



**REPUBLIC OF KENYA**

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

**PROBATE AND ADMINISTRATION DIVISION**

**ADOPTION CAUSE NO. 286 OF 2015**

**IN THE MATTER OF AN APPLICATION FOR ADOPTION OF BABY DA**

**MWN.....APPLICANT**

**JUDGMENT**

1. The Court has before it an Application brought by Originating Summons filed for an order that the Applicant be authorized to adopt the Child the subject of the Application. The Application is phrased a little out of ordinary and seeks the following orders only:

- 1) *THAT the child be presumed to be a Kenyan Citizen by birth.*
- 2) *THAT the Director of Immigration be authorized to issue the child with a Kenyan passport.*
- 3) *THAT the Applicant be authorized to adopt the child to be known as DN.*
- 4) *THAT JN and JMN be appointed as the legal guardians of the child in the event of the death or incapacity of the Applicants (sic) before the child is of full age and fully self-reliant.*
- 5) *THAT the Registrar General do make an entry of this adoption in the adopted children Register.*
- 6) *THAT the Court be pleased to make any further orders it deems necessary.*

2. The Application contains one ground “*that the orders sought are in the best interests of the child, further grounds set out in the annexed statement and affidavit of the Applicants herein and the annexures thereto and another and further grounds to be adduced at the hearing hereof*”. The Application was heard on 20<sup>th</sup> July, 2017 further grounds were not raised.

3. The Applicant is alleged to have been born on a date in 1970 that does not appear on her ID Card No [particulars withheld]. The pre-placement assessment report demonstrates that there has been no attempt to ascertain the correct date of birth. However the Guardian ad Litem uses a date the source of which is not disclosed. The Applicant is a sole applicant. She relies on the fact that she is a Kenyan citizen residing in Kenya.

4. In her statement the Applicant states that she is currently single and that she is currently running a hardware store and involved in dairy farming and pig rearing. She says that she is financially stable and medically fit. She says she has never been charged with any criminal offence and exhibits a certificate of good conduct. At paragraph 11 she says “*THAT I live in a home in a comfortable environment suitable for nurturing the child and ensuring her full development*”. She does not state where that home is.

5. This Court, differently constituted appointed CWM as the Guardian ad Litem for the purposes of these proceedings. The Order was made on 14<sup>th</sup> April, 2016 and the Report filed on 19<sup>th</sup> July, 2017. She does not state where she has obtained that information as the Identity Card Exhibited at LWN-10 shows only 1970 as a date of birth. It goes on to say that the Applicant works in Kirigiti, Kiambu and lives in Kiambu, [particulars withheld] Estate. The Applicant is described as having Christian Values and being a practicing Catholic. She has caused the Child to be baptized and changed her name without obtaining parental responsibility first. The Applicant and Child live in a one bedroomed rented house in Kiambu about 8 km from Kiambu town. The compound is spacious enough for the Child to play and is guarded at night. The Guardian ad Litem states that the Applicant has “never been married”. The Applicant herself states that she is not currently married and the Report from the Director of Children’s Services states that she was married briefly between 1995 and 1998 but was divorced due to her inability to bear children and she wishes to re-marry.

6. The Applicant was assessed by Little Angels Network. The Pre-Placement Report is dated 1<sup>st</sup> August, 2012 pursuant to an application made on 24<sup>th</sup> May, 2012. It is prepared by a Martin Juma. In that Report, the Applicant is described as a businesswoman and farmer. In the

Introduction she is said to live in Mugumo next to [particulars withheld] School. Her marital status is recorded as single instead of divorced and her net income per month is recorded as Kshs.40,000 per month. In the body of the Report, she is said to reside in her Mother's house in Kiambu Town next to [particulars withheld]. The Compound is fenced and gated and the remainder is used for farming. According to the Pre-Placement Report authored by Little Angels Network the Applicant was married between 2002 and 2004. The house is described as "a four bedroomed brick house, with a lounge, living room area and kitchen area". The applicant has a pit latrine within her compound and piped water. The house is also serviced with electricity. There was said to be a home assessment conducted on 11<sup>th</sup> July, 2012. The same report also records at page 5 that she has a stable income of Kshs.55,000/= contrary to what is said in the Introduction relating to an income of Kshs.40,000/=. Neither amount is substantiated by cogent evidence.

