



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ADOPTION CAUSE NO. 4A OF 2014

IN THE MATTER OF THE CHILDREN'S ACT

AND

IN THE MATTER OF ADOPTION OF E (A CHILD)

AND

IN THE MATTER OF:

1. M W A

2. E W M.....APPLICANTS

JUDGMENT

On 30th January, 2014, the applicants lodged in this court an originating summons dated 29th January, 2014 in which they sought for three main orders the first of which is for an appointment guardian *ad litem* for E (a child) (hereinafter "Baby E"). The second and third prayers are respectively for an adoption order allowing the applicants to adopt Baby E and, if that order is granted, the child to be named N W M which name should be entered by the Registrar General in the Adopted Children Register accordingly.

The first prayer is spent as the appointment of guardian ad litem was made on 10th June, 2014.

The summons was made under the relevant provisions of Part XII of the Children Act No. 8 of 2001 on adoptions. In particular, the applicants invoked sections 156,157, 160(1) (2) (4) and 170 of the Children's Act, 2001. The summons was supported by an affidavit jointly sworn by the applicants on 29th January, 2014 and filed alongside the Summons on 30th January, 2014. In that affidavit they made reference to a joint statement which they also filed in court on the same date in support of the application for the adoption order.

The applicants have stated that they are a married couple; a certified copy of an entry of marriage certificate attached to their application shows that their marriage was solemnised in church under the Marriage Act, cap. 150 on 12th April, 2008.

The first applicant is a citizen of the [particulars withheld] where he was born on 5th July, 1952. His country of residence has, however, remained Kenya since 21st May 2008; a copy of an entry permit from the Principal Immigration Officer to this effect is attached to his application. He has built a retirement home in Kenya and it is his wish to remain in this country together with his family if he can secure citizenship through naturalisation.

The second applicant, on the other hand, is a Kenyan by birth. She hails from Othaya in Nyeri County where she was born in 1963. She is the third born in a family of 12 children. At the moment she is a [particulars withheld].

According to their joint statement, the applicants have been living together as husband and wife since the year 2008. They do not have an issue of their own and they have never had one before. This is their primary reason why they seek to adopt Baby E. They both profess Christian faith and they intend to bring up Baby E in the same faith.

The subject of the application, as noted, is Baby E. According to a report filed in this Court by the Child Welfare Society of Kenya which is a duly registered Adoption Society, Baby E was born on 23rd December, 2010 at Liberty Nursing Home in Embu County. He was born prematurely and for this reason he was immediately admitted for neo-natal care. His mother took advantage of this situation and disappeared from the hospital leaving him behind.

A report to the abandonment was made to the police at Embu police station where it was entered in the occurrence book as No. [Particulars

withheld].

Nine months later, the child's mother had not been located and on 9th September, 2011, he was rescued by the Child Welfare Society of Kenya and taken the Society's Home at Embu for care and protection as efforts by the police to locate his mother or any of his relatives continued.

Subsequently, a committal order formerly placing the child in the custody of the Child Welfare Society of Kenya was obtained from the Chief Magistrates Court at Embu as Protection Order No. 47 of 2011.

By a letter dated 21st January, 2014, Embu Police Station confirmed that as of that date, no one had come forward to lay claim on the child.

Against this background the Child Welfare Society of Kenya was of the view that since neither the child's mother nor any of his relatives had been traced four years after his birth, the child ought to be presumed as having been abandoned and in the regard, the Society invoked section 159(1) (a) (i) of the Children Act which states as follows:

159. Power to dispense with consent

(1) The court may dispense with any consent required under paragraphs (a), (b), and (c) of subsection (4) of section 158 if it is satisfied that—

(a) in the case of the parents or guardian of the child, that he has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child:

Provided that—

(i) 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 at least six months;

For the foregoing reasons the Society declared Baby E free for adoption and more so, because the child needs an alternative family care and parental protection. An Adoption Order, in the Society's view, would be in the best interest of the child.

The suitability of the applicants to adopt Baby E was supported by two social inquiry reports respectively made by the Nyeri Sub-County Children's Office, supposedly on behalf of the Director of Children Services and the Child Welfare Society of Kenya.

