



**REPUBLIC OF KENYA**

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

**ADOPTION CAUSE NO. 6 OF 2013(O.S)**

**IN THE MATTER OF THE CHILDREN'S ACT**

**AND**

**IN THE MATTER OF ADOPTION OF J J S (A CHILD)**

**AND**

**IN THE MATTER OF:**

**1. J S M**

**2. G K S...APPLICANTS**

**JUDGMENT**

The applicants lodged in this honourable court an originating summons dated 13<sup>th</sup> June, 2013 seeking for orders that, first, L W M and W M N be appointed as guardians litem of baby J S; second, that the applicants be allowed to adopt baby J S; and, finally that the court dispenses with consent of the baby's mother as he was an abandoned child. The summons is said to have been brought under section 158 of the Children Act, cap.141.

The applicants swore a joint affidavit in support of the summons; in it they deposed that as at the time they filed the summons, they were aged 44 and 41 respectively. They also exhibited a copy of a certificate of marriage showing that their marriage was solemnised in church under the African Christian Marriage and Divorce Act, cap.151.

They also deposed that the child whom they sought to adopt was put into their custody their capacity as prospective adoptive parents on 4<sup>th</sup> October, 2012 by Little Angels Network, an Adoptive Society duly registered as such under the Children Act, cap.141.

In a report filed in court on 19<sup>th</sup> February, 2014 by the Society declaring baby J S free for adoption, the latter is estimated to have been born on 17<sup>th</sup> February, 2012 and that he was found abandoned within [particulars withheld] Sub-district hospital, Kirinyaga County, on 1<sup>st</sup> March, 2012. He was immediately admitted in the same hospital for medical care and nursing. In the meantime, a report of his abandonment and subsequent recovery was made to Kimbimbi police post which falls under Wanguru police station and booked as O.B. No. [Particulars withheld].

Subsequently, the child was presented before the children's court at Wanguru magistrates' court for a placement order in Protection and Care Case No. 13 of 2012. The order was granted and the child was subsequently placed at the New Life Home Trust which I understand to be a children's home in Nyeri town.

By a letter dated 6<sup>th</sup> September, 2012, the Officer in Charge of Wanguru police station informed the children home's administrator advising that since the search of the child's parents or his relatives had not borne any fruit and further, considering that no one had come forward to claim the child since the day he was found abandoned the police had no objection to any other legal steps being taken to secure the interests of the child.

On 4<sup>th</sup> October, 2012 the child was discharged from New Life Trust Home and from then on the applicants took custody of him. In the absence of any information regarding the child's biological family and noting that none of his family members has come forward to claim him, the child was found to be in need of alternative family care where he could benefit get family love, care and necessary provisions that ordinarily would not be found in an institution such as the one he was accommodated in.

It is against this background Little Angels Network recommended that it would be in the child's best interest if he is adopted; accordingly, on

19<sup>th</sup> September, 2012, it issued the requisite certificate declaring the child free for adoption.

The Children Officer from Nyeri District Children's office, no doubt acting on behalf of the Director of Children's services, made a social inquiry on the applicants and filed his report. He established that the prospective adoptive father, the 1<sup>st</sup> applicant is a Kenyan citizen and was aged 47 as at 17<sup>th</sup> March, 2015 when he made his report. He also established that he is married to the 2<sup>nd</sup> applicant and that both applicants profess Christian faith. The 1<sup>st</sup> applicant was also established to be a valuer by profession and his place of residence is at a place called [Particular withheld] in Nyeri town.

As far as the prospective adoptive mother is concerned the Children Officer established that she too is a Kenyan citizen and aged 43. She is married to the 1<sup>st</sup> applicant and the two have been married since the year 2001. She is a banker and like the 1<sup>st</sup> applicant, she is based in Nyeri.

The officer conducted the home visit on 16<sup>th</sup> March, 2015 and it is on this particular dated that he interviewed the applicants. In the course of this interview, he established that the prospective adoptive parents have no biological child of their own and it is unlikely that they will have any because of a medical condition diagnosed on the 2<sup>nd</sup> applicant.

The officer also confirmed that the child was placed in the custody of the applicants on 4<sup>th</sup> October, 2012 while he was only 8 months old. He observed that the child relates well with his parents and communicates with them in Swahili, English and Kamba languages. He found the child to be healthy and without any manifest medical or health concerns.

The officer also observed that the house in which the applicants and the child live is a rental two-bed-roomed self-contained house. It is serviced with piped water and electricity. It is one among several other units surrounded by a perimeter wall. Apart from the house, there is an open ground spacious enough for the children to play in. The officer was satisfied that the general environment in which the child lived was conducive for his upbringing.

