



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ADOPTION CASE NO. 14 OF 2014

(IN THE MATTER OF ADOPTION OF BABY O H)

J W W.....1ST APPLICANT

H W G.....2ND APPLICANT

JUDGMENT

On 27th October, 2014, the applicants lodged in this court an originating summons dated 25th August, 2014 seeking for an adoption order to adopt Baby O W (a child) (hereinafter “Baby O”); pending the determination of this summons, they sought for appointment of one M N W as the guardian *ad litem*. They also asked this court to dispense with the consent which is otherwise necessary for an adoption order. The summons is stated have been brought under section 158 of the Children Act, cap. 141.

The summons is supported by the affidavit which the applicants jointly swore on 27th of August, 2014. In that affidavit, they have said that they are a married couple and that as at the date of swearing their affidavit, they were aged 61 and 51 respectively. Upon their application, Baby O was placed in their custody by Little Angels Network, an adoption society, on 19th October, 2014 with the intention to adopt him if their present application is successful.

In proof of the fact that they are married, the applicants exhibited to their affidavit a copy of a marriage certificate showing that their marriage was solemnised in church under the African Christian Marriage and Divorce Act cap.151 on 27th of May, 2010.

The 1st applicant swore a further affidavit on 10th July, 2017 in which he stated that due to medical complications, his wife, the 2nd applicant, underwent a surgery that left her permanently unable to conceive; in the circumstances, the couple is unable to have a biological child of their own and it is partly for this reason that they intend to adopt Baby O.

The 1st applicant has also sworn that since Baby O was placed in their custody, they have lived with him uninterrupted and they have, in the process, bonded well. The 2nd applicant also swore a supplementary affidavit on 10th of July 2017 and agreed with her husband that they would wish to adopt Baby O.

Baby O background is found in two reports respectively filed in court by Little Angels Network, which as noted, is a duly registered adoption society and the Director of Children services, Nyeri County.

According to the adoption society, Baby O was found abandoned near a coffee factory at Ndagaini sublocation in Meru South sub County on 7th September, 2012. He was located by good Samaritans who notified the area chief and who in turn reported the matter at Chuka police station. The report was entered in the occurrence book as number 40/7/9/2012. The child is estimated to have been born on 23rd August, 2012 at the time he was rescued.

The child’s plight was then reported to Meru South District Children’s office for home placement. A vacancy for the placement was secured at the New Life Home Trust children’s home where he was admitted on 23rd November, 2012 pending committal by court.

On 30th November, 2012, the child was presented before the children’s court at Chuka for formal committal into the children’s home. The committal was facilitated by Chuka District children’s office and was granted by protection and care case number J/V/3/12.

On 26th March 2013, the Children’s Home received a letter from Chuka police station saying that as of that date nobody had turned up to claim the child. Similarly, no parent or guardian had turned up at the children’s home to claim the child during his entire stay at the institution and neither has it received any information from the Department of children services or the police department concerning the child’s parents, relatives or any other person who, ordinarily would have claimed him.

In the adoption society's assessment, Baby O was presumed to be an abandoned child and who was therefore officially placed in its custody for care and protection; he remained unclaimed for more than 6 months and he remained so unclaimed at the time he was placed in the custody of the applicants.

Before the applicants took him in, the police department confirmed having exhausted its investigations on the child's case; it had hitherto failed to trace the child's family or received any information that could lead them to trace the child's parents, relatives, guardian or guardians. It is as a result of these circumstances that the society opined that the child needed alternative family from where he stands to enjoy family love, care and protection as opposed to being in an institutional care.

The case committee of the adoption society therefore deliberated on this matter in a meeting held on 5th June, 2013 and recommended that an adoption would be in the child's best interests. It is on this note that the society declared the child free for adoption in accordance with section 156(1) of the Children Act. It issued a certificate in this regard accordingly.

The adoption society also made a pre-placement report which was also filed in court. The report which is dated 21st August, 2013 gives further details of the applicants' background; for purposes of the present application, it was established that the applicants underwent a medical evaluation the results of which certified them to be in good health. The report further indicated the applicants to be mentally and emotionally stable. They are both covered by the National Health Insurance Fund and by virtue of their membership to the scheme, the medical needs of the adopted child will also be covered.

The same report detailed that the 1st applicant has an income of Kshs. 12,000/= per month, while the 2nd applicant is a salaried employee who earns Kshs. 14,000/= per month. Their average monthly expenditure is about Kshs. 9,500/=. Judging from the couple's income and expenditure patterns, the applicants are able to provide for the needs of the child. Apart from the monthly earnings they also own property in the form of land at Mweiga and at Mukurweini.

