



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

ADOPTION CAUSE NO. 153 OF 2014

IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001

AND

IN THE ADOPTION OF CHILD E. (MINOR)

J A A.....APPLICANT

JUDGMENT

1. Pursuant to the provisions of Sections 4 and 154 of the Children Act, Section 9 of the Kenya Citizenship and Immigration Act No. 12 of 2011 and Article 14 of the Constitution of Kenya, J A A herein referred to as the applicant moved this court vide an Originating Summons dated 26th May 2014 but filed on 3rd June 2014 seeking various orders as follows:

- (1) That J A A be authorised to adopt the child E.**
- (2) That the consent of the biological parents be dispensed with as the child was abandoned.**
- (3) That upon making of the adoption order the said child be known as A G A A.**
- (4) That the Registrar-General do make the appropriate entry of A G A A in the Adopted Children's Register.**
- (5) That the child be presumed to be a Kenyan Citizen born in Kenya on 5th May 2007 and that the Director of Immigration do issue the child A G A A with a passport.**
- (6) That C A A be appointed legal guardian to the child.**

2. The application is anchored on grounds on the face of it and a statement in support of the application together with annexures thereof. The applicant is a Kenyan citizen born 1967 and a self-employed. She is a single mother who has never been married but blessed with one biological child (daughter) who is now over 29 years old. The motivation to adopt the child herein was born by the desire by the applicant's daughter to have a little sister. The applicant's daughter first saw the child during a Corporate Social Responsibility function at Hope House Babies Home and urged her to go and adopt the child, and after due consideration, she decided to adopt the child.

3. According to a letter ref KNH/MSW/CPF/VOL.III/1 (432), the child who is presumed to have been born on 5th May 2007 was found on the same day having been abandoned between 4th and 5th floor of Kenyatta National Hospital and rescued by a security officer and a nurse in the hospital. The child was admitted to New Born Unit at the Hospital on 6th May 2007. On 29th September 2008, the child was committed to Hope House Babies Home by the Children's Court at Nairobi vide Protection and Care Case No. 334 of 2008.

4. Despite every effort by the police and Children Department in tracing the mother and or relatives, nothing positive came out of it. This is confirmed through a final letter from Kenyatta Police Post dated 9th May 2008 pursuant to Regulation 16 of the adoption Regulations 2005 (legislative supplement No. 21). On 3rd August 2008, the child was placed under the custody of the applicant for purposes of this adoption. That however was before the Child Welfare Society of Kenya held its case committee on 12th January 2010 and recommended the child for adoption. The child was declared free for adoption in compliance with Section 156 (1) and a certificate S/No. xxx issued to that effect.

5. The court on 28th April 2016 appointed L W as guardian *ad litem* and ordered that she files a report after carrying out a social inquiry on

the applicants. A similar report was sought from the Director of Children Services. The director Children Services, guardian ad litem and Child Welfare Society of Kenya filed their assessment and evaluation reports on 20th July 2015, 13th July 2016 and 6th June 2014 respectively. According to all the three reports, the applicant was socially, emotionally and financially stable and suitable to adopt the child. It was also found that the child and the applicants have bonded well and that adoption would be in the best interest of the child.

6. However, the Director Children Services and the Child Welfare Society of Kenya noted that the child was placed with the applicant on 3rd August 2008 before she was declared free for adoption on 12th January 2010. This was done contrary to Section 156 (1) of the Children Act 2001 which states that no arrangement shall be commenced for the adoption of a child unless the child is at least six weeks old and has been declared free for adoption by a registered adoption society. The Director Children Services left the matter to the discretion of the court.

7. I have considered the application herein. Issues for determination are: whether the child is available for adoption; whether the applicant is suitable to adopt the child and whether it is in the best interests of the child to be adopted.

8. The child herein was found having been abandoned between 4th and 5th floor of Kenyatta National Hospital. Efforts to trace the mother or any other relative have not been fruitful. This is clear from the report of the Children Department filed herein and a police final letter of 9th May 2008 in which they confirmed that nobody has since laid claim over the child. To that extent the requirement for consent in accordance with Section 159 (1) of the Children Act is dispensed with.

9. With regards to the issue of the child being placed with the applicant before declared free for adoption, I note the provisions of Section 156 (1) of the Children Act 2001 which states as follows:

(1) No arrangement shall be commenced for the adoption of a child unless the child is at least six weeks old and has been declared free for adoption by a registered adoption society in accordance with this rules prescribed in that behalf.

