



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**ADOPTION CASE NO. 2 OF 2014**

**IN THE MATTER OF CA.....A CHILD**

**AND**

**IN THE MATTER OF KA.....A CHILD**

**AND**

**IN THE MATTER OF THE CHILDREN'S ACT (PART XII)**

**AND**

**IN THE MATTER OF ADOPTION OF CA AND KA (both minors)**

**IN THE MATTER OF AN APPLICATION BY NCC AND NAA**

**AND**

**NCA.....1ST APPLICANT**

**NRB.....2ND APPLICANT**

**JUDGMENT 2**

By way of an originating summons dated 20th February 2014, the 1st and 2nd applicants seek; *inter alia*; the following prayers:-

1. That an adoption order be made authorizing the applicants herein (NCA and NRB) to adopt the children namely CA and KA.
2. That such other of further orders be made as the Honourable Court may deem just and expedient..

The application was supported by an affidavit sworn by the 1st applicant with the authority from the 2nd applicant. In the affidavit he avers that the 2nd applicant and himself are married citizens of the United States of America lawfully working and residing temporarily in the Republic of Kenya. That they both do missionary work under the Baptist Convention of Kenya and currently run and manage a relief centre at [Particulars Withheld] sub location of Migori County where they are currently residing.

He further averred in reference to the children that KA was brought to the relief centre with pneumonia, mouth sores, failure to thrive, high fever and severe malnutrition while CA had failure to thrive and was grossly under weight. Further he stated that the children were born to a single mother HA who died on 12th June 2010 and both children were born to an unknown father, as a result of which the general outlook of the children was bleak but after they consulted the larger family for the best way forward, the said family requested them in writing to take care and custody of the children and they in turn reported the situation to the District Children's Officer, Migori and at a joint meeting with the family of the children it was resolved that the applicants continue to have custody of the children.

The 1st applicant averred further that they have continued to have actual custody of the children who have come to know them as their only parents and that the children's mother tongue is English and are only comfortable in their household.

Before I address the issue of the applicant's desire to locally adopt the minors in this matter, it is worthwhile to note that the application by both applicants for an order of international adoption was declined by the International Adoption Committee sitting on 21st August 2013 on the following grounds:-

- *That the application lacked a clearance document from the US Department of Justice. FBI.*
- *The home study report which was on record had expired, having been prepared on 8th August 2012. It was only valid for one year.*
- *Authorization by the US Department of Homeland Security is a photocopy.*
- *The application lacks full size body photographs of the applicants.*
- *Alien certificates attached to the application for both applicants No.563047 and 563016 expired on 23rd September 2011.*
- *Lacks consent from the applicants' children apart from Kaittin whose consent is undated.*
- *Lacks birth certificates of the applicants' children.*
- *There is evident pre-selection.*

The above notwithstanding, the minors have remained in the continuous care and control of the applicants as seen on the custody order granted in Migori Children's Case No.9 of 2013. By the order dated 13th February 2014 the Senior Principal Magistrate made the following orders:-

1. *That pending the hearing and determination of originating summons, this court be pleased to grant interim custody orders to the applicants herein vesting legal custody of both the children herein to applicants in any event for a period not exceeding 12 (Twelve) Months*
2. *That applicants ordered to commence the Adoption proceedings before the High Court.*

It is to be further noted that an application for leave to travel with the minors out of the court's jurisdiction was rejected by this court through an order dated 8th April 2014.

In a Home study report conducted by the **Little Angels Network**, a duly registered Adoption Society, dated 16th June 2014 and signed by the Programme Officer one Caroline Okuba and the Chief Executive Officer Susan Otuoma, the following information was evident:-

- i. The applicants' adoption application is for two specific children (minors) CA and KA both aged four years three months who are twins. The children were declared free for adoption on 15th August 2012 by the Little Angels Network Case Committee after relevant consent had been obtained from their biological family.
- ii. The 1st applicant is a trained Nurse in the United States of America where he worked as a Nurse for about 25 years. He later did Clinical Orientation Course in Kenya for four months thus he is a registered Kenyan Nurse with the Nursing Council of Kenya. His practice licence Number is 045685 and is valid until 31st December 2014. Currently, he is not employed though he is a volunteer with Vision of Hope Kenya, an organization which was registered in Kenya on 20th December 2011. He does his work through Baptist Church to reach families within the

[Particulars Withheld] in Migori County.

