



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

ADOPTION CAUSE NO. 5 OF 2017 (O.S.)

IN THE MATTER OF THE CHILDREN'S ACT 2001

IN THE MATTER OF BABY B

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION BY M L L AND S W W

RULING

This originating summons dated 18th October 2017 filed pursuant to section 158, 159, 160 of the Children's Act, the interpretations and general Provisions Act Cap 2 of the Laws of Kenya and section 3A of the Civil Procedure Act seeks the following adoption order. To adopt the minor referred as baby B. The originating summon is supported by a joint affidavit sworn by the applicants for purposes of this matter referred to as M.L.L and S.W.W.

During the hearing the court has considered the pleadings, oral arguments by counsel for the applicants, the reports by the Children's Department and the Kenya children's Homes Adoption society on the minor and applicants suitability. The following findings of fact and law on the adoption cause has been reached.

Historical Background

From the brief history on 12th July 2016 Baby B was apparently abandoned by her biological mother around Raila slums. As fate would have it a good Samaritan rescued her and reported the matter to the police station. The National police service at Langata commenced investigations as Baby B was accorded temporary custody at Thomas Barnado Home for care and protection.

According to the outcome of investigations conducted by the police no person came forward to claim parenthood of Baby minor. The minor now became a subject of the state in need of care and protection. Searching for an immediate placement the Kenya children's Home Adoption society a licensed child care giver commenced inquiry of availability and willingness of suitable person to accept adoption of Baby B. A report freeing baby B for adoption in a case committee held on 19th July 2017 was adopted.

The applicants agreed and accepted to temporarily have Baby B placed into their custody with effect from 31st July 2017. The minor has remained in the applicants care since and throughout pendency of these proceedings as they waited the possibility of being allowed to adopt by this court. Since the date of abandonment, placement of the minor at Thomas Barnado Home neither the parents nor next of kin has come forward to lay claim of parenthood.

The applicants in this cause have stated in their application that they have lived together as a married couple since solemnizing their marriage on 20th November 2011. Further the applicants deposed that in their evaluation they have what it takes to adopt Baby B to provide a permanent family home and take care of her. In support of this contention the applicants attached their financial statements and evidence on ownership of properly registered jointly in their names. This is so fundamental because adoptive parents receive children into their homes to provide an environment where the principle on the best interest and welfare of the child will be realised.

The Kenya Children's Homes conducted an inquiry and due diligence as to the suitability of the applicants as prospective adoptive parents. In their report dated 24th November 2017 a favourable recommendation for the applicants' requests for adoption of the minor was heard before this court.

The Children's department considered experts in child welfare, care and protection on behalf of the state conducted an evaluation and assessment of the applicants. The report compiled on the applicants personal, social economic, culture and religious background opined that is in the minor's best interest to be adopted by the couple M.L.L and S.W.W.

The court also heard from the Guardian L.A.L and R.L.R. According to the legal guardians they have known the applicants and they do

confirm to court that they are fit and deserve to be allowed to nurture the minor into adulthood. In addition they covenanted to be available for Baby B in the event they are called upon to do so in place of the applicants.

The first question which arises is whether the applicants have satisfied the legal requirements under the Children's Act to be granted the adoption order.

Analysis and Decision

What the law provides on cases of this nature: The constitution of Kenya 2010 under article 26 (1) provides that Every person has the right to life (20 And the life of a person begins at conception.

Article 53 (1) sets out rights in relation to children as follows:

1. Every child has the right:

- a. To a name and nationality at birth**
- b. To free and compulsory basic education**
- c. To basic institution, shelter and health care**
- d. To be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour.**
- e. To parental care and protection, which includes equal responsibility of the mother and the 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.

The convention on the rights of the child of which Kenya is a signatory and duly domesticated its provisions in our children's Act of 2001 primarily deals with four aspects of children rights.

- a. Participation by the children on decisions affecting them**
- b. Protection of children against discrimination and all forms of neglect and exploitation.**
- c. Prevention of harm to them and provision of assistance to children for their basic needs.**

In the region the African charter on the rights and welfare of the child 1990 in its preamble states that "the child occupies a unique and privileged position in the African society and requires legal protection as well as particular care with regard to health, physical, mental, moral and social development. In the same charter under article 15 children are protected against all forms of torture, maltreatment and abuse.