According to the Children Services report dated 6th April, 2017, a home visit of the applicants' residence was conducted on 6th April, 2017. Ms Janet Miricho, the Children Officer from Nyeri Central County office interviewed the applicants and established, among other things, that they were married in church in April, 2008; that they have never had a biological child of their own despite their efforts to do so; that the prospective adoptive father is a retired engineer from United Kingdom and at the moment he lives on pension from his last employer; and, that the prospective adoptive mother is a farmer who rears pigs out of which the applicants earn extra income. The officer also established that the applicant's home is on ¼ an acre of land at King'ong'o where they have built a three bed roomed, well-furnished house. The residence is connected to piped water and electricity. In the officer's view, the applicant's residence is generally a conducive environment for bringing up a child and in particular the subject of adoption.

According to the officer, both the applicant's are Christians and they intend to bring up Baby E as a Christian. She observed that the child looked happy, healthy and has bonded well with her adoptive parents; she communicates with them in both Swahili and English languages. Finally, it was the recommendation of the Children Officer that the child be adopted.

The Child Welfare Society of Kenya filed a similar report after conducting a home study whose primary purpose was to establish the suitability of the applicants to adopt Baby E. The Society's findings are more or less consistent with those of the Children's Office; they include the fact that the male applicant is a British citizen who was aged 61 as at time the Society compiled its report; that he trained as an engineer and worked for several companies before he retired from employment in 2004; that he relocated to Kenya in 2008 where he has been living since then; and that he has been practising greenhouse farming at his [Particulars withheld] farm in Nyeri county. The report recommended him as a suitable adoptive parent.

As far as the second applicant is concerned, the home study by the Society established that she is the third born in a family of 12 children with whom she relates well. As at 5th May, 2014, she was aged 52 and a house wife.

The society established also that both the applicants are Catholics and have introduced baby E to this religious persuasion. They are said to have tied their nuptials in a catholic church in Othaya on the 12th April, 2008. Their marriage was the first for both of them and despite the fact that they have not had a child of their own, theirs was described marriage is a happy one.

They are motivated to adopt Baby E because they want to provide shelter and other basic needs to a deserving child in the best way they can. They also want to have a complete family and also somebody who will inherit their property.

On whether the two applicants have the financial capacity to take care of the child, the Society established that the male applicant earns a pension of Kshs 90,000/= per month; he was set to get an additional sum Kshs 80,000/= on turning 65 years old. To demonstrate their financial capability each of the applicants exhibited copies of their bank statements showing their income which, for all intents and purposes,

is sufficient. The male applicant for instance has a steady monthly income of 682 Sterling Pounds while the female applicant has several bank accounts whose credit balances range from Kshs 275,000 to over Kshs 6,000,000/=. Amongst the properties the applicants have is their residential home in Nyeri, a commercial plot within Nyeri town, half an acre piece of land at Mweiga and one and half piece of prime land in Ruiru town.

The applicants have employed a resident house help who helps to take care of the child and doing other domestic chores. They have a three bed roomed palatial home; the baby has been allocated one of the bedrooms next to the applicants' bedroom.

The applicants do not suffer from any sort of ailment that would make them unfit to adopt Baby E.

The findings on the child were that he was born on 23rd December, 2010. At the time of the home study, he was aged four and in Kidergatten 1 at [Particulars withheld] Kidergatten. Like the Children's office, the Society observed that the child has bonded well with the adoptive parents and he appeared healthy and well taken care of.

It was also established that the applicants are at home most of the time and therefore they provide constant care and attention to the child. The home set up is friendly for the child to grow up in since the compound is spacious and secure. It was the view of the Society established that the applicants are physically, financially and mentally stable to adopt the child. On this note, it recommended that they be allowed to adopt the child.

I had occasion to hear from the applicants when their application came up for hearing in my chambers. They both confirmed that they understood the import of an adoption order; in particular they understood that once an adoption order is made they assume parental responsibility of the child who is henceforth treated as their own biological child. As such he is entitled to all the rights their own biological child would have been entitled to including the rights to inheritance.

