



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ADOPTION CAUSE NO. 9 OF 2017**  
**FAMILY DIVISION**  
**IN THE MATTER OF CHILDREN'S ACT NO. 8 OF 2001**  
**AND**  
**IN THE MATTER OF ADOPTION OF BABY S A (CHILD)**  
**AND**  
**IN THE MATTER OF THE APPLICATION FOR ADOPTION**  
**BY J A S AND M K A**  
**JUDGMENT**

1. The applicants herein J A S a German national (1<sup>st</sup> applicant) and M K A a Kenyan by nationality (2<sup>nd</sup> applicant) moved this honourable court vide Originating Summons dated 7<sup>th</sup> February, 2017 and filed the same day seeking orders as follows:-

- a. That H N M of P.O. Box 12585-00400, Nairobi be appointed as guardian ad litem of S A in this cause.
- b. That the applicants be authorized to adopt S A.
- c. That upon adoption, S A be known as S A S.
- d. That the Registrar General be directed to enter this adoption into the Register of Adoptions.
- e. That the child shall be presumed to be a Kenyan citizen and be accorded all rights of immigration that accrue to Kenyan citizens.

2. Application which is filed under Section 158, 159 and 160 of the Children's Act, Section 26 of the interpretation and general provisions Act Chapter 2 and Section 3A of the Civil Procedure rules Chapter 21 of the Laws of Kenya is based on grounds on the face of it and a statement in support dated 7<sup>th</sup> February, 2017.

3. The applicants' motivation to apply for adoption of baby S A a biological child to the 2<sup>nd</sup> applicant born on 6<sup>th</sup> March, 1999 (now an adult) is the desire for the 1<sup>st</sup> applicant to fill the gap of fatherhood, care and affection, bonding and unity within the family and most importantly provide for his education and bright future.

4. The applicants who are husband and wife celebrated their monogamous marriage on the 26<sup>th</sup> March, 2011 at [particulars withheld] under the Marriage Act Cap 150 Laws of Kenya and have since been blessed with two living issues namely N L A (female) born 16<sup>th</sup> April, 2011 and E J A born 25<sup>th</sup> April, 2013.

5. Prior to her marriage to the 1<sup>st</sup> applicant, the 2<sup>nd</sup> applicant had a previous marriage relationship with A T D the biological father to the subject herein and another baby known as S W A born 2<sup>nd</sup> August, 2000 who is also the subject of adoption in adoption cause No. 8/2017 wherein the applicants herein are the same. Upon the 2<sup>nd</sup> applicant's divorce with A T on 21<sup>st</sup>

February, 2005, she remained in physical custody of the two children till the time she moved into her new marriage with the 1<sup>st</sup> applicant. Since their marriage, the children have been under the joint care and control of the applicants.

6. The first applicant who is a lawyer working as a legal researcher for an international NGO in Kenya accepted and took the subject herein together with his sister Sophia into their matrimonial home at [particulars withheld] where they have settled and built a permanent four bed roomed house as their residence.

7. After their application to Little Angels Adoption Society expressing their intention to adopt the child, the society made several visits to their home, carried out inquiries and eventually prepared a report declaring the applicants fit and the child free for adoption. A certificate S/No. [particulars withheld] dated 16<sup>th</sup> December, 2016 was issued to that effect by the said society.

8. On 7<sup>th</sup> February, 2017, the applicants came to court through Chamber Summons dated 7<sup>th</sup> February, 2017 seeking to have the appointment of H N M as a guardian ad litem. The court granted the said orders on 6<sup>th</sup> April, 2017 and directed the Director Children Services and guardian ad litem to file their investigative reports within 45 days.

9. Prior to the hearing, the guardian ad litem submitted her report dated 7<sup>th</sup> July, 2017 but filed in court on 11<sup>th</sup> July, 2017, Director Children Services also presented a report dated 6<sup>th</sup> April, and Little Angels Adoption Society adopted theirs dated 16<sup>th</sup> April, 2016. Both stakeholders legally mandated and required to file the said adoption reports recommended the application for adoption reliance being the best interests of the child.

10. Various home visits by the said stakeholders revealed that, the applicants are financially stable with a combined monthly income of 500,000/= and have assets including a permanent residence of a four bed roomed house within [particulars withheld] estate. The subject herein has gone through his secondary education and is due to join university. Both applicants have no criminal record; they are Christians and above all their relatives and family members from both sides have approved and recommended the adoption.

11. During the hearing, both applicants pleaded with the court to allow them adopt the baby though he had become an adult during the pendency of these proceedings. They asserted that it is in the best interests of the subject herein who is not opposed to the proceedings that he joins the rest of the family in sharing the father's name to avoid some sense of discrimination and also the need to fill the gap of fatherhood now that the biological father an Ethiopian refugee has given consent to the adoption proceedings both in court and written consent dated 15<sup>th</sup> December, 2016.

12. I have considered the application herein, materials placed before me and the testimony by the applicants and the child (subject) in respect of this adoption proceedings.

13. The guiding and paramount principle before making adoption orders is the "best interests of the child". This position is well captured in our constitution Article 53 (2) which provides:-

**"A child's best interests are of paramount importance in every matter concerning the child".**

Similar position is echoed in Section 4 Sub-Section (2) and (3) of the Children's Act No. 8 of 2001.

14. For a court to make adoption orders, there are pertinent requirements and considerations to be taken into account besides the best interests of a child. Among such basic requirements is: the subject sought to be adopted must be a child (below 18 years) and one of the proposed adoptive parents must have attained the age of 25 years and not more than 65 years. (See Section 158 (2) of the Children's Act.

15. In the instant case, there is no objection from any quarter challenging the application. Both applicants have met all the necessary social and legal requirements for adoption. The 1<sup>st</sup> applicant is 44 years old and a resident of Kenya with a good professional job earning a good salary and they have a good home. The second applicant aged 38 years is also an accountant and engaged in business. The subject is assured of a good environment for his emotional, moral, mental, spiritual wellbeing, education and career development. Above all, he is provided with basic necessities like water, shelter, clothing, food, health (medical cover) and a bright future with an opportunity to inherit property.

16. Whereas the applicants have met all the necessary conditions and legal requirements, one key issue for determination is the age of the subject. Having attained 18 years during the pendency of these proceedings, can the court make orders of adoption?

17. The subject herein was born on 6<sup>th</sup> March, 1999. This proceedings were filed on 9<sup>th</sup> February, 2017 exactly one month before attaining the age of majority. When making an order of adoption, the relevant date is the date when the order of the court is made and not the date of filing.

18. In the circumstances, the "child" having attained the age of majority by the time the proceedings were going on, the orders sought automatically lapsed on attainment of age of majority. The order cannot apply retrospectively in the circumstances. This court cannot enlarge time for purposes of adoption and it can longer refer to Shawn as a child whose name is to be entered in the register of adoption. Bearing in mind that adoption proceedings and orders arising therefrom must relate to a child, S A is no longer a child and cannot be declared as such for so to do will be akin to directing an adult to adopt another adult hence the orders sought are overtaken by events and the same cannot apply.

19. For the above reasons herein stated, the application by Originating Summons dated 7<sup>th</sup> February, 2017 be and is hereby dismissed. The guardian ad litem herein H N M is hereby discharged.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of;

.....Advocate for the Applicants

.....Court Assistant