



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ADOPTION CAUSE NO. 10 OF 2012

IN THE MATTER OF THE ADOPTION OF Y K (A CHILD)

AND

IN THE MATTER OF M W N.....APPLICANT

JUDGMENT

Baby Y K was abandoned by her mother on 20th September, 2009. She was left in the custody of one F O. This happened in Garissa County where both the baby's mother and F O apparently hailed from.

F O stayed with the child till 24th September, 2009 when she reported the abandonment to the police at Garissa police station. The report was entered in the police records as O.B. No. [particulars withheld].

The child was thereafter referred to Garissa hospital for medical checkup. She remained there until 28th September, 2009 when she was referred to the Children's Office at Garissa. On 29th September, 2009 she was admitted at Garissa Rescue centre for care and protection before she was taken in at Nairobi Children's Home for the same purpose on 10th March, 2010. She was committed to this home vide a committal order granted in Garissa Children's Court Care and Protection Case No. 2 of 2010. She remained at this home until 29th March, 2011 when again she was referred to the Child Welfare Society of Kenya for care and protection. Subsequently, the child was committed to Mama Ngina Kenyatta Children's Home for care and protection vide a committal order issued in Nairobi Children's Court Care and Protection Case No. 93 of 2011.

This background information is contained in a report dated 9th July, 2014 by the Child Welfare Society of Kenya declaring the child free for adoption. The report was filed in this cause on 4th February, 2015 in support of the applicant's Originating Summons dated 10th December, 2012 and filed in court on 4th February, 2013 seeking for the order to adopt Baby Y.

According to the statement filed by the applicant to support her summons, she is a Kenyan citizen who was born in 1964. She has no intention of relocating to any other country and currently she resides in Nyeri County. She professes Christian faith and she is unmarried. The applicant further states that she received the child on 15th November, 2011 based on an Agreement of foster Parent executed on that date between herself and the Child Welfare Society of Kenya in whose custody the child was at the material time.

She averred that she has not received or agreed to receive any payment or reward and no person has made, given or agreed to make or give her any such reward or payment in consideration for the adoption. Again, she has not made any similar application for adoption before. If the order for adoption is granted she prefers the child to be called D N W.

I had occasion to hear the applicant herself and the respective representatives of the Child Welfare Society of Kenya and the Director of Children Services. The applicant reiterated that she understands the import of an adoption order; she appreciates that if the order is made in her favour, the child will stand in the same stead as her own biological child, if she had one. She also appreciates that apart from entitlement to basic rights of a child such as food, shelter, clothing and education, the child has inheritance rights over her estate; as a matter of fact, she was motivated into making this application because she, among other things, wanted somebody who could inherit her property upon her demise.

The applicant also stated that she has always been single and does not intend to marry in future. Again, she has never had a biological child of her own.

On the question of her capability to raise the child, the applicant assured the court that she is in a position to cater for the child's needs; in proof of this fact she asked the court to consider that she took in the child when she was only 2 ½ years and seven years later she has been able to raise her to be the person she is today. The two of them live happily as mother and daughter.

As a business lady, the applicant stated that she has sufficient income to cater for the child's financial needs. She has, for instance, enrolled her in a primary school where is in class three.

The child herself acknowledged the applicant as her mother. I noted that she was fairly intelligent though a bit shy. My further assessment of her is that she is happy, healthy and well taken care of.

The representative from the Child Welfare Society of Kenya confirmed that the Society is a state corporation incorporated under legal notice no. 58/2014 for protection and care of children. In that regard it filed the report that I have made reference to giving the child's background and also declaring her free for adoption. A certificate to this end, being certificate no. [particulars withheld] was also filed alongside the report.

Besides declaring the child free for adoption, the Society's representatives visited the home where the applicant and the child live. They established they live in a two-bedroomed house on the outskirts of Nyeri town. Their residence is connected to electricity and is also supplied with piped water. It is fenced and well protected; in their assessment, the home environment is conducive enough to raise the child. The applicant's relatives are supportive of the applicant's intentions and they now regard the child as the applicant's own.

The applicant herself was assessed to be mentally and physically fit to care for the child. She does not suffer from any ailment that would render her unable to deliver on her parental responsibilities. She attends the Church of God at Nyeri together with the child. She intends to bring her up in Christian faith.

On his part the representative of the Director of Children Services stated that he made a social enquiry on both the child and the applicant. As part of the enquiry, he visited the applicant's home at [particulars withheld] village which, as noted, is near Nyeri town. Based on that visit and the interview he conducted, he was convinced that the applicant has the means to support the child. For instance, he established that the applicant has an average income of about Kshs 20,000 per month from her cereals business. She also keeps poultry from which she earns Kshs 10,000.00 per month. She owns a house built on an 1/8 of an acre of land. The officer recommended the adoption because, in his view, it is in the best interest of the child. The social enquiry report dated 19th March, 2018 was filed in court to support the recommendations by the representative of the Children Services.

