



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
ADOPTION CAUSE NO. 141 OF 2016
IN THE MATTER OF THE CHILDREN'S ACT, 2001
AND
IN THE MATTER OF BABY M ALIAS L
AND IN THE MATTER OF AN APPLICATION FOR ADOPTION BY C I O (1ST APPLICANT)
AND J O O (2ND APPLICANT)

JUDGMENT

The Applicants in this matter are C I O also known as C W M and J O O. They sought grant of orders to adopt Baby M alias L through an Originating Summons Application dated 2nd November 2016. The Applicants are American Nationals of Kenyan and Nigerian origin respectively as evidenced by their passports of **Serial Nos. [...]** and **[...]** respectively. They currently reside in Kenya. The First Applicant is a [Particulars withheld] and the Second Applicant is a [Particulars withheld].

The Applicants were married on 13th April 2011 through a Christian Marriage celebrated under the American Law as evidenced by their marriage certificate of **Serial No. [...]**. The 2nd Applicant has a biological son born in 1993 who is currently in Portugal. The 1st Applicant also has a biological son of 22 years who lives in Boston. Both sons gave their consents to this adoption. The Applicants wish to adopt the child because they seek to balance their family and they think that adoption is the best option for them as it will also give the child a family identity and love. They have been recommended by KKPI Adoption Society as persons suitable to adopt a child in their country of residence, that is, Kenya.

The minor in this matter; Baby M is presumed to have been born on 12th March 2015. She was found abandoned by the Roadside at Karen and was rescued by Fr. John Mwai. The Minor was then taken to Fatima Maternity Hospital and the matter was reported to Hardy Police Station vide OB No. 31/12/03/2015. The Minor was admitted to Thomas Barnado Home on 13th March 2015. She was then committed to the said Home as a child in need of care and protection on 15th March 2015 by the Children's Court at Nairobi vide **Care and Protection Case No. 105 of 2015** as evidenced by that Court's order dated 15th May 2015.

It was confirmed by the Officers of Hardy Police Station by a letter dated 14th September 2015 that no one had reported the issue of a missing child and that their efforts to trace the child's family have been futile. The Minor was then freed by Change Trust Adoption Society Case Committee sitting on 13th October 2015 for adoption under **section 159 (a) (1) of the Children's Act, 2001** as evidenced by the

freeing certificate of serial no. 00057. The Minor stayed in the Home until she was placed under the care and control of the Applicants who are desirous to adopt her on 2nd August 2016.

The Proposed guardian *ad-litem* Ms. L K filed a Report on 13th December 2016 in which she recommended the adoption. In the Report, she noted that the Applicants are of good health and have no criminal records. Moreover, it was stated that the Applicants are financially stable and are thus able to provide for the Minor without strain. It was also noted that the child was of good health and was well taken care of by the Applicants and that she has bonded with the Applicants as well as the Applicants' extended family who reside in Kenya.

The Director of Children Services having conducted a Home Study of the Applicants also filed a Report on 24th January 2017. It was noted that the Applicants have bonded with the Minor and that she seemed jovial. The Report asserted that the Applicants have the financial capability to provide for the Minor. However, Director of Children Services noted that due to the fact that the Applicants are both Residents of the USA and that no document had been availed to show that the child once adopted will be accepted in the USA, it was unclear whether this matter is a local adoption or an International adoption and thus recommended the Court to firstly satisfy itself on that issue before making its final orders.

KKPI Adoption Society also filed their Report on 24th November 2016 based on a home visit and an interview conducted with the Applicants. In the said Report, it was averred that the Applicants are financially stable and that they plan to provide the Minor with the best education as well as other basic needs. It was established that the Applicants were of good health, have no criminal records, are socially stable and that the extended family and the legal guardian were in full support of the adoption. Further, it was confirmed that the Applicants had read the Explanatory Memorandum for Adopters and had voluntarily signed a certificate of acknowledgment and are ready to abide by the adoption conditions. Accordingly, the Report confirmed that the Applicants met the legal adoption requirements as enshrined in the Children's Act, 2001 and recommended that it will be in the best interest of the child for her to be adopted by the Applicants.

DETERMINATION

From the foregoing, the issue for determination is whether the Applicants shall be granted orders to adopt the child based on the evidence on record. This Court is satisfied that the Applicants are indeed socially, medically and financially able to take care of the Child herein. Moreover, the prerequisites for adoptions under **section 156 (1) of the Children's Act, 2001** have also been met. The issue for this Court is whether this is a local Adoption or an International Adoption as the concern raised by the Director of Children Services.

According to their Report, the concern is that the 2nd Applicant holds a USA passport and a Resident status in Nigeria while the 1st Applicant claims to hold a dual citizenship of Kenya and USA and that the Applicants are both Residents of the USA.

Section 162 of the Children's Act, 2001 on International Adoptions requires,

“An adoption order may be made in respect of a child upon the joint application of two spouses *who are not Kenya citizens and not resident in Kenya....*”

From the words of this section, an International Adoption involves adopting applicants who are neither citizens nor residents of Kenya. This means that the two conditions must exist for an Adoption matter to be considered as an International Adoption.

