form 1 under Regulation 19 (c) Adoption Regulation being a Certificate of Acknowledgment; the form of inquiry in prospective adopters Form 2 under Regulation 19 under the Adoption Regulations. A home study pre-placement report as also provided by the Adoption Society.

15. On 22<sup>nd</sup> February 2019, the Adoption Society approved the Applicant to adopt EWM, and issued a Certificate Declaring a Child Free for Adoption No. [particulars withheld], pursuant to **Section 156 (1)** of the Children's Act. The original certificate was provided to the court.

16. Finally, the Applicant availed a letter from the Ministry of Gender, Children and Social Developments Adoption Committee established under **Section 155** of the Children's Act Cap 141. The letter reference **ODEN/62/N/ADS/VOL.1 (33)** provides **“Guidelines for Special Circumstances by the Adoption Committee”** for adoption in situations of (a) a sole Kenyan male applicant in respect of a female child; (b) a sole Kenyan female applicant in respect of a male child, and (c) a sole foreign female applicant.

17. Under the Adoption Committee's aforesaid Guidelines for Special Circumstances the Applicant falls in category III, and consideration for adoption may be given in respect of:

***“Category III: Kenya Male Adopting a female child***

1. Where the child is a relative.

2. *Has other biological or adopted children over whom he is willingly exercising parental responsibility.*

3. *Where the applicant is the legal guardian of the child or children appointed by will or in adoption proceedings and the parents die or become permanently incapacitated.”*

The court has noted that the Applicant satisfies the criteria in (1).

18. By an order of the Court, the Department of Children’s Services, Gilgil Sub-County, was directed to investigate the Applicant’s fitness to adopt or otherwise, and to file a report in court in respect thereof.

19. The Gilgil Sub-County Children’s Officer filed a report dated 2<sup>nd</sup> May, 2019, Reference **CRC.551/2018-2019** in respect of the proposed adoption of EWM by the Applicant. The report contains full particulars of the home visit; the details of the Applicant, the child, the backgrounds of both, and other observations.

20. The aforesaid report made recommendations as follows:

*“Your Honour, from the foregoing I noted that the parents of the Adoptive child (subject) are not well to do people. The father was employed three years ago as a truck driver and he is not well paid. For example, the floor of his residential house is full of dust as it is not cemented. This is due to the number of his children he supports with his limited resources.*

*I also learnt that it is the prospective parent who sought a vacancy for the subject which took him over 2 years to secure it. In addition, he is the one who pays the subject’s fees of Kshs 10,000 every term, the adopter has good plans for the child. He says since he stays in Sweden he intends to take the subject there for advanced treatment in case this application goes through.*

*In this case your Honour, the adoptive parent has the best interest of the child at heart and she is set to greatly benefit from this adoption since her adoptive parent will take her for advanced treatment in Sweden.*

*Your Honour, since the prospective parent meets all conditions set out in the Children’s Act, I unreservedly recommend that STW is fit to adopt EW.”*

21. In light of all the above information, this court is required to make the decision whether the child EWM. may, properly, be adopted by the Applicant

22. **Article 53(2)** of the **Constitution**, provides the over-arching principle which must apply whenever any decision concerning a child is to be undertaken. It provides that:

*“A child’s best interests are of paramount importance in every matter concerning the child”*

23. In **Re J (Minor)**, the court dispensed with the consent of the biological mother where the child was abandoned, and waived the requirement of a freeing certificate. The applicants there had demonstrated that they had the ability to maintain baby JN, had bonded well with the baby and had readily accepted the child as one of their own. The court stated as follows:

*“...this court is satisfied that this is a kinship adoption and that the Applicants are suitable persons to adopt baby JN aka JNW and that they are financially stable and have the means to provide and care for him”*

24. In **Re JNA [2018] eKLR** the court reiterated the concept of “local adoption” when it stated as follows:

*“Kenyans living abroad and wishing to adopt a Kenyan child will adopt as Kenyans by way of domestic adoptions. This is therefore considered to be a local adoption.”*

The Court cited with approval the **Guidelines for Alternative Family Care of Children in Kenya page 153** which states as follows:

*“kinship adoption is adoption by adapters who are kin or relatives within the extended family of the child”*

25. In the present case, the court is satisfied that :-

i. the proposed adoption is a kinship adoption, meaning that the child will continue to be within her family, with the added benefit that she will be able to receive quality medical care because of her condition (Spinal Bifida and Hydrocephalus) and she can get more advanced attention under the medical insurance facilities of the Applicant;

ii. Therefore, the adoption will be in the best interest of the child; and

iii. The Applicant, after seeking the proper written authority from the Catholic Church, has been approved as a prospective adoptive

parent by competent social workers through a duly registered Adoption Society under the Department of Children Services, thus he is able to effectively handle his parent responsibilities.

26. Accordingly, the application is allowed and the following orders are hereby issued:

1. The Applicant, Father STW, is hereby authorized to adopt the child currently identified as EWM.
2. That henceforth, the child be renamed as EWT.
3. That the guardian ad litem, be and hereby discharged.
4. That SWW and MWM (the Applicant's sister and mother, respectively) be and are hereby appointed as the legal guardians of the child EWT.
5. The Registrar General is hereby directed to make the appropriate entries in the Adopted Children's Register, and do issue a Certificate to that effect.
6. The cost of the application to be borne by the Applicant.

27. Orders accordingly.

**Dated and Delivered at Naivasha this 30<sup>th</sup> Day of May, 2019**

---

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Wairegi holding brief for Kimenyi for the Applicant
2. Applicant - Not present
3. Guardians - Not present
4. Court Clerk - Quinter Ogutu