REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ADOPTION CAUSE NO. 5 OF 2012(O.S)

IN THE MATTER OF THE CHILDREN'S ACT, CAP.141

AND

IN THE MATTER OF ADOPTION OF BABY D I alias S W M (MINOR)

AND

IN THE MATTER OF:

1. J M W

2. C G M.....APPLICANTS

JUDGMENT

By an amended Originating Summons dated 29th September, 2015 the applicants sought for two main prayers the first of which is an order for appointment of J W N and C G M as guardians *at litem* for baby D I alias S W M. This prayer has been spent for it was granted on 18th December, 2017. The second prayer is for an order for adoption according to which the applicants are seeking to be authorised to adopt baby D I who is also known as S W M. They have invoked sections 154,156(1), 157(1), 158, 159(4) (7)(8), 160(1)(2),163,164(1) and 170 of the Children Act, cap. 141 and section 24 of the Interpretation and General Provisions Act, cap 2 Laws of Kenya.

The summons is supported by a statement jointly signed by the applicants on 29th September, 2015 and filed in this court on 20th May, 2016.

The statement was made under oath and in it the applicants have sworn that they were married on 21st of December 1997and that they took custody of baby I from Child Welfare Society of Kenya, a duly registered adoption society, on or about 13th January, 2010. He was then 15 months old. Apart from baby I, the only other child they have is M N M whom they adopted on 30th March, 2009. They have continued to live with the two children to date.

The applicants are Kenyan citizens and were born in 1954 and 1964 respectively; the 1st applicant is a teacher by profession while the 2nd one is a farmer. They have always lived in Kenya and they intend to continue living in this country indefinitely.

They profess Christian faith and are members of the Catholic Church; they intend to raise baby I in the same faith if the adoption order is made. They have also sworn that the Child Welfare Society of Kenya has given them the permission to adopt baby I. It is their deposition that they have not received or agreed to receive any payment and no person has given or promised to give them any payment in consideration of the adoption. They have stated that they have not made any other application for adoption in respect of the same child. If their application is allowed, they would want the child to be named as S W M.

The applicant's father deposed that he is financially capable of raising the child and affording him medical care, education and leisure. Both applicants further stated that they are physically and emotionally healthy and are capable of taking care of the child. They have also never been charged or convicted of any criminal offence or any offence referred to in the 3rd Schedule of the Children Act.

The Child Welfare Society of Kenya which, as noted, is a registered adoption society under the Children Act filed its report declaring the child free for adoption on 16th October, 2017.

According to that report, on 19th of December 2009 at around 5:30 AM, the child was found abandoned in Nairobi. It was estimated that he was about 4 hours old at the time he was rescued by good Samaritans who took him to Buruburu police station. His case was booked at the station as OB No.[particulars withheld]. On the same day, he was referred to Imani Children's Home for care and protection.Subsequently, the child was committed to the same institution on 1st September, 2010 by a committal order issued in the Senior Resident Magistrates'

The investigations by the police did not yield any fruit as far as the whereabouts of child's parents or his relatives is concerned. The police themselves confirmed that no one had come forward to claim the child and neither has anybody been arrested in connection with his abandonment. The Child Welfare Society of Kenya has itself made attempts to trace the children's parents or relatives to no avail.

The child, therefore, remained in the custody of the institution for care and protection until the 24th April, 2011 when the applicants took him in; and he had remained in their custody as of 16th October, 2017 when the Society filed its report.

Considering that three years down the line the parents or relatives of the child had not been traced and that nobody had come forward to claim him and further still no one had been arrested as a result of his abandonment, the society declared the child free for adoption under section 159(1) (a) (i) of the Children Act which states that:

> ***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 seen nor heard from a parent or guardian of the child for a period of at least six months.***

The society hoped that this declaration would facilitate the process of helping the child to grow up in a family setup, in an atmosphere of love and where there is a sense of belonging. Accordingly an adoption order in favour of the applicants would be in the best interest of the child and for this reason the society issued a certificate declaring the child free for adoption on 18th of December 2013.

As far as the applicants' financial capability is concerned, the society established that their monthly income is about Kshs. 40,000/= per month out of which Kshs.10, 000/= goes to the expenses. They are confident that the balance is sufficient to take care of family needs and more particularly, the adopted children. They also have properties which include land measuring 1.62 hectares on which they have constructed their residential house. They have several other properties in the form of plots of varied sizes scattered in Nyeri. They also keep dairy animals.

As to the question of inheritance, the applicants are well aware that an adopted child has a right to inherit their property just as their biological one would. As a matter of fact, this is one of the reasons why they want to adopt the child in question.

The applicants also stated that they are law-abiding citizens and have never been charged in a court of law on any matter that touches on the children, their rights or curtailing of their freedoms. They confirmed that they do not have any kind of criminal record. As far as their health is concerned, the applicants stated that they are physically, mentally and psychologically fit to take care of the child. They said that they have no terminal disease or any other medical condition that would impede them from parenting.

