



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ADOPTION CAUSE NO. 36 OF 2018 (OS)
IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001
AND
IN THE MATTER OF ADOPTION OF BABY J.J.W
SHR & EWN (APPLICANTS)
JUDGMENT

1. The Applicants, moved this court by way of an Originating Summons dated the 21st March 2018, where the Applicants **SHR** and **EWN** sought the following orders that; -

- a. That the child be presumed to be Kenyan citizen by birth.
- b. That the Applicants **SHR** and **EWN** be authorized to adopt the **JJW** and upon adoption the child to be known as **LRS**.
- c. That **RWM** be appointed as the legal guardian of the child in the event of the death or incapacity of the Applicants before the child attains the age of majority and becomes fully self-reliant.
- d. That the Registrar General do make entry of this adoption in the adopted children Register.
- e. That the Director of Immigration be authorised to issue the child with a Kenyan passport with the new names.

2. Through a ruling dated 10th May 2018 the court appointed **GMH** as Guardian *ad litem* and required the said Guardian *ad litem* and the Director of Children's Services Department do conduct a social enquiry on the Applicants' fitness and the prevailing circumstances as relates to this adoption and file their respective reports. The reports were filed on 8th November and 2nd January, 2019 respectively.

3. Both the Guardian *Ad Litem* and Director of Children's Services Department in their respective reports found the Applicants physically, financially and morally fit to adopt the child.

4. However, the Director of Children Services raised concerns due to the moratorium issued by the government of Kenya in 2016 against international adoption due to the nationality of the 1st Applicant.

5. From the facts on record this adoption has peculiar circumstance, it is therefore necessary to consider the relevant facts as against the existing laws, procedure and process of adoption in order to arrive at a conclusion that will be beneficial and to the best interest of the child herein.

6. This 2nd Applicant **EWN** is the biological mother of baby **J. J. W** and a Kenyan citizen by birth. She is legally married to the first Applicant **SHared Rage**. The First Applicant is of British nationality and of Somali extraction. The First Applicant resides with his wife and children in Kenya and does business between Kenya and Somalia.

7. The child subject matter was conceived while the mother worked in Southern Sudan with a man whom she claims she had a casual relationship with and who disowned the pregnancy and has not taken up any parental responsibility since the birth of the child.

The said father has not made any attempts to know the whereabouts of the child and the 2nd Applicant has indeed lost contacts with him since.

8. On 7th February 2013 the First Applicant SHR married the Second Applicant and they have since been staying as a couple. The child subject matter has since the marriage between the First Applicant and the Second lived with them. The First Applicant SHR has since assumed parental responsibility over the child. The couple have a second child of their own.

9. The questions there for before this court are as follows;

i. Is this matter affected by the inter-country moratorium on adoptions?

ii. Does the moratorium as conceptualized by the government of Kenya bar children from enjoying their constitutional rights under bill of rights and other relevant laws.

iii. What is the best interest of the child in the circumstances of this case?

10. In addressing the issues above this court is alive to the following provisions;

a) Article 53(1) (e) & (2) of the Constitution of Kenya which provides that:

“Every child has a right –(1)(e) to parental care and protection which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not.”

(2) A child’s best interests are of paramount importance in every matter concerning the child.

b) Convention on the Rights of the Child which provides:

Article 20 (1) “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

(2) States Parties shall in accordance with their national laws ensure alternative care for such a child.”

c) Section 4(i), (2) (3) (a) (b) (c) of the Children Act:

S.4(1) “Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

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

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as it necessary for the welfare of the child and in the public interest.”

11. In addition to the above quoted provisions of the law the court takes cognizant of the following facts; - The first Applicant though a British citizen, resides in Kenya and does business between Kenya and Somalia. Further the first Applicant is married to a Kenyan who is the biological mother of the child subject matter and who is the second Applicant and with whom they have another child. The family resides in Kenya since marriage. This adoption falls under the purview of kinship adoption and cannot by any means be considered an inter-country adoption. Even if it were; the law and the facts would lean towards the best interest of the child. Further the view of this court is that the moratorium ought not to be applied blindly without considering facts before court and the applicable laws.

12. Having stated the above, having considered the facts of this matter and the law concerned the Court is convinced that the moratorium is not applicable in this matter. If applied the child will not enjoy her constitutional rights, and other rights provided for under international law and the Children’s Act. Further the best interest of the child would be to have her enjoy being with the family; the mother, father and sibling(s).

13. Consequently, I make the following order;

- a. That the Applicants SHR and EWN be and are hereby authorized to adopt JJW whose name will henceforth be LRS.
- b. That RWM be and is hereby appointed as the child's legal guardian.
- c. That the Registrar General do enter this adoption in the adoption register.
- d. That the guardian ad litem be and is hereby discharged from the duties earlier conferred upon him by the court.

DATED, SIGNED AND DELIVERED at NAIROBI THIS 31ST DAY OF JULY ,2019.

ALI-ARONI

JUDGE

In the presence of:

Counsel for the Applicants.....