Section 4(1) of the Children's Act No. 8 of 2001 states:

"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, Courts of law, administrators

These provisions demonstrate that the child rights are fundamental under the constitution and our courts are required to apply them with equal force in the best interest of the child shall be a primary consideration."

Under sections 5, 6, 7, 8, 9, 10, 11, 13 of the Children's Act recognizes various rights to be availed to the children by both parties and the state. When considering adoption proceedings, the court shall give due regard to the desirability of continuity in the child's upbringing realization of the specified rights.

Section 159 of the Act provides for the powers vested with the court to dispense with the consent required of the guardian or biological parents in the following circumstances.

a. In the case of the parents or guardian of the child that he was abandoned, neglected, persistently failed to maintain or persistently ill treated the child provided that:

- 1. 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 six months.**
- 2. The court may dispense with the consent of the spouse of the applicant for an adoption if satisfied that the person**

whose consent is to be dispensed with, cannot be found or it is incapable of giving consent or that the spouses have separated or divorced and are living apart and that such separation is likely to be permanent.

The right of parents to raise their children within the family unit as basis of social order is echoed under Article 45 of the constitution. It is therefore both constitutional and statutory that biological parents have exclusive rights to raise their children unless there exist specific circumstances for the state to intervene. When the state provides the basic rights to education and health it does so within the confines of the family unit. In the event that biological parents cease to exercise their parental rights over their children the state under the constitution is mandated to fill in the gap.

The termination of parental rights can be occasioned where a child is removed from his/her home due to abuse, neglect or abandonment. It is the reason the government put in place a mechanism under the children's Act for the involuntary termination of parental rights. The sole purpose is to protect the child for her or his best interest.

This is an important requirement designed to meet the needs faced by legal orphans within our country. Under the Act Adoption process is provided for by which a child legal rights and duties towards his or her biological parents are substituted by similar measure with duties and rights toward adoptive parent (s).

The conditions laid down in section 158 of the Act for grant of an adoption order provides the criteria to be considered before issuance of the order in favour of the adoptive parents.

They include the attainment of the age above twenty-five years older than the child but has not exceeded the age of sixty-five year or is a relative of the child or is the mother or father of the child. Section (2) prohibits the court from making an adoption order for applicants who are of unsound mind, convicted by a court of law for offences under third schedule of the Act, is homosexual, in the case of joint applicants if they are not married to each other. Secondly, in the case of a parent who has abandoned, neglected or appears to have abandoned parental rights at birth.

These circumstances under section 159 are particularly relevant to the present case as deduced from the material placed before me in support of the application.

In the instant Adoption cause case from the inquiries conducted by the children's department and Kenya Children's Home adoption agency the application do not fall in any of the restriction clauses under section 158 of the children act. The joint applicants meet the legal requirements as suitable prospective adoptive parents of the minor.

In considering the origin and background of the minor as laid down in the factual matrix the consent required from the biological parents is hereby dispensed with pursuant to section 159 of the Act.

The above provisions will apply in making a determination in this Adoption cause.

Decision

The purpose of Kenya's Constitution and Children's Act is to protect and promote the welfare of Children by providing them with stable family units. The fundamental concern therefore in every adoption cause provision is of the best interest of that very child.

That law presumes that by granting foster care the adoptive parties will provide and promote a stable, supportive and nurturing environment for the child. From the reports filed by the Director Children Services and Kenya Children's Homes adoption agency both applicants are in good health, have fulfilled the condition's precedent set out under section 158 of the Children's Act.

It is also not in dispute that they both have a steady income and a home where they live together. During the pendency of these proceedings both applicants have had the opportunity to bond with the child since her placement in their custody.

It is that family unit that the constitution contemplates under Article 45 which also has to take responsibilities in fulfilling the obligations enjoined in Article 53 of the same constitution.

I am of the conceded view that weighing all factors and the evidence placed before me the applicants are of sufficient ability to bringing up the child and to furnish her with appropriate support and maintenance within their resource base availed to them.

Accordingly, the originating summons dated 18th October 2017 and declarations rights are hereby granted. Costs of this application be borne by the applicants.

Dated, delivered and signed in open court at Kajiado on 23rd day of January, 2018.

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R. NYAKUNDI

JUDGE

Representation:

Ms Gitonga – Counsel for the applicants

The Applicants - present

Mr. Mateli - Court Assistant