The applicants also underwent a pre-adoption counselling on 31st of July, 2013. The counselling session was conducted by a counselling psychologist whose report indicated that the applicants were psychologically prepared for the adoption; he observed that the applicants are of sound mind and in his view, they were capable of adopting the child.

The Nyeri County Director of Children Services' report on the background of the child was consistent with that of the adoption society and similarly recommended that the child be adopted. He further undertook a social enquiry on the applicants and in particular with respect to their capacity to adopt the child. He established that the applicants reside in Nyeri County. As of 22nd March, 2017, when he made his report, the 1st applicant was 65 years old. He is a livestock farmer keeping dairy cows, chicken and rabbits. He is also a member of Full Gospel Churches of Kenya church.

As at the time of the home visit, the couple lived in a semi-permanent four-roomed house but which was connected to piped water and electricity. However, they were putting up a permanent two-bedroomed house with a spacious living room on a quarter of an acre plot registered in the name of the 2nd applicant. The house is in the neighbourhood of such social amenities as schools, hospitals and tarmac road. The applicants should have moved in their new house as at the date of this judgment.

The prospective adoptive mother, on the other hand, is an accountant at **[particulars withheld]**. She has been in the employment of this **[particulars withheld]** since 1991. Like her husband, she also attends the Full Gospel church.

The director also established that despite their fairly advanced age, the applicants' marriage is the first for either of them. They first met in 2007; they then courted for 3 years before they finally married on 27th March, 2010. Although they have no biological child of their own the marriage has been a happy one. They do not contemplate divorce because it is their firm conviction that divorce is inconsistent with their Christian beliefs.

As far as the child is concerned, the director of children's services established that he was placed under the continuous care and custody of the applicants on 19th October, 2013 by which time he was slightly over a year old. As at the time the report was made he had lived with the applicants for 4 years. He has grown and developed well and, in his opinion, the child is vibrant and energetic. He also says that the boy is charming and he feeds well. As at 22nd March, 2017, he was 5 years old and attending a pre-school. He has bonded well with the applicants and at he is also at home with guests.

The couple was motivated to adopt the baby because they have not been able to get a biological child of their own. In the director's view, the applicants are financially capable of maintaining the child because the 2nd applicant is a salaried, permanent and pensionable employee while the 1st applicant is engaged in agro-business. Their combined income is sufficient for the child's needs.

At the hearing of the originating motion the representatives of the adoption society and the office of the director of children's services in Nyeri County presented their respective reports and reiterated their contents. The applicants too reiterated their sworn depositions but added that they were aware of the consequences of an adoption order. In particular, they were aware that once the order is made, Baby O will be treated as their own biological child with all the appurtenant rights that their own biological child would have been entitled to, including the right to inherit their estate.

I had occasion to interact with the child, albeit briefly, and my own assessment of him was that he was well taken care of. He appeared bright. He told me that he is now in a nursery school and he would like to be a police man when he grows up. Most importantly, he acknowledged the applicants as his parents. He loves them both.

The order for appointment of guardian ad litem was made on 9th February, 2017 and therefore all that this honourable Court is concerned

with at the moment is the prayer for the adoption order.

From the facts presented in court, Baby O can properly be presumed to have been abandoned as understood under the proviso to 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;
(Underlining mine).

I agree with the adoption society and the director of children services that in these circumstances, the child can properly be adopted.

The power for this Court to make an adoption order in favour of any applicant or applicants, is found in **section 154(1)** of the **Children Act**. One of the conditions necessary 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 O, he was obviously more than six weeks old. Prior to their application, a committal order placing him in the custody of the Little Angels Network for care and protection had been made when he was about four months old. The applicants took him in on 19th October, 2013 for foster care pending the filing of the application for adoption. The adoption Society issued a certificate declaring the child free for adoption in accordance with section 156(1) of the Children Act and the Adoption Regulations in Kenya Gazette Supplement No. 37. This certificate dated 5th June, 2013 was filed in court on 8th February, 2017.

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

And **section 157(1)** of the Act 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 27th October, 2014 the applicants had been in continuous care and control of the child for more than one year. 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 applicants 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, in an application such as the present one where the applicants are a couple, is below that age.

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 less than two months after birth; he was left abandoned near a coffee factory and was only rescued by a good Samaritan. 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 am satisfied 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 and therefore embrace him 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 satisfied that it is in the best interest and the welfare of the child that the adoption order is made in the applicant's favour.

For the foregoing reasons, the applicant's originating summons dated 27th August, 2014 is allowed. The applicants are therefore allowed to adopt Baby O. I further order that the said child be renamed O W W 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 28th September, 2018

Ngaah Jairus

JUDGE