Besides the applicants, I also had opportunity to talk with the child alone, in the absence of the parents or any other person. He looked intelligent, happy and healthy. He said that he loves both the applicants, whom he fondly refers to as 'mum' and 'dad' respectively.

Now, the power for this Court to make an adoption order allowing an applicant or applicant to adopt a child is found in **section 154(1)** of the **Children Act**. One of the pre-requisites for such an order is that before any arrangements for adoption are commenced for adoption is that the child must be at least six weeks old and has been declared free for adoption by a registered adoption society (See **section 156(1)** of the Children Act).

As at the time the applicants applied to adopt the Baby E he was four years old. Before then, a committal order placing him in the custody of the Child Welfare Society of Kenya for care and protection had been made when he was about a year old. The applicants took him in on 19th January, 2013 for foster care pending the filing of the application for adoption. More importantly, Child Welfare Society of Kenya issued a certificate declaring the child free for adoption. This certificate dated 5th May, 2014 was filed in court on 8th May, 2014.

I am therefore satisfied that applicants have met the conditions prescribed in sections 154(1) and 156(1) of the Act.

According to **section 157(1)**, the child was eligible for adoption; that section provides that any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was not born in Kenya.

It is not in dispute that the child in issue was born and is resident in Kenya.

There is, however, a proviso to that section which states 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."

As at the time the Originating Summons was filed in court 30th January, 2014 the applicants had been in continuous care and control of the child for at least 11 months. It has also been noted that both the child and the applicants have been assessed by a duly registered adoption society and the office of the Director of Children Services; they have, in their reports, recommended that the child be adopted. They have also established that the child bonds well with the applicants. Thus the applicant's application satisfies the proviso to section 157(1) as well.

Although the male applicant is now passed the age of 65, the female applicant is much younger and therefore the factor of age of the applicant's cannot stand in the way of the applicant's application; I say so because section 165(2)(c) of the Children Act sets 65 as the maximum age beyond which a person cannot make an application for adoption. The same section, however, leaves it open for the court to grant an adoption order if one of the applicants is below that age of 65.

Section 158(4) requires an application for adoption to be accompanied by written consent of the parent, guardian or a person who is liable by virtue of any order or agreement to contribute to the maintenance of the child or parents or guardians of the mother of the child or the court. If the child has attained the age of 14 years, his or her consent is required.

However, under section 159(1) the court has power to dispense with the consent if it is satisfied that the parents or guardian of the child has abandoned, neglected, persistently failed to maintain or ill-treated the child. As far as abandonment is concerned, **section 159(1) (i)** states that it may be presumed if the child appears to have been abandoned at birth or if the institution or person having the care and possession of

the child has neither seen nor heard from a parent or guardian of the child for a period of at least six months.

The child in this case was literally abandoned at birth in hospital by his mother; she disappeared while the child was admitted for neo-natal care never to show up again. In these circumstances the court will not be out of step to presume that the child was abandoned and therefore dispense with the consent for his adoption.

Finally each of the applicants produced a police clearance certificate to demonstrate that none of them has been charged and convicted of any of the prescribed offences in the Schedule to the Act.

I would, in these circumstances, conclude that the applicants have not only complied with the legal requirements necessary for making of an adoption order but they also understand the consequences of making that order; they are not mistaken as to their responsibilities. I am also persuaded that they not only have the will to adopt the child as their own biological child, but they have also demonstrated that they have the means to provide him with shelter, clothing, food, education and, most importantly, the parental care and protection that he needs and deserves. I am therefore inclined to conclude that as much as the applicants intend to adopt the child as one of their own and to whom they can bequeath their inheritance, it is also in the best interest and the welfare of the child that the adoption order is made in their favour.

For the foregoing reasons, the applicant's originating summons dated 29th January, 2014 is allowed. The applicants are therefore allowed to adopt Baby E. I further order that the said child be renamed N W M and the Registrar General is hereby ordered to make the appropriate entries in the Adopted Children Register accordingly.

Signed, dated and delivered in open court this 21st day of March, 2018

Ngaah Jairus

JUDGE