7. The Applicant was brought up by her mother as a sole parent. The whereabouts of her father were not known. The day to day care of the Applicant and her two siblings was carried out by her maternal grandmother. The Applicant was married briefly, for a period of two years. It is said that she was unable to have children of her own so her husband left her for another woman. No-one has seems to have asked the husband if that is correct. It seems she is currently single and would like to re-marry. The pre-Placement report contains no recommendations nor conclusions and is not signed.

8. The Applicant's mother is also a farmer. The Report does not say whether they farm the same land or separately that has implications for the net income available to each of them. The applicant is involved in dairy farming and pig rearing. Prior to that she has had a variety of occupations. In 1991-93 she attended a dressmaking course. In 1995 she was employed as a dressmaker. She stopped in 1998 to care for her grandmother which she did until 2002. The Report states that she started a cereals business and in 2008 she began a hardware store that she currently runs. The Report omits the fact that prior to opening her own business she worked for one of her sisters. The Applicant's motivation for adopting seems to be her inability to have children of her own and loneliness. However, the Report from Little Angels states that she likes children and assisted in raising her nephew and niece who are now a doctor and lawyer. The Applicant is supported by her family in the process. That is to the extent that they have provided references for her (see Mary Ngubia (advocate). The Author of the Report considers that "*The Applicant seems to have adequate means, both financially and socially to cater for the needs of a child. She also seems to have carefully thought out the issue of adoption. L meets the legal and social requirements to adopt*". The Case Committee sitting on 7<sup>th</sup> November, 2012 assessed the case and found the applicant suitable to adopt a female child of her preferred age (which was 6-8 months). There is no record of which members of the Case Committee attended the meeting. Clearly one of the proposed signatories was not there to sign his own report.

9. Pursuant to the Order of 11<sup>th</sup> July, 2016 a Children's Officer's Report was filed on 15<sup>th</sup> June, 2017. Contrary to what is said in the Pre-Placement Report, the Children's Officer reports that the home visit confirmed that the Applicant lives in a rented 1 bedroom house and the child sleeps in the same room with the Applicant. The Child is attending [particulars withheld] Academy and appeared to be healthy and happy. It is recorded that the Applicant understands that on adoption the Child will have the right to inherit from her estate. The Applicant has chosen her sister JM and her brother in law JM to be the Legal Guardian of the Child in the eventuality that she is unable to care for the Child herself. The Director of Children's Services confirm that the Child has been declared free for adoption by Little Angels Network Adoption Society and that adoption is in the best interests of the Child. The Director of Children' Services recommends that the Court rule in favour of the Applicant. The Applicant would like to re-name the child DN.

10. The Child has been given the name D A alias unknown baby. There is no date of birth recorded for her. She was abandoned shortly after birth and the agencies dealing with her have neglected to give her a presumed date of birth. She is estimated to have been born on 1<sup>st</sup> January, 2013. The History as recorded in the Report accompanying the Declaration Certificates states that the Child was found in a bush in [particulars withheld] Village as Saos Location, Koibatek District. She was taken to Eldama Ravine District Hospital. The discovery was then reported to Eldama Ravine Police Station. The Occurrence Book No is recorded as [particulars withheld]. The whereabouts of the biological family are unknown and investigations have not located them, nor have they claimed the Child, according to the Report. The Child was released from the Hospital on 4<sup>th</sup> January, 2013. She was then placed by the Koibatek District Children's Officer at the New Life Home Trust in Nakuru for "temporary custody protection and care".

11. About a week later, the District Children's Officer Koibatek made an application to the Court on 11<sup>th</sup> January, 2013 for a care and protection order. The Application (**CP No. 1 of 2013**) records clearly that the case is one where there is a "Child in need of care and protection". The needs of the Child are for "care and protection" and the risk is said to be high". The Application makes a recommendation that the Child is placed in the care of a "charitable children institution for Regular Supervision and Support (see page 8). It is further recommended that the Child "be committed to **New Life Home Trust-Nakuru for a period of 3 years**. The Officer who signed the Application is named as Elvis K. Kurgat. From the Exhibits it seems the Child was formally admitted to New Life Home Trust- Nakuru on 22<sup>nd</sup> January, 2013. The Order was dated 11<sup>th</sup> January, 2013. The Order is very clear in its terms. It states that the Court was satisfied that the Child was in need of Care and Protection under Section 119 of the Act and therefore it Ordered that **DA** be committed to the care and custody of NEW LIFE HOME TRUST – Nakuru for a period of 3 years. It is also directed to the home in the following terms. **NOW THIS IS THEREFORE TO AUTHORISE AND REQUIRE YOU THE STATED NEW LIFE HOME TRUST** to receive the said D A into your custody **and keep him for a period of three years...**". (emphasis added) The terms are clear and unambiguous. It is also clear that it extends for a term of three years.

