



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ADOPTION CAUSE NO. 73 OF 2017
IN THE MATTER OF THE CHILDREN ACT, 2001
AND
IN THE MATTER OF BABY RW aka RWB – MINOR
BY
M B.....1ST APPLICANT
J M C.....2ND APPLICANT

JUDGMENT

1. Vide an application brought by way of Originating Summons dated 15th May, 2017 and filed on 16th May 2017 pursuant to **sections 154, 156, 157, 158, 159, 160, 163, 164 and 170** of the **Children Act 8 of 2001**, the applicants herein sought the following orders:

- 1. That WNK of ID. No. [xxxx] be appointed *Guardian ad litem* in this case.**
- 2. That the Director of Children’s Services be directed to compile the requisite report on the Applicants’ fitness to adopt the infant, RW aka RWB, under the Children’s Act.**
- 3. That the Applicants be authorized to adopt Baby RW aka RWB an infant who is to be known as RWB.**

2. The application is supported by a joint statement of the Applicants and annexures thereof.

3. The Applicants are in a monogamous marriage. They got married under Kikuyu customary law in the year 2014 and the marriage was solemnized in Germany on 31st March, 2014 and annexed a copy of their Marriage Certificate to the application.

4. From the pleadings, the court gathers that the male applicant is a doctor of dental medicine operating his own dental clinic whereas the female applicant is a business woman. While they have always desired children, they have not been blessed with a child of their own hence their wish to adopt the minor who is the subject herein.

5. The minor who is the subject of this adoption is a niece of JMC the 2nd Applicant herein. She was born on 15th August, 2011 to one MNN and MH. The minor’s biological mother died on 4th July 2015 due to cardio respiratory arrest as shown in the death certificate produced in court while the whereabouts of her

father, Martyn Hastings remain unknown.

6. Upon her mother's death, the minor moved in with the Applicants and has remained in their continuous care and custody since then. This was pursuant to a Miscellaneous Children's Case number 181 of 2015 in which the 2nd Applicant was appointed guardian over the minor herein.

7. Prior to the hearing of the adoption application, Buckner Kenya Adoption Services, an adoption society prepared and filed a report in court declaring the child free for adoption pursuant to **section 156(1)** of the **Children Act**. The case committee at Buckner Kenya Adoption Service intimated that they were satisfied that the kinship adoption would be beneficial to the child in this matter, who is also an orphan. They also issued a certificate of serial no. 0171 dated 9th December, 2016 declaring the child free for adoption. The guardian ad litem WNK filed a report which was favourable and recommended the adoption of the child by the Applicants.

8. Mr. Tsuma, an officer from the Directorate of Children's Services conducted home visits and established that the Applicants are financially and emotionally capable of providing for the up keep and education of the child. He filed a report dated 5th December, 2017 recommending the adoption for reasons that the child, who is an orphan, stands to gain from the opportunities provided by becoming a daughter of the Applicants. The officer established that the Applicants are emotionally and financially capable of caring and providing for the child. That the child has bonded with the applicants and appears to be of good health and very happy.

9. The officer from the directorate of children services however noted that whereas this is a kinship adoption, it has both local and inter-country angles, since the male applicant is a German national. He pointed out that this matter is therefore affected by the cabinet moratorium in place on inter-country adoptions. With a rider, the report noted that the court has the discretion to grant orders which promote the best interest of the child.

10. This is an adoption which encompasses an inter-country aspect and it is important to interrogate whether the Applicants have fulfilled the legal requirements for the adoption of the child. The prerequisites for the grant of an adoption order are contained in **sections 156, 157, 158 and 159** of the **Children Act**. It is also important to interrogate whether the present adoption is barred by the cabinet moratorium cited herein.

11. On 26th November, 2014 the Cabinet approved an indefinite moratorium on intercountry adoption of Kenyan children and revoked all licenses to conduct adoptions in Kenya.

12. The orders sought by the applicants herein relate to a child. Of importance however, is that in any matter concerning a child, the best interest of the child are of paramount importance as provided under **Article 53** of the **Constitution** and **section 4** of the **Children Act**.

13. **Section 4** of the **Children Act** provides thus:

“(1) ...

(2) in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

(4) ...”

14. The principle that the “*best interest of the child is of paramount importance*” is enshrined in the Constitution whose **Article 53(2)** provides thus:

“A child’s best interests are of paramount importance in every matter concerning the child.”

15. In the premise therefore, the court will proceed to determine the present application in line with the paramountcy principle as outlined above, and in accordance with the requirements stipulated under **sections 154, 155 and 163(1)** of the **Children Act**.

16. The child herein is a niece to the 2nd Applicant who is married to the 1st Applicant, with whom she has lived since her biological mother’s demise. The child has been afforded quality education in an international school and her emotional well-being has been ensured as evidenced by the bond she shares with the Applicants who she fondly refers to as mum and dad. The Applicants have therefore demonstrated that they are capable of providing for the child both financially and emotionally as demonstrated in the reports filed by the *guardian ad litem* and the Directorate of children services which were both favorable and confirmed that the adoption would be in the best interests of the child.

17. Further in the case of **Re. Baby K.R. Adoption Cause 123 of 2015 (O.S) [2015] eKLR** Muchelule J, correctly observed that the cabinet moratorium is inferior to the **Children Act** and the **Constitution** which provides that the best interest of the child is of paramount importance in any matter concerning a child. The learned Judge stated thus:

“However, there has been a long-standing practice that before an international adoption order is made the Director will conduct an inquiry regarding the suitability of the applicant to adopt and file a report. This is really superfluous, in view of the approval by the Adoption Committee which is housed in this Ministry, and the fact that the Director is the Secretary to the Committee. But this has been found to be a necessary precaution given that under section 38 of the Act the Director is the one charged with the function of safeguarding the welfare of children...

So that, once the court issued an order to the Director to inquire into the suitability of this adoption this became a statutory obligation from which he was not going to resile. It was not open to the Director to hide behind the cabinet moratorium, or the gazette notice. These two were certainly inferior to the order which had a statutory basis.”

18. Similar position was held in the case of **In re of pm (baby)[2017] eKLR** where judge Amin found that the best interests of the child and the facts of the case justified the making of an adoption order even in the face of the moratorium. What mischief was the moratorium intended to cure? The intention is clear on the face of it in that it was meant to curb child trafficking. Fortunately in this case, it is an aunt adopting a niece who is an orphan hence kinship adoption. The element of child trafficking does not arise.

19. The upshot of the above is that the application for the kinship adoption before this court is in the best interests of the child underpinned both in the Children Act and the Constitution which is the supreme law of the land. Bearing in mind that the Director of Children Services has filed a favorable report recommending the adoption save for the moratorium, it is my conviction that the baby stands to benefit from this adoption.

20. Accordingly, in the spirit of ensuring the best interests of the child, and pursuant to the power conferred upon this court under **section 154** of the **Children Act** to make an adoption order, the

application dated 20th November, 2017 is allowed in the following terms:

- a) That MB and JMC be and are hereby authorized to adopt Baby RW who shall henceforth be known as RWB.
- b) That Yvonne MKW is hereby appointed as the legal guardian of the child in the event that the Applicants die, or are incapacitated by ill-health.
- c) That the Registrar General be and is hereby directed to enter this adoption into the Register of Adoptions.
- d) That the guardian ad litem WNK be and is hereby discharged.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2018

J. N. ONYIEGO

JUDGE