On the other hand, the 2nd applicant is a certified property Manager and currently works as the Vice President of RAM Partners, a property management company in the United States of America. This is a relatively new position which she took up in April 2014 following her return to America in November 2013. It is a flexible job and allows her flexible working hours. She works from home most of the days.

Both applicants are in their second marriage. The 1st applicant was married to one CN for 23 years during which he (1st applicant) struggled with drug addiction that eventually led to their divorce on 23rd June, 2008. They had one daughter named MN aged 29 years.

The 2nd applicant on the other hand was married to one JM for five years and had three children that is JM aged 22 years, JM aged 20 years and KM aged 18 years. Their marriage ended due to marital infidelity by the husband.

- The applicants had never envisioned that they would one time adopt a child; however God has placed the girls into their lives and are now part of their family and would do everything possible to give them the best opportunity to be raised as God fearing children, to get good education and show the children that their choices in life matter.
- The minors have enjoyed good health for the period they have been with the applicants apart from normal colds and coughs. They do not have any health complication and are HIV negative. When they are unwell, the 1st applicant takes them to a clinic in Migori town in case they suffer any serious ailment.
- *The applicants have settled for P and LH to be guardians of the minors adopted. The appointed guardians have been through the adoption and home study process which allows a level of comfort regarding their knowledge of raising an adopted child. Besides the proposed guardians have themselves adopted a child (a daughter) aged 5 years.*
- *The applicants are in good physical health, are free of any infectious communicable diseases and are all upto date on any necessary immunization. They are also free from any mental or physical impairment that would negatively infect the life of a child.*
- *Currently, the couple resides in a two bedroomed permanent house in [Particulars Withheld] of Migori County. They leased the 34 acre piece of land for fifty years. They have stayed at the place for four years. The house has a living room with a kitchen area, two bedrooms and a toilet cum bathroom. The children share a bed in their room which has a play station, toys and books that they read. The house has electricity supply and is supplied with rain water.*
- *Lastly on their assessment and observation the report states:-*
- *The applicants have a stable marriage and have raised their children together. Their parenting ability is therefore not in question.*

They have had continuous care and control of the proposed adoptees C and K since 2011. During this period they have provided for the needs of the children (Physical emotional, social, spiritual and psychological.) The children have bonded well with both applicants who they consider and refer to as mum and dad. They have adjusted well to their new family and can speak fluent American English. There is no doubt that the children have benefited from the care and upbringing provided by the applicants.

The report then proceeds to highlight issues that have been noted by the adoption agency and urges this honourable court to consider them before any adoption order is granted as they have an influence on the best interests of the children. The issues are:-

The applicant's application for inter country adoption was rejected by the adoption committee with valid reasons that this court should consider and satisfy itself that the same have been met.

*Most of the documents provided by the applicants are out dated and may need to be reviewed to verify the applicants current status e.g. information on financial status and employment, criminal background checks, health status (medical reports) and accommodation arrangements in the USA.*

*The applicants are American citizens and it is crucial that they obtain a confirmation from the USA government that the adoption will be accepted in the USA and that the children will be granted residence and citizenship post adoption as per Section 162 (b) of the Childrens Act and the Guideline for Foreign Residents by the Adoption Committee.*

The issue of pre-selection needs to be addressed in light of the best interests of the children. The applicants took custody of the children before formally making an application and being assessed/approved for adoption. Also, the requirements of **Section 156 (1)** have not been observed as the children were placed in the family before they were formally declared free for adoption, Pre-selection cannot be cured and it is non started in the adoption process. On the other hand, the children have benefited from the care and protection received from the applicants during the period that they have been in their care. It is our humble opinion that the best interest of the children should be a paramount consideration on the issue of pre-selection.

The applicants have been granted custody of the children at the children's court at [Particulars Withheld] court and the same court made a recommendation to proceed with adoption. It is our humble opinion that this honourable court should consider the validity of the custody order made and whether the court that made this order was made aware of the circumstances surrounding this case prior to the making of the order.

Lastly the report recommends the following:-

**“In light of the foregoing observations, we are challenged and cannot give a recommendation that adoption orders be made in favour of the applicants. It is our humble opinion that this honourable court exercises its discretion and satisfies itself on the issues raised and any others that the court deems necessary before making the final adoption orders.”**

When the matter came up for hearing before this court on 16th September 2014, the same proceeded by way of viva voce evidence in chambers.