As to their religion, they affirmed that they profess Christian faith and attend Catholic parish where the 1st applicant is a service leader while the 2nd applicant is a member. During their free time they read newspapers and the Bible as well as relaxing in the house. They also play with the children. Since the 2nd applicant is a housewife, she spends most of the time with the children.

On the education of the child, it is their intention to educate him to the highest level of education. They have also opened a savings account for the children's education.

The applicants' residence is a four bed roomed timber house that has a detached kitchen. They use kerosene lamps as a source of light but have piped water from the County government. The compound is clean and provides a good environment from which the children can grow.

The extended families of the applicants are happy and supportive of the adoption. The applicants themselves have embraced the adoption because through it, they now consider their family as complete. The entry of the children to the family has brought joy and happiness with it. To them, raising the children is a blessing despite the fact that they have no biological children of their own. They expect the children particularly the one in issue to grow in the fear of God and excel in his education.

After the home visit and after interviewing the applicants, the Society observed that the applicants are psychologically prepared to raise the child; they are of good physical health and they have the financial capacity to care for him. The society was also satisfied that the applicants have demonstrated their commitment to adoption by providing the child with his basic needs. More importantly, they have bonded well with the child who knows them as his parents. The child also bonds well with the other child whom they adopted first. The home environment is conducive for the upbringing of the child. In the Society's view, an adoption order would be in the best interest of the child since he is also in need of a permanent family.

The report from the department of children's services filed in court on 10th April, 2018 was consistent with that of Child Welfare Society of Kenya's report in every material respect. The report was based on the applicants' home visit conducted on 27th March, 2017.

Similarly, when the applicants, the representatives of the Child Welfare Society of Kenya, the Children's Department and the child himself appeared in my chambers for the hearing of the application, they all reiterated the contents of the fairly comprehensive home visit report by the Welfare Society.

Most importantly, both the applicants emphasised that they not only understood the consequences of an adoption order but also that they have been through this process before. They understood that if the adoption order is made in their favour, the child will attain the status of a biological child of their own should they have had one; he is entitled to all the rights their biological child would have had including the rights to inheritance. Again, they understood that they owe the child parental responsibility which include provision of the necessities such as food, shelter, clothing, medical care and education.

Besides the information gathered during the home visits by both the Chidren's Department and the Child Welfare Society, the 1st applicant informed the court that he now has rental houses and his average monthly income is now increased to Kshs 100,000. He is also on pension and also earns dividends of approximately Kshs 250,000/= per year.

I also had occasion to speak with the child. He told me that he is eight years old and is now in class two at [particulars withheld] Academy. He regarded the applicants as his father and mother respectively. He has embraced the other child who was adopted before this application was made as his sister with whom he attends the same school. He told the court that he loves his parents and his sister as well. I noted that he's intelligent, healthy and happy. He appeared to me to have bonded well with his parents and his sister.

As always in applications such as the present summons, the court has to bear in mind the law applicable as specifically spelt out in the Children Act. Section 158 of that Act, more or less gives the description of a person who is eligible to apply for an adoption order; for avoidance of doubt, it also describes a person who does not meet the threshold of such an application. In the same breath, it prescribes the circumstances under which an adoption order will be refused besides spelling out the basic requirements in an application for an adoption order. It is necessary I reproduce the entire section here for better understanding; it says:

158. Adoption applicants

(1) An adoption order 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-one years older than the child but has not attained the age of sixty-five years; or

(b) is a relative of the child; or

(c) is the mother or father of the child.

(2) An adoption order shall not be made in favour of the following persons unless the court is satisfied that there are special circumstances that justify the making of an adoption order—

(a) A sole male applicant in respect of a female child;

(b) a sole female applicant in respect of a male child;

(c) an applicant or joint applicants who has or both have attained the age of sixty-five years;

(d) a sole foreign female applicant.

(3) An adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them—

(a) is not of sound mind within the meaning of the Mental Health Act (Cap.248);

(b) has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule to this Act or similar offences;

(c) is a homosexual;

(d) in the case of joint applicants, if they are not married to each other;

(e) is a sole foreign male applicant:

Provided that the court may refuse to make an adoption order in respect of any person or persons if it is satisfied for any reason that it would not be in the best interests of the welfare of the child to do so.

(4) Subject to section 159 an adoption application shall be accompanied by the following written consents to the making of an adoption order in respect of any child—

(a) the consent of every person who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child;

(b) in the case of a child born out of wedlock whose mother is a child, with the consent of the parents or guardian of the mother of the child;

(c) in the case of a child born out of wedlock whose father has acquired parental responsibility in respect of the child under the provisions of this Act, with the consent of the father;

(d) on the application of one of the spouses, with the consent of the other spouse;

(e) in the case of two spouses who are not Kenyan citizens and who are not resident in Kenya, with the consent of the court of competent jurisdiction or of a government authority situated in the country where both or one of the spouses is ordinarily resident, permitting the spouses to adopt a foreign child;

(f) in the case of a child who has attained the age of 14 years, with the consent of the child.

