



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ADOPTION CAUSE NO.9 OF 2014

IN THE MATTER OF CNO(CHILD)

(HEREINAFTER REFERRED TO AS “THE CHILD”)

AND

IN THE MATTER OF CHILDREN ACT 2001

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION

PBN (APPLICANT)

(HEREINAFTER REFERRED TO AS “THE APPLICANT”)

JUDGMENT

1. By an Originating Summons dated 5th June 2014 brought under Part XII of the Children's Act, the applicant herein PBN sought the following orders:-

1) *That the court do make an adoption order in respect of the child herein in favour of applicant.*

2) *That court be pleased to make such other orders as appear just and convenient in the circumstances of this case including but not limited to appointing a guardian ad litem for the child pending determination of this application.*

1. The application was supported by an affidavit by PBN, the applicant in which she says that she seeks to adopt the child namely CNO (hereinafter referred to as the child) who has been declared free for adoption by the Child Welfare Society of Kenya.

2. That she is a Kenyan citizen aged 36 years, married in a monogamous union, working as a professional nurse at [Particulars Withheld] in Nakuru for the last 9 years while her husband JO is currently residing and working for gain in the United States of America. However, that her husband has given her his personal consent and is willing to proceed and adopt the child.

3. In addition, the deponent avers that she and her husband have been blessed with one biological child (a boy) named COO born on 5th September 1999 and that they do not suffer any hindrance or disability that by law would render them unsuitable to adopt the child or any other child.

4. Furthermore, that the child they intend to adopt is now 16 years old, residing in Kenya and currently studying at [Particulars Withheld] School in Form Three and the child has been in her continuous care and control in Kenya for a period of more than 12 consecutive years preceding the bringing of this application.

5. She further avers that the child has been assessed and evaluated by the Child Welfare Society of Kenya, that her mental health and status has been evaluated and found sound; the child has attained the age of 16 years and has given her written consent; the child was abandoned at birth about 16 years ago and so far her parents have not been traced or heard of; neither herself nor her husband have received any payment or reward to adopt the child and that the child has not been the subject of any previous adoption order or proceedings.

6. Finally, the deponent says that she has bonded very well with the child for all the period she has been under her care and control and has become part and parcel of her family. She has been responsible for her education and all her other needs of life as a parent could for his/her own child, the child and her family intend to go and live with her husband in the United States of America in due course. As at the time of making the affidavit the applicant was scheduled for an interview at the American Embassy in Kenya, Nairobi on Monday, 17, July 2014 at 6.45 a.m. as part of preparations to relocate to the U.S.A. to join her husband together with the child and their biological child. That she would be required to present an adoption order in respect of the child issued by court so that the child too can be considered and allowed to accompany her and her other child to the U.S.A. The deponent further states that it would not be desirable and in the best of interest of the child if her family and herself relocate to the U.S.A. and abandon the child who has been under her care and control for over 12 years now.

7. When the application came up before me on 4th July 2014, Mr. Nyasimi for the applicant submitted that all the prerequisites have been met in this case, that a certificate issued by the registered society declaring that the child is available for adoption has been filed; that the adoptive agency the Child Welfare Society of Kenya has also filed an independent report as required by law; the child has been in continuous care and custody of applicant for more than 12 years, and the law allows the court to make the orders sought as more particularly set out under **Article 53 (2)** of the **Constitution** which emphasizes the best interests of the child in every matter and that there is no obstacle to these adoption proceedings.

8. Mr. Nyasimi further submitted that the reason why they urgently seek the above orders was because the applicant was about to join her husband in the U.S.A. as her husband has a green card, and that she was scheduled for a visa interview on 17th July 2014 at 6.45 a.m. and should the applicant leave the child behind, the child would feel abandoned.

9. Furthermore in reference to requisite consents required, counsel submitted that applicant's husband had given his consent. Mr. Nyasimi prayed for the order sought so that the child's life can continue to be smooth.

10. The child also spoke on her behalf and indicated that she was for the orders sought because the applicant had been a good mother to her.

11. Mr. Abiya, the Child Welfare Society of Kenya representative on the other hand acknowledged that they filed the report and briefly highlighted the fact that the good Samaritan who found the child abandoned was infact applicant's mother in-law; they have the chief's letter dated 13th April 2011 confirming that child was abandoned; the applicant reported matter to the police at Nyakoe police station under **OBNO.09/16/011/2012** and the matter was also reported to Children's Office.

12. Furthermore, he admitted that due to the complexity of the case, they carried out assessment of the good Samaritan to substantiate the claims, they did that on four different dates, in addition to reports by area chief, children's office and police. Hence he contended that it was

only upon the above assessment that they declared the child fit to adopt vide certificate No.0653 of 9th May 2014.

13. In concluding his address to the court, Mr. Abuya submitted that this was a proper case for adoption and the child is indeed in need of alternative family care. Furthermore, that the applicant and child have bonded and recognized each other as family. Thus the proposed adoption was disclosed to child who had given her consent.

14. Mama J, the mother in-law to the applicant and the person said to have found the child told the court that once she found the child, she took it to the village elder who told her that they would look for the mother. That she attended several chief's barazas where announcements were made concerning the lost and found child.

15. The applicant on her behalf stated that she intended to move to the USA to join her husband who has been in the USA for a long time.

16. After considering the above submissions by all parties concerned in the adoption, the only issue I need to consider is whether indeed the applicant has met all the requirements prescribed by the Children's Act before I declare her fit to adopt the child.

17. **Section 156 (1)** of the **Children's Act** addresses the issue of Pre-requisites for Adoption and states:-

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 this rules prescribed in that behalf.”**

2.

3. The **Children (Adoption) Regulations, 2005 Rule 12** is on renewal of registration of an adoption society and it stipulates:-

4. **“Every registered adoption society shall apply for renewal of registration every twelve months after the date of initial registration or the date of the last renewal of registration whichever is the case.”**

5.

18. Before me I have a letter from the Ministry of Gender, Children and Social Development signed by Ahmed Hussein who is the Director, Children Services and Secretary of Adoption Committee dated 29th May 2013 listing the registered societies which are allowed to make local and international adoptions. The Child Welfare Society of Kenya (CWSK) as at 29th May 2013 did not have a current registration to make adoption arrangements.

19. I personally took the liberty to call the Gender, Children and Social Development Department in Nairobi to establish whether indeed the Child Welfare Society of Kenya (CWSK) is registered for the year 2014. I was informed that the said society was exempted by the in charge from registration, but there is no evidence of such registration on record.

20. In my humble view, despite the fact that the cabinet secretary may have exempted the said (CWSK) from registration, the law has however not changed and in accordance with **Section 156** of the **Childrens Act Cap 141** and **Regulation 12** of the **Children (Adoption) Regulations 2005** any society conducting the duty of processing adoption of minors must be registered.

21. In the circumstances, my hands are tied and this court will not accept a report from an

unregistered adoption society to clear a child for adoption.

22. In the premises, the applicant is advised to facilitate her adoption of the child through a registered adoption society. In the meantime, this court appoints one Mama JGO as guardian ad litem to the same child until the issue of the Child's adoption is completed.

23. **Delivered, dated and signed at Kisii this 1st day of August, 2014**

24.

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Nyasimi for Applicant

Mr. Bibu - Court Assistant