



**REPUBLIC OF KENYA**

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

**ADOPTION CASE NO. 4 OF 2017**

**IN THE MATTER OF CHILDRENS ACT NO 8 OF 2001**

**IN THE MATTER OF BAY I M R**

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

**RULING**

The applicants hereinafter referred as L M and S O O filed an originating summons pursuant to Section 4, 154, 156, 157(1), 158(1), 159(4), (6) (7) and 8(a) 163, 164(1) and 170 of the Children's Act no 8 of 2001, Section 9 of the Citizenship and Immigration Act 2011, the constitution of Kenya, seeking an adoption order in favour of Baby 1 M R. The application is grounded on the reasons that the proposed adoption will be in the best interest of the child.

In support of the application is joint affidavit by the applicants detailing evidence by way of annexures to persuade this court should consider them suitable to adopt the baby J M R. In this originating summons they were represented by Ms Kaimenyi. **Factual background**

The facts giving rise to this originating summons are that baby J M R is presumed to have been born on 24<sup>th</sup> October, 2016 when she was abandoned in Githurai. According to the investigation report unnamed Good Samaritan who came across rescued her and took her to Cords Marie Hospital where she received the first medical attention.

The matter was reported to Githurai Kimbo Police Station for the law enforcement agency to commence investigations with a view to apprehend the culprit. In the interim period the baby was admitted to New Life Home Trust at Kilimani vide a court order issued on 15<sup>th</sup> February, 2017. A communication from the police confirmed that no parent or next of kin has come forward to claim the baby as their own. Subsequently, through Buckner Kenya Adoption services this need case of baby J M R was determined upon a resolution reached in a case committee held on 26<sup>th</sup> May, 2017. It was resolved that it will be in her best interest to be adopted by willing applicant/s. A certificate to declare baby J M R fit for adoption was issued pursuant to Section 156 of the Children's Act. Further subsequent events indicate that New Life Home who had custody of baby J M R released her to the applicants for continuous foster care and protection.

**The applicant's background**

The applicants L M and S O O have deposed in their affidavit that as at the time of filing this application both are aged 44 years old. Further the applicants are Kenyan Citizens who profess the Christian faith. L M and S O O confirmed that they got married on 11<sup>th</sup> December 1999 and that their union has been blessed with two issues namely T N and S K.

As a requirement of the law both T W and S K have consented to the adoption of baby J M R as an additional member of the family. The applicants have further deposed that they operate Hotel business which provides a steady income for the family. Besides the income from the family business, the applicants have demonstrated by way of documentary evidence ownership of properties in the form of land and motor vehicles.

According to the applicants the family have a strong bond and their children T W and S K have extended the same to J M R since her arrival to the home. The children in the language of the applicants have shown healthy signs of friendship and social development. Based on the right to information availed to the applicants they are aware and did confirm in their affidavits that the new member whom they seek to adopt has equal inheritance rights like T W and S K. The applicants in safeguarding the interest of the baby J M R have appointed S M as the legal guardian in the event of death or unforeseen circumstances before attaining the age of maturity.

I have reviewed the evidence presented to this court by the applicants and I conclude that L M and S O O parent-child relationship is strong and favourable for the care and protection of the minor to be adopted.

The social, economic and cultural indicators are all favourable to the child growth and development. The financial resources and assets at their disposal would accommodate an additional member of the family. Their parental abilities is high and healthy for the wellbeing of baby

J M R. During the adoption hearings both the legal guardian and the children of the applicants comprehended the new relationship were appropriately.

The applicants presented independent report from the Directorate of Children's Department, Buckner Kenya Adoption services and Happy Life Children's Home. The three reports duly filed in court have dealt with a number of factors and characteristics which make up for a legal adoption order.

The reports involved careful observation and evaluation of the applicants and the prospective minor to be adopted prior to the final placement. It is also clear from the contents of the report that the adoptive applicants were subjected to home study, background check on any criminal records, physical, economic, social, educational and financial suitability. This is all done to ensure that the applicants can provide a safe, healthy, stable and nurturing environment of the minor until she attains the age of maturity.

In a unanimous recommendations the three agencies stated in their view that the adoption by the applicants is in her best interest.

