



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADOPTION CAUSE NO. 25 OF 2013

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

AND

IN THE MATTER OF: AN APPLICATION FOR THE ADOPTION OF BABY S

AND

MR. Y M

MRS. A D M..... APPLICANTS

JUDGMENT

Before court is the originating summons application dated 6th November, 2013 seeking inter alia the following orders:

“3. THAT the consent of the biological parents of baby S be and is hereby dispensed with since the child was abandoned by his mother within Mathare estate and later placed for adoption.

4. THAT the applicants MR. Y M and MRS. A D V – M be allowed to adopt the child and the said child be called C J M 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 S.”

On 9th December, 2013 the court did approve the appointment of **Ms. S S** as ‘Guardian ad-litem’ in the matter. The main application was disposed of by way of vive voce evidence on 27th February, 2014. The applicants are a Dutch couple who are married to each other and who have travelled to Kenya seeking to adopt a child. It is important to note at the outset that the applicants are not strangers to the adoption process. They already have a child named ‘**J M**’ whom they adopted from Kenya in May, 2011. The said Joshua is now aged 4½ years old and the applicants did travel back with him to Kenya in their quest to adopt a second child. Since the applicants are both foreign nationals this adoption application will be governed 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’. Section 156(1) of the Children Act provides

“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.”

The subject child whose given name is ‘Baby S’ was born on 10th June, 2011 in Kenya and thus was aged about 2 ½ years old by the time this application was filed in November, 2013. Annexed to the application is a certificate serial No. [Particulars withheld] dated 6th February, 2013 declaring the said child free for adoption. Also annexed is an approval certificate for a Foreign Adoption dated 23rd May, 2013 issued by the National Adoption Committee. I therefore find that all the prerequisites for this adoption application have been met.

THE APPLICANTS

As stated earlier the applicants are a married couple who are both citizens of the Netherlands who got married to each other on 13th May, 2000 in (withheld). They were unable to bear children together due to medical complications and therefore opted to pursue the option of adoption. The couple already have one son adopted from Kenya in the year 2011. They travelled back to the Netherlands with this child and have lived with him there since 2011. No adverse reports have been received regarding the care of this child. Indeed I did see the said child J together with the applicants in my chambers. He appeared to be healthy, happy and had obviously been well looked after. The applicants both assured me that they understood the legal consequences of an adoption order. They both confirmed that they understood that an adoption order was binding and non-reversible and both undertook to treat the child as their own biological child. I have perused the report prepared by the Child Welfare Council of Netherlands. A social enquiry undertaken revealed that the applicants were both physically and medically fit, and neither had any criminal record. The applicants were each raised in a normal family environment and each maintains close ties with family. They are both in employment, the 1st applicant as an Economist running his own business and the 2nd applicant as a lawyer with the Municipal Council. They jointly earn sufficient funds to cater for a second child and have indicated that they are preparing to move into a newly built larger home to cater for the expanded family. Their commitment to this adoption process cannot be in any doubt given that they have made a second trip to Kenya at no mean expense, in order to achieve their goal. I note further that despite the unfortunate passing of her father during this process, the 2nd applicant returned to Kenya after his funeral in order to complete the process. I find that the applicants to be fit prospective adopters for the child.

THE CHILD

The child ‘S’ was abandoned by his biological mother into the hands of a good Samaritan in Mathare village in Nairobi. The good Samaritan ‘E’ reported that a lady who gave her name as ‘E’ approached her seeking accommodation as she was unable to pay rent. The said E obliged. The child’s mother then left claiming that she was going to the nearby shops. She never returned. E reported the abandonment at Ruaraka police station vide OB No. 06123/12/2011. The matter was referred to the Kasarani Children’s office. Eventually the child was admitted to the ‘**Happy Life Childrens Home**’ in Nairobi which is where the applicants met him. This is a clear case of abandonment. No doubt the child’s mother felt she was unable to provide for the child. A letter from the OCS Ruaraka dated 23/12/2011 confirms that efforts to trace the child’s biological mother have proved fruitless. As such there is no known person from whom consent for this adoption can be sought and/or obtained. I therefore waive any requirement for consent in line with section 159(2) Children Act.

THE APPLICATION

In matter concerning a child section 4(a) of the Children Act obliges a court to give priority to the **best interest** of the child. I have carefully perused the report from the Adoption Agency, the Home Report prepared by the Malindi District Childrens Officer, **MR. MUGAISI** as well as the report submitted by the *guardian ad litem*. The child was handed over to the applicants on 5th August, 2013 by way of a fostering arrangement. From that time the child has been living with the applicants and their other adopted son in Malindi, Kenya. Home visits reveal that he has bonded well with the family. This is evidenced from my

observation of the family in my chambers. The two boys were obviously very fond of each other. The child who at best faced an uncertain future in institutions will now have an opportunity to grow in a stable and loving home environment with an elder sibling. This in my view certainly serves the best interests of the child. I therefore allow this application and I hereby grant prayers (3), (4) and (5) of the originating summons dated 6th November, 2013. No order on costs.

Dated and delivered in Mombasa this 26th day of March, 2014.

M. ODERO

JUDGE

In the presence of:

Ms. Mwatu Advocate