



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**ADOPTION CAUSE NO. 3 OF 2017**  
**IN THE MATTER OF THE CHILDREN'S ACT 2001**  
**AND**  
**IN THE MATTER OF E. C. HEREINAFTER REFERRED AS THE MINOR**  
**AND**  
**IN THE APPLICATION BY M W M AND W N G**  
**RULING**

**Introduction and background of the case:**

In this adoption cause the minor namely E. C. was born on 7/5/2016 as per the birth certificate attached as an exhibit in these proceedings. The minor was found abandoned at Ngong Matasia area on 9/5/2016 and rescued by a good Samaritan. This incident found its way to the police service at Ngong as a law enforcement agency who commenced investigations on the case.

The first cause of action was for the police and children's department to refer the minor for care and protection at Mahali pa Maisha Children's home where he was duly admitted. The committal order was applied for by the Director of Children Services – Ngong and granted by the Magistrate Court on 5/7/2016. The committal order placed the minor under the care and protection with Mahali pa Maisha Center for a period of 12 months. In the course of his stay at Mahali pa Maisha Center a non-governmental organization involved in child welfare and registered adoption agency received an application from M.W.M. and W.N.G. to be considered as foster parents to adopt the minor E.C.

On receipt of the application Little Agencies Network conducted background check and due diligence to establish the suitability of the applicants. The report on both applicants in respect of their social, economic, and cultural aspects was captured in the attached annexure dated 16/12/2016.

In the overall assessment taking the positive indicators and risk factors which might arise in situations involving the adoption of a minor; the agency strongly recommended the applicants. The case committee in their deliberation dated 16/12/2016 found the applicants having satisfied the criteria on both legal and social parameters to adopt the minor baby herein identified as E.C. The department of children's services in their report dated 9/10/2017 which was also prepared after extension inquiry recommended adoption of the minor E.C by the applicants M.W.M. and W.N.G.

The evidence revealed that the adoptive parents were undisputedly in good relationship with each other. The applicants adequately addressed their financial ability and home environment to accommodate an additional member into the family. This was confirmed through the home visit made by the children's

officer and supporting documents on financial probity and credit reference status.

Based on the best interest of the child the children's officer recommended to this court that a favourable order be made to enable the applicants adopt the minor child herein referred as E.C. The application filed in this court by the applicants is anchored on the Constitution of Kenya 2010, the Children's Act and the International Instruments on the rights of the child.

### **The Legal Framework:**

Under Article 53 of the *Constitution* ***“every child has a right to a name and nationality from birth, basic education, shelter and health care, to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour, to parental care and protection which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not.”*** More specifically under Article 53 (2) of the Constitution it states that, ***“child's best interests are of paramount importance in every matter concerning the child.”***

The best interest of the child as a paramount consideration also found its way in various UN conventions i.e. Convention on the rights of the child, UN Declaration on Social and Legal Principles relating to the protection and welfare of children with special reference to foster parents and adoption both provide as follows:

The state shall provide alternative protection and assistance through foster care or adoption for every child who is found, neglected, orphaned or abandoned. To this end the state shall ensure that every child remains under the care and custody of his parents and provided with love, care, understanding and security for the full and harmonious development of his/or her personality, duly when such efforts prove insufficient and no appropriate placement or adoption within the child's extended family is available shall adoption by an unrelated person be considered.

The convention on the rights of the child embodies four general principles:

- 1. The best interest of the child shall be a primary consideration in all actions affecting children. (See Article 3).**
- 2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic, or social origin, property, disability, birth of other status. (Article 2).**
- 3. State parties recognise that every child has the inherent right to life and shall ensure to the maximum to the extent possible the survival and development of the child. (Article 6).**
- 4. Children shall be assured the right to express their views being given due weight in accordance with the child's age and level of maturity. (Article 12).**

Section 157 of the Act sets out the criteria to be met for the children legible to be adopted. One of the key provisions herein is in respect of the prospective minor to have been in continuous care and control of the applicants for a period of three consecutive months preceding the filing of the application.

Section 158 further provides that one of the applicants must be more than 25 years old and more than 21 years older than the infant and less than 65 years old. The applicants could also be a relative or one of the parents as the case may be.