12. What happened next is, to this Court, at least, surprising if not astounding. New Life Home Trust then firstly transferred the Child away from Nakuru. That is contrary to the Order which provides for the Child to be committed to the Nakuru home for 3 years. This was done within 2 months of the Order. There is no Application on the file for variation of the Order. That amounts to non-compliance with the Order. No explanation for that has been provided. That non-compliance is then compounded by the Little Angels Network in issuing a "CERTIFICATE OF DECLARING THE CHILD FREE FOR ADOPTION". It seems that is contrary to the Court Order that required the Child to remain in institutional care in Nakuru for a period of three years. Absolutely no consideration seems to be given to the term of the Order and removal from one County to another making it more difficult to trace the birth family. The Certificate was issued on 17<sup>th</sup> July, 2013 which means it was made after less than 6 months. Although that may meet the requirements of the Applicant, it cannot be said to comply with the Court Order. Further, there is no evidence that there was any communication with the District Children's Officer nor the Court for a review or variation of its Order.

13. The Child was moved from one area of the Country to the other. That was done in contravention of a Court Order. There is no evidence before the Court as to the reasons for that move. There is no application for variation or discharge of the care and protection order which clearly defined that the Child shall remain in Nakuru. In view of that Order, it is unclear on what basis and under what authority New Life Homes and/or the Little Angels felt able to issue a declaration that the Child was free to be adopted. The Freeing Certificate was issued on 17<sup>th</sup> July, 2013 and bears the Serial Number [particulars withheld]. The Child was in fact on the date of declaration still subject to the Order of the Court made in Nakuru. The Court takes judicial notice of the position taken by Little Angels Network is that the "Freeing Certificate" is simply a confirmation "that the paperwork is in order". However, that explanation is implausible when the freeing certificate is relied upon in proceedings such as these, to justify adoption. The Guardian ad Litem's Report focuses more on the Applicant than the Child. It informs the Court of her status and that they have Certificates of Good Conduct from the Kenya Police. She records how she is a long standing family friend of the Applicant yet she says "L [has]...Never been married". Her recommendation is that "*The Adoptive Parent is capable of raising this child and as per the decision of the Court, I have no objection to her being granted orders to adopt Baby D A*". The Applicant is said to have appointed her sister and brother in law as legal guardians. However, she has no authority to do so without parental responsibility, which she does not have. The Applicant has had the Child baptized and thus changed her name, again that has been done without an order or parental responsibility. The prospective guardians ad litem are said to have signified their agreement by completing the relevant paperwork. The "paperwork" referred to comprises a single sheet of paper standard form produced by Little Angle's Network. There is nothing on that sheet of paper to inform the reader of the identity of the signatories. There is nothing that says that the responsibility to which they are agreeing was explained to them.

14. The Court has considered all the reports presented in this case and has formed the view that in view of the numerous discrepancies in the factual background presented by the reports, in particular on fundamental issues of identity and residence, Legal Guardians this Court cannot grant an Order for Adoption at this stage.

15. It is therefore Ordered that the Applicant file a Supplementary Affidavit setting out the exact and true position in relation to her age, marital status, residence and income.

16. Further the Director of Children's Services is directed to conduct a further home visit to confirm that the details put forward are in fact correct. Given that it is reported that the Child has bonded with the Applicant and that is the only family she knows, the placement will continue pending filing of the Reports. Reports to be filed within 28 days of today.

Order accordingly,

**FARAH S.M. AMIN**

**JUDGE**

**Delivered, Signed and Dated at NAIROBI this 18<sup>th</sup> day of April 2018.**

In The Presence of:

Court Clerk: Patrick

Counsel for Applicant: Mrs Mueni-Nyokabi