Another relevant provision is section 154(1) of the Act; it is in this provision that the power of the court to make an adoption order is found. It states as follows:-

Subject to this Act, the High Court may upon an application made to it in the prescribed form make an order (in this Act referred to as "adoption order") authorising an applicant to adopt a child.

Subsection (2) of the same section lays emphasis on the confidentiality of the proceedings; it is to the effect that the proceedings in respect of an application for adoption shall be heard and determined in chambers and that the identity of the child and the applicants shall always remain confidential.

One of the conditions precedent for an adoption order is that before any arrangements for adoption are commenced, 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 far the present application is concerned, there is sufficient evidence that this condition has been complied with. The child was placed in the custody of the applicants on 24th April, 2011 by which time he was more than a year old considering that he was born on 19th December, 2009. The Child Welfare Society of Kenya issued a certificate declaring him free for adoption on 18th December, 2013 almost three years before the amended originating summons was filed.

It is also apparent from the record that before the commencement of the adoption process the child was available for adoption. Section 157(1) of the Act is to the effect that any child who is resident within Kenya may be adopted irrespective of whether the child is a Kenyan citizen or was not born in Kenya. The available evidence points to the fact that the child in issue was not only born in Kenya but he was also a resident of this country at the material time.

There is, however, a proviso to section 157(1) which has to be taken into account; it states as follows:

"…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."

The applicants' amended Originating Summons was filed in court on 29th September, 2015. The two home visit reports and the agreement for foster parents executed between the applicants and the Child Welfare Society of Kenya show the applicants took custody of the child for foster care on 24th April, 2011. There is a space of almost four years for which the applicants had been in continuous care and control of the child before they initiated the adoption proceedings.

Needles to say, a duly registered adoption society and the office of the Director of Children Services have evaluated the applicants and the child and come to the conclusion that the applicants are not only suitable to adopt the child but it is also in the best interest of the child that he should be adopted. In short they have, in their reports, recommended that the child be adopted. I am therefore satisfied that the proviso to section 157(1) has been complied with to the letter.

One other requirement that deserves consideration is section 158(2) (c) of the Children Act; this provision sets 65 years as the maximum age beyond which a person cannot make an application for adoption. No adoption order can be made in favour of an applicant or applicants who have attained this age. As at time the application was heard on 11th May, 2018 the 1st applicant was 64 years while the second applicant was 54 years old. Although the foster father is close to the upper age limit, the foster mother is way below this ceiling. And even if the foster father was the sole applicant, his age would not have been a factor because as much as he is 64 he has not yet attained the proscribed age. It follows that the applicants are eligible adoptive parents as far as the requirement as to age is concerned.

Besides the age factor, section 158(4) requires an application for adoption to be accompanied by a 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. The child in issue is about eight years and therefore the last part of this requirement does not arise in this case.

Where consent is necessary and yet cannot be obtained, section 159(1) comes in handy because under this provision, 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.

It was established that the child in this case was found abandoned at Maili Saba a few hours after his birth on 19th December, 2009. He was rescued by good Samaritans who took him to Buruburu police station where a report was duly booked regarding his abandonment and rescue. Since then no one has laid any claim on him. The investigations by the police to trace his parents or either of them or his parents have not yielded any fruit. Again no one has been arrested in connection with the child's abandonment. In these circumstances, it is logical to

presume abandonment because such presumption is consistent with what is deemed as abandonment under section 159(1) (i) of the Act. In my humble view, this is a proper case in which the court has no alternative but to invoke section 159(1) (i) and dispense with the consent for adoption of the subject.

Finally, section 159(3) (b) says that no adoption order shall be made if the applicants or an applicant has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule to this Act or similar offences. The applicants have satisfied this honourable court that neither of them has fallen short of this requirement; in other words, they have not been charged and convicted of any of the specified offences or any offences for that matter. To this end, they produced police clearance certificates from the Directorate of Criminal Investigations of the National Police Service certifying that there are no records of any charges or convictions involving them or any of them.

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 clearly needs and deserves. I am therefore inclined to conclude that as much as the applicants intend to adopt the child as their own biological child 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. In coming to this conclusion, I take cognisant of section 119(1) (a) of the Children Act which states that 'a child is in need of care and protection –who has been abandoned by his parent or guardian and also take into account Article 20 of the United Nations Convention on the Rights of the Child which is to the effect that:

> ***A child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the state-states parties shall in accordance with their national laws ensure alternative care for such child-such care include adoption.***

For the foregoing reasons, the applicants' amended originating summons dated 29th September, 2015 is allowed. The applicants are therefore allowed to adopt B D I who shall henceforth be known as S 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 Chambers this 25th day of May, 2018

Ngaah Jairus

JUDGE