An adoption order shall not be made in favour of the applicants unless the court is satisfied that there are special circumstances that justify the granting of an adoption order:

- a. A sole male applicant in respect of a female child.**

- b. A sole female applicant in respect of a male child.**
- c. An applicant or joint applicants who has or both have attained the age of sixty five years.**
- d. A sole foreign female applicant.**
- e. The applicant is not of sound mind under the reading of the Mental Health Act.**
- f. Applicants have been charged and convicted by a court of law for any offence against children under Kenyan Laws.**
- g. Homosexuals joint applicants not married to each other.**

Section 158 (4) there is need for consents from existing parents, guardians or anyone else contributing to the maintenance of the child under any agreement, or order, in case she is a minor step father who has acquired parental responsibility on the application of one of the spouses with the consent of the other spouse, in case of a child who has attained the age of 14 years with the consent of the child.

The adoption legally terminates the natural bond between its natural parents, next of kin and substitutes them with adoptive parents. Where there exist exceptional circumstances that the consent of biological parents or other close biological parents or other close relatives the court under Section 159 of the Children Act has the jurisdiction to dispense with such consent.

The following provisions shall apply:

In the case of the parents or guardians of the child that he has abandoned, neglected, persistently failed to maintain or persistently ill treated the child provided that:

- 1. Abandonment may be presented 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.**

Section 4 (1) of the Act provides as follows:

**“Every child shall have inherent right to life and it shall be the responsibility of the government and the family to ensure the survival and development of the child.**

**(2) In all actions concerning children, whether undertaken by the public or private social welfare institutions, or legislative bodies, the best interest of the child shall be a primary consideration.”**

In the present adoption cause the minor was neglected and abandoned presumably by the biological mother. The law provides that an adoption order can only be made when it is in the best interest of the child. It is in the interest of the state to preserve and strengthen the family as a basis of social order as provided for under Article 45 (1) of the Constitution.

The general principle of social order is to preserve and strengthen those family ties and whenever possible the children to be in the custody of the biological parents. If by necessity the child best interest can no longer be assured by his or her parents; preferential consideration would be the next kin. It is only when the two criteria of parenthood fails, the best interest of the child is determined by placement order on other suitable foster parents. This is the situation which has befallen the applicants seeking an adoption order to takeover parental responsibility of the minor child.

The applicants in this case through the Little Angles Network and department of children services have demonstrated that they do not fall on any of the exceptions outlined under section 158 of the Act. This court has further reviewed both reports from the Little Angles Network, the registered adoption agency

and the children's officer's report on the matter and in all aspects the scale of best interest of the minor tilts in their favour.

What emerges from both inquiries the biological parents consent to adopt the minor E.C is not necessary nor practical since he was wilfully abandoned at birth. The inquiry presented has clear and convincing evidence which establishes that the biological mother or father voluntarily or intentionally forsook, neglected and or abandoned all responsibilities in the upbringing of the minor. In the circumstances of this case the court dispenses with the consent of the parents in making this adoption order pursuant to section 159 of the Children's Act.

The word wilfully abandoned is defined in *Blacks Dictionary 1834 10<sup>th</sup> Edition 2014*:

**“Abandon means – to leave (someone).**

**(2) When doing some acts amounts to an abdication of responsibility. To relinquish or give up with the intention of never again reclaiming one's right or interest.**

**(3) To desert or go away from permanently.”**

From the evidence gathered by the police, the children's department, the Little Angles Network the minor was abandoned at birth by the mother. There is proof of wilful neglect and abandonment which is manifest from the weight of the evidence.

In my view, applying the principle of the best interest of the child the applicants before court have satisfied the criteria to fundamentally nurture the minor and raise him as construed in our constitution, international conventions and the Children's Act No. 8 of 2001. It is in the best interest that the custody of the minor child be placed under the protection and care of the applicants.

As a result the following orders shall abide:

- 1. That the applicants M.W.M and W.N.G. are hereby granted adoption order to adopt baby E.C.**
- 2. That W.M.M. and L.N.W. be and are hereby appointed as Legal Guardians.**
- 3. That from now henceforth the baby minor shall be known in the names and style referred as E.W.W.**
- 4. Pursuant to this order the Registrar General on registering of births do make in the adopted children's register in respect of the baby to read as E.W.W.**
- 5. That the baby minor E.W.W. be considered and registered as a Kenyan citizen for all purposes and interest under the constitution.**
- 6. That costs of this application be in the cause.**

**Dated, signed and delivered in open court at Kajiado on 16/10/2017.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Ms. Narasia counsel for the applicants

Applicants

Legal guardians

Mr. Mateli Court Assistant