



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADOPTION CAUSE NO. 24 OF 2013

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

AND

IN THE MATTER OF: BABY J E (THE CHILD)

AND

MR. R J W H

MRS. R V D H..... APPLICANTS

JUDGMENT

By the originating summons dated 30th October, 2013 the two applicants namely **MR. R J W** (hereinafter referred to as the 1st Applicant) and **MRS. R P M** (hereinafter referred to as the 2nd Applicant), seek *inter alia* the following orders:

“3. THAT the consent of the biological parents of baby J E is and hereby dispensed with since the child was found abandoned by the roadside bush at [Particulars withheld] in Western Province and efforts by authorities have not born any fruits.

4. THAT the applicants MR. R J W and MRS. R P M be allowed to adopt the child and be called M J E henceforth.

5. THAT the Registrar-General be and is hereby ordered to make the appropriate entries in the Adopted Children's Register in respect of baby J E.”

On 11th November, 2013 the court approved the appointment of **MS. H A** as ‘Guardian ad-litem’ in the matter. The application was heard by way of *vive voce* evidence on 18th December, 2013. The applicants are a couple who are both citizens of the Netherlands who got married to each other in 2006. The couple have no biological child of their own but have a son ‘J’ whom they previously adopted from Kenya in the year 2012 they have now returned to Kenya seeking to adopt a second child.

The subject child is a boy aged about 2 ½ years. The child was born in December, 2011 and was found abandoned by the road side in [Particulars withheld] in Kakamega County. After rescue the child was admitted to **PEFA Rehema Children Home** for care and protection. He was later declared free for adoption by a registered adoption agency and was handed over to the applicants under a fostering

agreement dated 26th July, 2013. The couple have lived with both children in a rented apartment in [Particulars withheld], Kwale County since then.

In view of the fact that the applicants herein are both foreign nationals this qualifies as an International Adoption. As such it will be guided by the Children Act 2001 of Kenya as well as ‘**The Hague Convention on the Protection of Children and Co-operation in respect of Inter Country Adoption**’ (Hague Adoption Convention). Section 156(1) of the Children Act of Kenya sets out the prerequisites for adoption in Kenya as follows:

“156(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 the rules prescribed in that behalf.”

In this case the child having been born in December, 2011 is well above the six week age limit prescribed by section 156(1). Annexed to the summons is a certificate No. [Particulars withheld] from Little Angels Network which is a registered Adoption Agency in Kenya declaring the child free for adoption. Thus the legal prerequisites for adoption in Kenya have all been met.

In deciding whether or not to allow this application for adoption this court must interrogate the suitability of the applicants as adoptive parents. To this end much reliance will be placed on the reports and certificates annexed to the summons. I have carefully read the report on the applicants prepared by the Child Welfare Council under the Ministry of Safety and Justice in the Netherlands. A thorough and indepth investigation was conducted into the life and background of the two applicants and both were found to be fit and suitable adoptive parents. The applicants are a Christian couple (of the Roman Catholic faith) and are in a stable and committed marital union having formalized their marriage in church in 2006. Annexed medical reports indicate that they have been unable to bear a child naturally and thus opted to adopt in order to complete their family. Their commitment to this decision is proved by the fact that they both took time off their careers and travelled to Kenya where they have lived since June, 2013 (no doubt at great financial cost) to achieve this dream. They have also subjected themselves to investigations both in the Netherlands and in Kenya and have adhered to all the legal formalities. The applicants are registered with ‘*Stichting Afrika*’ a registered Adoption Agency in the Netherlands have pursued counseling and have promised to allow the agency to conduct post-adoption monitoring of the child. Last but not least the couple already have a son called ‘*J*’ adopted from Kenya in 2012. This child has been under their custody and care in the Netherlands and reports indicate that he is flourishing and is about ready to start school.

The court has considered the finances of the applicants. Both are in steady income earning careers, the 1st applicant as an ICT Manager and the 2nd applicant as a Childrens Physiotherapist. This shows that the 2nd applicant works around children and thus would be comfortable to have children in her own home. Their yearly income has been indicated in the reports and is more than sufficient to provide for the needs of two young growing children. The couple live in an open community and own their own home. They assured the court that racial discrimination is unlikely to occur but both are prepared to deal with any such eventuality. Both have submitted certificates of Good Conduct from the Dutch police proving that neither has a criminal record.

Upon questioning by the court the applicants stated that they both understand and accept the legal consequences of an adoption order. They are prepared to accord the child all the rights and privileges due to a biological child including the rights to food, shelter, education and medical care, just as they have been providing for their elder adopted son. Indeed both have signed an undertaking to this effect. There is also evidence that their respective families do support their decision and are ready to welcome the child with open arms. Indeed some family members have travelled from the Netherlands to Kenya in order to meet the child and give their support to the couple. Based on the material placed before the court I have no doubt that the two applicants are suitable adoptive parents for the child.

As stated earlier, this is an international adoption and as such section 162 of the Children Act applies. The applicants assure the court that upon adoption the child will be entitled to take up Dutch citizenship and

the adoption order made in Kenya will be respected and enforced by Dutch authorities. I have also seen the Approval Certificate dated 23rd May, 2013 issued by the National Adoption Committee of Kenya which fulfils the requirements of section 162(c) of the Children Act.

Section 162 (a) of the Children Act obliges the court to ensure that all necessary consents have been obtained before an adoption order can be made. In this case the records indicate that the child was found abandoned by the roadside on 20th December, 2011 in [Particulars withheld], Kakamega County. Upon being rescued the child was committed to PEFA Rehema Home. Since that time no person has come forward to claim the child. The identity of the birth mother and biological father remain unknown. By a letter dated 10th September, 2012 the Kakamega police station have confirmed that no headway has been made in tracing the parent/parents of the child. There is no known relative from whom consent can be sought and/or obtained. This being a clear case of abandonment this court dispenses with the requirement for a consent to the adoption.

Section 4 (a) of the Children Act obliges the court to give priority to the '*best interest*' of the child when determining whether or not to grant an adoption request. This is a child who was abandoned. No person has come forward to trace him. He faced an uncertain future in childrens homes and institutions. The applicants are offering the child a chance to grow up in a stable home and in a loving, caring family environment just like other children. He will join a family where his elder brother hails from the same race/culture as himself. I have carefully read and considered the Home Report prepared by the Childrens department. It reveals that the child has already bonded with the applicants. Indeed this was quite obvious even to the court during the oral hearing. Both children appeared happy and healthy and obviously have great affection for each other. I find that this adoption would certainly be in the best interests of the child. Accordingly, I do hereby authorize this adoption and I grant prayers (3), (4) and (5) of the originating summons.

Dated and delivered in Mombasa this 27th day of January, 2014.

M. ODERO

JUDGE