The conclusion that one can make from the reports by the Child Welfare Society of Kenya and the Director of Children Services is that the applicant is not only financially able to raise the child but she also has the will and the motivation to embrace the child as her own biological child. In return, apart from accessing the basic needs such as food, shelter, clothing and education, the child also has emotional comfort from a person she now regards as her mother. The applicant's home and companionship would, in these circumstances, provide a conducive environment for the parental care and protection that the child deserves.

Going back to the law, one of the pertinent provisions that I often cite in applications such as the present one is Section 158 of the Children Act, 2001. It is relatively lengthy but owing to its centrality in this application, it is worth being reproduced here; it 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.

This provision of the law sets forth the qualifications necessary for eligibility for an adoption order; in the same vein, it sets out circumstances under which one may not be eligible for such an order. It lays bare the circumstances when an adoption order will be declined and prescribes the basic requirements that must be met before an adoption order is made.

Besides section 158 of the Act, section 154 (1) of the same Act is equally relevant in the sense that it is in this latter section that this court derives its power to make adoption orders. 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 us 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 for such an adoption order is that before any arrangements for adoption are commenced, the subject of adoption 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). Looking at the material before court, there is no doubt that this provision has been complied with because as at 11th November, 2011 when the applicant executed an agreement with the Child Welfare Society of Kenya as a foster parent of the child, with a view to adopting her in future, the child was already 2 ½ years old. There is also evidence that a certificate declaring the child free for adoption was duly issued by a duly registered adoption society.

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 Kenya. The available evidence points to the fact that baby 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 applicant’s Originating Summons was filed in court on 4th February, 2013 by which time the applicant had been in continuous care and control of the child for over a year.

Both the child and the applicant were assessed by a duly registered adoption society and the office of the Director of Children Services; they both recommended an adoption order in favour of the applicant. The former society established for instance, that the applicant was motivated to adopt the child because she wants company and is also interested in having someone inherit her property. She also wants continuity of her generation.

Both the Society and the Director of Children Services were also consistent 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 years as the maximum age beyond which a person cannot make an application for adoption. The applicant has demonstrated that she was way below this age at the time the application was made; as noted, she was born in 1964 and therefore she was aged 48 at the time she filed her application. There is no doubt therefore the applicant satisfies the condition of age.

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.

According to the report by the Child Welfare Society of Kenya declaring the child free for adoption, the efforts to trace the child's parents or relatives have been futile. A letter from the Officer in Charge of Garissa police station dated 4th October, 2013 says that since the report of abandonment was made to the police no person had showed up to lay claim on the child, four years later. The stranger in whose hands the child had been left at birth could also not be traced.

Abandonment of the child is a fair and logical presumption in these circumstances; they fit the description of 'abandonment' as defined in Section 159(1)(i) of the Act. This therefore is a clear case where the consent for adoption can be dispensed with.

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 the Act or similar offences. The applicant has satisfied this honourable court that she has not been charged and convicted of any of the specified offences. She produced a police clearance certificate from the Directorate of Criminal Investigations of the National Police Service certifying that it has no records to the effect that the applicant as previously been convicted of the prescribed offences or any offence for that matter.

I am satisfied that the subject child is not only available for adoption but the applicant has also demonstrated that she has complied with all the legal requirements necessary for this Court to make an adoption order.

I also agree with the observations and recommendations by the Child Welfare Society of Kenya and the Director of Children Services that since, for all intents and purposes, the child is presumed to have been abandoned, she is in need of an alternative family where she can find love, care and protection. The Act itself is clear in section 119(1)(a) thereof that a child who has no parent or guardian or has been abandoned by his or her parents or guardian is a child who is in need of care and protection. Again Article 20 of the United Nations Convention on the Rights of the Child to which Kenya is a signatory emphasizes that such care and protection can be accessed through an adoption. It states:

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 could include adoption.

Based on the reports by the adoption society and the Director of Children Services and, having heard the applicant and the baby herself and further, in view of the legal provisions which I have cited, I am persuaded that it is in the best interest of the child that an adoption order is made in favour of the applicant. Accordingly, I hereby allow the applicant's originating summons dated 10th December, 2012 and the applicant is allowed to adopt Baby Y K who shall henceforth be named as D N W. The Registrar General is hereby ordered to make the appropriate entries in the Adopted Children Register accordingly. It is so ordered.

Signed, dated and delivered in chambers this 29th June, 2018

Ngaah Jairus

JUDGE