PW1 was the 1st applicant CAN. He told the court that he is a missionary and a nurse by profession but he has a Kenyan Nursing Licence. He currently resides at [Particulars Withheld] in Migori, he is aged 54 years and he is an American citizen.

That he was seeking adoption orders for the two minors that is K and C. The said minors came into their lives in June 2011 while both were sick. They attempted home treatment with their grandmother (maternal) but K's condition deteriorated and she was taken back to the applicants by her grandmother. They then gave her (K) two weeks medical care. At the time K was aged 1 year but weighed only 2½Kg. She was very sick. On the other hand, her twin C was suffering from desire to thrive.

He also stated that after the two weeks, the minors' family did not return to pick them up and three weeks later his wife (the 2nd applicant) and their teenage daughter went looking for minors' grandmother but they in turn did not want the children back. That is how and why since June 2011, they have been staying with the minors.

PW1 told the court that they have their own children that is 4 of their children the youngest of whom is aged 19 years. That the two minors have interacted with 2 of their children and have found favour with them. The two older children have given consent to the adoption which are attached to his affidavit dated 20th February 2014.

Furthermore, PW1 revealed that their children range between the ages of 29 and 19 years. He reiterated that all their 4 children are fully backing them on the proposed adoption and confirmed that they have the means to look after both the children. Moreover, the 2nd applicant is gainfully employed in America and that once he himself gets to America he can easily get a job.

Lastly, he told the court that they are missionaries attached to [Particulars Withheld] where they currently

work and they usually go to the US to work and come back with money to support their work. Hence by shuttling in and out of the country, they will ensure that the minors will not lose their roots with the community.

PW2 is the 1st applicant's wife RCN. She reiterated the 1st applicant's testimony on the issue of residence and nationality and also told the court that while in the States in Nashville Tennessee she manages real estate but when she is in Kenya she is a missionary.

She agreed with the 1st applicant's testimony but added that though she is employed, she can work from home and will therefore have time for the minors. Currently they have enrolled the minors in a wonderful Christian school, and that their family back in the U.S.A is keen to meet the girls. The 1st applicant's mother who is still alive is 89 years of age and wants to meet the minors. The minors are currently in excellent health.

Lastly, PW2 told the court that they have separate health insurance policies in case they die before the minors are 18 in the range of US Dollars 100,000 and 250,000 respectively. Furthermore, that they have appointed a younger couple as guardians.

PW3 was Susan Achieng Otuoma the Chief Executive Officer of Little Angels Network a licenced adoption agency.

In reference to the report filed by the adoption agency dated 1st August 2014 she presented the said report pursuant to **Section 156** and **158** of the **Children's Act** where they had filed 3 reports:-

Individual reports for each child dated 15th May 2012.

A report on the applicants dated 6th June 2014.

She added that the minors in this case that is KA and CA were declared free for adoption after the necessary investigations were carried out. In addition to this, she confirmed that they obtained requisite consents from MA (maternal grandmother), JOD (uncle to the minors) and CAN. She explained that they were not able to obtain consent from the minors' biological mother because she was deceased. She referred to deceased's death certificate and stated that the biological father was unknown. Hence she was asking the court to dispense with the said consent.

In reference to the applicants, she told the court that the two applicants initially applied for international adoption on 1st February 2013 but the same was declined by the International Adoption Committee vide a letter dated 26th August 2013.

PW3 testified further that she had interviewed the applicants and agree with the information given to the court by the applicants. She also stated that they had questioned the applicants regarding their motivation for adoption and confirmed to court that what the applicants are doing in this case is an act of benevolence. Also that they visited the applicants' home in [Particulars Withheld]. She confirmed that the children have bonded very well with applicants and they are also satisfied with the care they have given the children.

In reference to reports from the CID (Kenya) PW3 stated that the same show that the applicants have no criminal records. The reports are dated 19th October 2012. They have also received reports from FBI in Georgia dated 6th August 2012. Further she attested to the fact that both applicants are of good health and they gave a medical report to that effect. I hasten to add here that these reports are now obsolete, since they have a lifespan of only one year.

Lastly on assessment and conclusion, she indicated the fact that the applicants have a stable marriage and have raised their 4 children together. That as an adoption agency, Little Angels Network had no doubt in their minds that the applicants would do the same for the two minors. Moreover the applicants have had continuous care of the minors' since June 2011 during which period they have provided for them. She

also indicated that there was no doubt the children have benefited from the care.