As far as the financial status of the applicants is concerned the officer established that they have a stable income from their employment. Apart from their earnings they own a vehicle and a plot. In the officer's view, the applicants are capable of providing for the basic needs of the child including such needs as food, clothing, education and medical care.

The report also notes that applicants are Christians who attend New Life Church in Nyeri; they informed the children officer that they are committed to raising the child in a godly manner. He assessed them as people who have positively embraced the adoption process; they too assured him that they have the support and encouragement from their respective families and friends. Based on his findings and observations, the children officer recommended that the applicants be allowed to adopt the child.

On my part, I had occasion to hear from the applicants, the representatives from the offices of the Director of Children Services and the Adoptive Society and even the child himself in the course of the adoption proceedings. I was left with the impression that the applicants are clear of what the process involves and are under no illusion of their responsibilities towards the child once an adoption order is made. For instance they are clear in their minds that they will have to embrace the child as they would have embraced their own biological child; that they are responsible for his parental care and at the very minimum they must ensure that he is nourished, he has a roof over his head, he is clothed and educated. More importantly, the child has inheritance rights over whatever they own.

I was satisfied that they can meet the child's needs that may need financial input; my appreciation of their financial capabilities arises from copies of their payslips which they filed in court. These documents show that their combined average monthly income is approximately KShs. 250,000.00.

The Children Officer and the representative of the Adoptive Society confirmed that they filed their respective reports to which I have adverted and apart from reiterating the contents of those reports, they were in agreement that the Originating Summons ought to be allowed.

The child himself appealed to be intelligent, healthy and happy when I talked to him. He regards both the applicants as his parents; he fondly refers to them as 'daddy' and 'mummy' respectively.

The Originating summons has to be considered in the context of the law applicable to applications for adoption as provided for in the Children Act. Section 158 of that Act which the applicants invoked states as follows:

**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.

It is clear that section 158 does not just paint a picture of a person who is eligible to apply for an adoption order; it also paints a picture of one who is not. In the same breath, it prescribes the circumstances under which an adoption order will be refused and also lays out the basic requirements in an application for an adoption order. These provisions are, no doubt, relevant to an application for adoption; however, we must also bear in mind that the power of this Court to make an adoption order is found in **section 154(1)** of the **Children Act**. It says:

**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 reminds all and sundry 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 pre-requisites for such an adoption order is that before any arrangements for adoption are commenced for adoption 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). From the evidence available, there is no doubt that this provision has been complied with as at 30<sup>th</sup> May, 2012 when the child was placed in the custody of New Life Home, he was more than three months old and by 4<sup>th</sup> October 2012 when applicants took custody of him, with the intention of adopting him, he was about eight months old. Again a certificate declaring the child free for adoption was duly issued on 19<sup>th</sup> September, 2012 which was few months before the applicants took him in.

It is also apparent 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

Kenyan. The available evidence points to the fact that baby Jarvis was born in Kenya and he was a resident of this country at the material time.

There is 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' Originating Summons was filed in court 14<sup>th</sup> July, 2013 by which time the applicants had been in continuous care and control of the child for close to 10 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. It follows that the applicant's application satisfies the proviso to section 157(1) as well.

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 applicants have demonstrated that they were way below this age at the time the application was made; as noted, they were aged 44 and 41 respectively. They still have got a long way to hit this age limit even as the date of this judgment. Accordingly, the applicants are eligible adoptive parents as long 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.

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.

Baby J was found abandoned within the [particulars withheld] Sub-district hospital on 1<sup>st</sup> March, 2012. He was briefly admitted in hospital before he was placed at the New Life Trust home. A report of his abandonment was made to the police and despite all their efforts to trace his parents or relatives, they never succeeded. It has also been demonstrated nobody has come forward to lay claim on baby Jarvis between the time he was found abandoned and the time the applicants filed the summons to adopt him. It will be logical to presume abandonment in these circumstances and in my view, such presumption is consistent with the provisions of section 159(1) (i) of the Act. I would therefore dispense with the consent for baby Jarvis' adoption.

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 neither of them has fallen short of the requirements of this section in the sense that they have not been charged and convicted of any of the specified offences. In this regard

They produced police clearance certificates from the Directorate of Criminal Investigations of the National Police Service certifying that there are no records that the applicants or any of them has previously been convicted of the prescribed offences or any offence for that matter.

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 29<sup>th</sup> January, 2014 is allowed. The applicants are therefore allowed to adopt Baby J J S who shall henceforth be named as J J S 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 25<sup>th</sup> day of May, 2018**

**Ngaah Jairus**

**JUDGE**