## **Analysis and determination**

### **The applicable law**

Section 158(1) of the Children's Act No 8 of 2001 provides as follows:

**“Adoption orders may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants**

**a. Has attained the age of twenty-five years and is at least twenty-five years older than the child but has not attained the age of sixty five years.”**

As prospective parents the applicants presented evidence that the subject minor was born on 24<sup>th</sup> October, 2016. On the weight of the evidence each of them in this joint adoption proceedings is aged 44 years old. This means that they meet the eligibility criteria under Section 158(1) of the Act.

In relation to section 156 (1) **it provides that no adoption proceedings shall be commenced of a child unless the child is at least 24 weeks old and has been declared free for adoption by a registered Adoption Agency.**

In the instant case Buckner Kenya Adoption Services duly licensed and registered in Kenya filed a declaration that the minor in issue is free for adoption. The Director of Children Services in their report dated 17<sup>th</sup> January, 2018 conducted an indepth inquiry and gave their recommendation to the purported adoptees.

Section 159(1) of the Act provides *inter alia* as follows that the court may dispense with any consent required under paragraph (a), (b) and (c) of subsection 4 of section 158 if it satisfied that:-

**In the case of the parents or guardian of the child that he has disowned or, neglected, persistently failed to maintain or persistently ill-treated the child provided that:**

**1. The abandonment may be presumed if the child appears to have been abandoned at birth. or if the person or institution having care and protection of the child has neither been nor heard from a parent or guardian of the child for a period of at least six months.**

**2. Persistence failure to maintain may be presumed where despite demands made, no parent or guardian has contributed to the maintenance of the infant for a period of at least six consecutive months and such failure is not due to indulgence.**

**b. In the case of a person liable by liable virtue of an order or agreement to contribute to the maintenance of the child that he has persistently neglected or refuses to so contribute.**

**c. n any case, except in respect of the consents Required under paragraph (e) and (f) of Subsection 4 of Section 158 that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent has been unreasonably withheld.**

From the readings of this provisions they do present different scenarios to be applied in making the adoption order. In the present case the court is faced with an application of a child abandoned by her mother at birth. A Good Samaritan came across her where she was dumped by her mother as the investigation and inquiry revealed.

The rescue triggered the sequence of events culminating in this adoption proceedings. I bear in mind that throughout the period under review no biological mother or next of kin has shown up to claim the child.

This section 159 vests powers on the adoption court where the natural parent consent is not practical to dispense with such consent. In regard to the back ground reports and evidence availed I am satisfied that child paramount best interest is likely to be affected if the consent is not done away with at this stage. This legal adoption order pursuant to section 159 can be made without the consent of the biological parent.

As articulated in the persuasive English case in **REKD a Minor (ward): Termination of Access (1988) AC 806 -812 the Principle on the role of a biological parent to his or her children is succinctly stated** as follows:

**“The best person to bring up a child is the natural parent it matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child’s moral and physical health are not endangered”**

From the above reasons the best interest of the child is the fundamental principle and central in determining these proceedings particularly when there is no biological parent. The multiple agencies involved in these judicial proceedings have identified and considered the best interest of the minor J M R in their individual reports filed in court.

In my view applying the law and the principles on the best interest and welfare of the child the applicants have been found suitable and fit as joint adoptive parents for baby T A M R. Accordingly the following orders are granted pursuant to originating summons dated 23<sup>rd</sup> October, 2017.

- 1. The child will henceforth be known as T A R M.**
- 2. The Registrar general is hereby directed to make appropriate entries in the Register and do issue a certificate to that effect.**
- 3. That S M K be and is hereby appointed the child legal guardian.**
- 4. That vide this order the child be and is hereby entitled to all rights and benefits under the constitution and all applicable laws.**
- 5. The costs of this application be borne by the parties.**

**Ruling dated, delivered in open court and duly signed on 23<sup>rd</sup> January, 2018.**

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**R. NYAKUNDI**

**JUDGE**

**In the Presence of:**

Ms. Kaimenyi for the applicants

The applicants - present

The legal guardian present

The child

Matel -Court Assistant