However she reiterated the technical issues contained in their report (as I have indicated above) and urged court to satisfy itself as to all the above matters before making the adoption orders.

After hearing the evidence, this court asked the applicants to avail communication from the US Embassy confirming that the children will be granted US residence and eventually US citizenship upon granting of Adoption orders.

On 22nd September 2014, the said report was filed. The 1st applicant stated that he proposed to fulfill the requirements of the letter from the US Embassy namely that:-

*The child has to be under the age of 16 or 18 in some special circumstances;*

*They must have had 2 years physical custody of the children as well as legal custody;*

*One of the parents has to be a US citizen and in this case they both are;*

*Adoption has to be finalized by the court in Kenya.*

Lastly the 1st applicant told the court that they have met all the above requirements through a supplementary affidavit indicating consents from their children accepting the adoption.

According to the applicants' evidence which has not been controverted, their first contact with the minors was in June 2011 when the said minors were brought to their mission critically ill. The minors were brought by their grandmother. According to the 1st applicant's supporting affidavit, they first put them on home treatment for the first two weeks but after the two weeks, the minors' grandmother brought them back in critical condition. The minors were then put under their care.

After a fortnight under the applicants' care, the minors' condition had significantly improved. However the grandmother never came back to pick up the minors from the applicant's mission. Towards the end of week three while the minors were still under the care of the applicants, the 2nd applicant and her daughter went to look for the minors' grandmother and that is when the minors' grandmother indicated that she preferred the minors to remain under the applicants' care as opposed to her taking care of them. In addition to this, they were informed that the minors' mother was deceased and their father was unknown.

The applicants have also attached photos showing a chronology of the health status of the minors before they started living with them and after. I must say that the minors look healthy and happy in the care of the applicants. I have seen them on a number of occasions as the case progressed. The adoption agency also submitted a report on each minor dated 15th August 2012 and on the applicants dated 6th June 2014.

PW3 the Chief Executive Officer of the Adoption Agency indicated that the said minors that is KA and CA were declared free for adoption. They had obtained consents from maternal grandmother to the girls, the minors' maternal uncle and aunt. She confirmed that the applicants' application for international adoption made on 1st February 2013, was declined on 26th August 2013, but that since then, they have interviewed the applicants and have questioned the applicants' motivation for the orders sought and confirmed to court that theirs is an act of benevolence. She further confirmed that upon visiting the applicants' home in [Particulars Withheld] and holding several meetings with them, she was satisfied that the children had bonded very well with the applicants and the Agency was also satisfied with the care the applicants were giving the minors.

PW3 however, expressed reservations on the adoption of the minors by the applicants on the grounds that:-

*1. The application for international adoption by the applicants was rejected;*

2. *Some of the documents provided by the applicants are outdated;*

3. *The applicants are American citizens and not Kenyans and it is important that the court is satisfied that the children will get visas to America and eventually become citizens;*

4. *Issue of pre-selection which was highlighted by the international committee.*

A point to note is that even after the International Adoption Committee rejected the applicants' application, the applicants have continued to exercise actual custody of the children. The Children's court in Migori gave them temporary relief by granting them interim custody orders for a period of twelve months and also gave them a go ahead to start adoption proceeding in this court. The said order is dated 13th February 2013.

In determining who shall have the actual custody of the child, this court is guided by the principle that it is the best interest of the child that shall be of paramount importance in matters affecting children. In **M.A. -vs- R.O).O [2013] e KLR** L. Kimaru J. defined best interests of a child as follows:-

**“What is the best interest of the child has not been defined by the law. This is as it should be because the best interests of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however is that there are certain minimum requirements that have universally been accepted to constitute the best interests of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall, where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up.”**

Mr. Justice Kimaru then cited the Supreme Court of England decision in **2HC Tanzania IFC -vs- Secretary of State for the Home Department [2011] UKSC 4** which grappled with the question of what the court should consider as constituting the best interest of the child where it is claimed it is a primary consideration. In paragraph 25 of her judgment, Lady Hale, reading in effect what was a majority decision, stated:-

**“Further, it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply Article 3 (1) of UNCRC and treat the best interest of a child as a primary consideration. Of course, despite the looseness with which these terms are sometimes used, “a primary consideration” is not the same as “the primary consideration” still less as “the paramount consideration”. Miss Joanna Dodson QC to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be averred by Section 1(1) of the Children Act 1989.”**