10. The above section is couched in mandatory terms. This means an application for adoption can be declined where the provision is not adhered to. In the case of In re C A & K A (both minors) [2014] eKLR, Judge R.N. Sitati allowed adoption of two children who had been placed with the applicants before they were declared free for adoption. In interpreting section 156 (1) of the Children Act 2001 while at the same time upholding the best interests of the child, the judge held as follows:

Pre-selection cannot be cured and it is non started in the adoption process. On the other hand, the children have benefited from the care and protection received from the applicants during the period that they have been in their care. It is our humble opinion that the best interest of the children should be a paramount consideration on the issue of pre-selection.

10. In the present case, the child has been in the custody of the applicant since 3rd August 2008 translating to 10 years. The applicant has enrolled the child to School, provided her with a home, medical attention and a family, hence providing her with a family that the child would otherwise not have at the children's home. The three reports filed in this court established that it was in the best interest of the child that she be adopted by the applicant. I find that it is in the best interest of the child that her life is not disrupted and that the adoption be allowed to proceed.

11. Under Article 14 (4) of the 2010 Kenyan Constitution, a child found in Kenya who is, or appears to be, less than 8 years of age, and whose nationality and parents are not known, is presumed to be a Kenyan by birth. Besides, Section 157 (1) of the Children Act provides that any child who is a resident within Kenya may be adopted whether or not the child is Kenyan citizen, or was or was not born in Kenya. The child herein is for all purposes and intents, constitutionally and statutorily presumed to be a Kenyan citizen. Secondly, pursuant to Section 156(1), the child who is presumed have been born on 5th May 2007 is over six weeks the minimum age requirement for a child sought to be adopted. For the reasons herein stated, the child is available for adoption.

12. Regarding the applicant's suitability to adopt the child, she is a Kenyan citizen born 1967 translating to 51 years old which age properly falls within the age bracket of not less than 25 years old and not more than 65 years in compliance with Section 158(1) of the Children's Act. As stated earlier, the applicant is a self-employed earning a monthly income of XXXX and owns ¼ hectares of land in Bondo. She has a clean criminal record as reflected in the certificate of good conduct; she is medically, physically, mentally and emotionally fit. Besides, her only daughter Y.A. has approved the adoption.

13. With the above stated positive social, economic, moral and emotional standing attributed and or associated with the applicant, it is my finding that the applicant has met the necessary requirements. It is in the best interests of the child herein to get a home, parental guidance, emotional, social and moral upbringing by a responsible parent. Further, the child is assured of basic necessities like food, shelter, clothing, medical care and education all of which the appellant is capable of providing.

14. Considering that this is a local adoption and the child having bonded very well as evidenced during their appearance and hearing in court, the baby is safer in the hands of the applicant. I am fully persuaded that the ultimate role of rules or law for that matter in any legal regime is to serve society to justify its existence.

15. Where the need for substantive justice outweighs consequences of breach of a certain provision of the law and more particularly on an issue touching on the best interests of a child, then, the court should adopt a more purposive approach to promote a greater objective which in this case is the best interests of the child. However, before making such orders, the court should take into account the circumstances of each case and make a determination on its own merits. The child having been placed with the applicant before being declared free for adoption which is a mandatory legal requirement, the same cannot be an impediment towards the realization of the best interests of the child.

16. In the spirit and letter of Article 53(2) of the Constitution and section 4(2) &(3) of the children's Act, the best interests of a child is a paramount consideration before a court or any institution or body makes an order or decision touching on a child. Taking into account the

circumstances of this case where the baby was abandoned and has been staying with the applicant for over ten years now, it will be unfair and detrimental to the baby's welfare more especially change of environment, school, and loss of friends to return him to the children's home.

17. Accordingly, application is allowed with orders:

- a) That J A A is hereby authorised to adopt the child E.
- b) That the consent of the biological parents is hereby dispensed with as the child was abandoned.
- c) That upon making of the adoption order the said child be known as A G A A.
- d) That the Registrar-General is hereby directed to make the appropriate entry of A G A A in the Adopted Children's Register.
- e) That the child is hereby presumed to be a Kenyan Citizen born in Kenya on 5th May 2007 and that the Director of Immigration is hereby directed to issue the child A G A A with a passport.
- f) That C A A is hereby appointed legal guardian to the child in the event of death or incapacitation of the applicant.
- g) That the guardian ad litem be and is hereby discharged.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF OCTOBER, 2018.

J.N. ONYIEGO

JUDGE