Looking at the facts in this case the 1st Applicant is a Kenyan Citizen and claims to hold a dual Citizenship of both Kenya and U.S.A and the 2nd Applicant is a Citizen of U.S.A and a Nigerian National, From the evidence presented in Court; they have not presented official documents to establish their citizenship and/or residency in USA, Kenya and Nigeria. The 1st Applicant has not confirmed

through official records the fact of dual citizenship and/or whether she renounced Kenyan citizenship for American citizenship and/or her terms of USA or Kenyan residency. Therefore; at this stage this Court cannot confirm based on the evidence on record and determine whether the Applicants are exempted from International adoption process or not.

Further, it is incumbent for the Court to satisfy itself that the adoption of the child shall be in the best interests of the child as provided by **Article 53(2) COK 2010 and Section 4 of the Children Act 2001**. The issue of the Applicants ordinary residence is key to the child's welfare and protection. As of now records indicate the Applicants reside in Kenya at the 1st Applicant's Auntie's place. What happens thereafter if or when the adoption is granted is not disclosed. The Court is mindful of the child's permanent residence; will the Applicants and child remain in Kenya, relocate to USA or Nigeria depending on the Applicants commitments and responsibilities. If permanent residence will not be in Kenya then pursuant to **Section 162 (b) & (c) & 163 1(b) of the Children Act 2001** ought to be complied with.

Section 162 (b) and (c) read;[the Applicants]

have satisfied the Court that the Country where they ordinarily reside and where they expect to reside with the child immediately after making of the adoption order will respect and recognize the adoption order and will grant resident status to the child; and

have been authorized and recommended as persons who are suitable (including being morally fit and financially capable) to adopt a foreign child by a competent Government authority of court of competent jurisdiction in the country where they expect to reside with the child immediately after making the adoption order.

Section 163 1(b) of the Act reads;

The Court before making and adoption order shall be satisfied that the order made will be in the best interests of the child, due consideration being for this purpose given to the wishes of the child, having regard to age and understanding of the child, and to the ability of the Applicant to maintain and educate the child.

The above provisions set standards that ought to be complied with in an international adoption. Since at this stage the Applicants' citizenship and residency in various countries is not confirmed, this Court cannot conclusively determine the Applicants status in terms of **Section 162 of the Act**. Similarly, since the Court cannot on the evidence on record determine the Applicants ordinary and permanent residence; the Court cannot grant adoption of the child unless and until satisfied of the child's permanent residence with the Applicants. Therefore, although the Applicants have been found suitable and competent to adopt the child from the Reports filed and it was evident that the Applicants are best suited to adopt and take care of the Child and they have been with the Child from 2nd August 2016;the matter regarding residence remains unresolved and the child's whereabouts and destiny undetermined. Until then; even if the Applicants may provide child's basic needs; at this stage granting the adoption would not be in the best interests of the child.

The Court exercises caution with regard to adoption of a child and the Applicants are not Kenyan citizens especially where none of the Applicants is a relative to the child, biological mother or father of the child and/or consents from the biological parent(s) is not available.

Secondly, though the Children Act 2001 provides for International adoptions a **Moratorium on Inter-Country Adoptions of Kenyan Children to Foreigners** was declared on 27th November 2014 by the Cabinet that restricts Inter-Country adoptions.

The Ministry of Labour, Social Security and Services issued directive to all Adoption Societies on 22nd December 2014 that they were not to accept any new applications on inter country and resident applications.

Recently; official communication from Ministry of East African Community, Labour and Social Protection of 14th February 2017 on inter country adoptions indicated that the moratorium arose from;

the decision was informed by Global Report on Trafficking Persons (UNODC) that cited Kenya as a source, transit and destination Country on human trafficking. the move was also a response to concerns about increased child trafficking through abuse of Kenya's adoption processes by foreigners due to existing loopholes and to a 2014 US State Department Report on trafficking in Persons which ranked Kenya at tier 2 Watch List for non compliance with minimum standards for elimination of human trafficking.

The above background puts in perspective the vigilance in adoption processes especially all non local adoptions. Be that as it may; each case shall be determined on its merits. In the instant case; from the evidence on record, the application was filed on 2nd November 2016 while the moratorium was in place. The Applicants place of permanent residence is not clear. Relying on the Director of Children Services Report it appears the Applicants ordinarily reside in USA and are not domiciled in Kenya. The status of their stay in Kenya is unclear and not confirmed by any evidence or documents. They did not state how long they have been in Kenya and how long they intend to reside in Kenya and where they plan to stay with the child after finalization of the adoption process. If they plan to relocate with the child; if the 1st Applicant renounced her Kenyan citizenship for American residency or not; she has not presented evidence of dual citizenship to this Court; then the application is one of inter country or international adoption which for now is prohibited by the existing moratorium.

DISPOSITION

In light of the above, this Court hereby orders that:

I. The Applicants C I O also known as C W M and J O O at this stage are not authorized to adopt Baby M until they provide evidence and or documents to confirm their citizenship and residence status in USA, Kenya and Nigeria. Further confirm ordinary and/or permanent residence on completion of the adoption process.

II. All statutory reports confirm the Applicants were assessed home visits were conducted and relevant investigations carried out they found the Applicants suitable to adopt the child. They have had the child with them and bonded well. Therefore by virtue of Section 166 of the Children Act 2001; the Applicants shall provide parental responsibility to the child until the adoption process is concluded.

III. The Child Baby M shall not leave the jurisdiction of the Court until further orders from this Court or final determination and conclusion of the adoption process.

IV. The orders regarding care and protection of the child shall be supervised by Director of Children Services who may inform or advise the Court of any eventuality.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF APRIL 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

.....
.....