It is therefore not in doubt that when a court determines any question with respect to:-

*the upbringing of a child; or*

*the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.*

5. However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR in its **Guidelines on Determining the Best Interest of the child (May 2005)** explains the matter neatly at para 11:-

**“The term “best interests” broadly describes the well being of a child .... the CRC neither offers a precise definition, nor explicitly outlines common factors of the best interest of the**

**child but stipulates that:-**

**a. the best interest must be the determining factor for specific actions, notably adoption (Article 211 and Separation of a child from parents against their will (Article 9));**

**b. the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).”**

In paragraph 46 of the judgment, Lord Ken held as follows:-

**“It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primary of importance must be accorded to his or her best interest. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors where the best interests of the child favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them it is not necessary to express this in terms of a presumption but the primary of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.”**

From the above discussion of what “best interests of a child” are, it is quite clear the best interests of a child include a child's basic needs that is food, shelter, clothing, health and education parental care and a safe environment to grow in. The best interests of a child are catered for when the child is given proper guidance both spiritually and morally. For proper growth and development, a child is entitled to hear a consistent, loving and firing voice that will provide not only physical direction but provide emotional strength to help the child along the rugged path of life.

From the evidence adduced in court and documents filed by PW3. PW3 was convinced beyond a shadow a doubt that the applicants were best suited to take care of the minors, the only stumbling block being their out dated supporting documents, and whether as American Citizens they can guarantee both residence and citizenship status for the minors.

After a careful analysis of the case herein, I can say the following.

Firstly, on the issue of the applicants' documents being outdated, it is clear from the evidence filed by the applicants that they assumed custody of the minors on June 2011. Although it is evident that the documents filed are outdated I am satisfied that the applicants' act of benevolence far outweighs anything else that may work against them. If the applicants had not intervened in the matter, the minors herein would long have been dead. It is not a small matter to weigh 2½ kilogrammes at the age of one (1) year. The applicants of course had the option to abandon the minors or perhaps to take them back to their maternal grandmother but they still held on to them and took care of them. Now the minors whom I have seen with my own eyes look healthy, content and happy. This observation was also confirmed by PW3. The applicants have, in my view, withstood the test of time even after their application for international adoption was rejected. I am thus satisfied that the applicants have a genuine heart and would endeavour to do just what a biological parent would do to take care of their child. Furthermore, the applicants have been consistent in seeking to ensure that the minors' lives are as far as is possible safe and secure.

In my humble view, I agree with what PW3 had to say about the conduct of the applicants, namely that their actions can simply be termed as an act of benevolence and for that reason their character is demonstrated by how they have taken in the minors as their own children, have even selected a suitable guardian for the minors just in case they are no longer able to take care of them and have even decided to take out an insurance policies for the sake of the minors.

Secondly on the issue of whether or not the minors will be American citizens once a local adoption is allowed by this Court, the applicants have filed in this court a letter from the U.S Embassy stating that:-

**“For Town I-130 purposes, an adopted child will qualify as an immediate relative of a US citizen if:-**

**The parent adopted the child before his or her 16th birthday (or before the child's 18th birthday under certain circumstances. The parents must submit evidence of a final adoption**

**AND**

**The parent had legal custody of and has physically resided with the child for at least two years -**

**d. the legal custody must have been the result of a formal assumption of responsibility by the adoptive parent for a minor recognized by a government only or court. This may include a grant of legal custody. Foster care or guardianship from a court or other recognized governmental entity.**

**e. The legal custody and joint physical residence requirements can occur before or after the adoption and can occur in segments so long as at least one of the adoptive parents has the full two years of legal custody and physical evidence.”**

From the above information, the requirements from the US Embassy are well outlined since the applicants have qualified on the basis that they are US citizens, they have had custody of the minors for more than 2 years, the only requirement they need to meet before applying for the immigrant visa for the children is the adoption order from this court.

Thirdly there is also the issue of pre-selection. According to the report by Little Angels Network (Adoption Agency) Pre-selection occurs when a person started assuming custody of a minor before the minor has been declared free for adoption. From the evidence on record, the circumstances under which the applicants assumed custody of the minors, were dire sine the minors were brought to them while critically ill. They decided to put them on home-based treatment, which did not work and the grandmother to the girls took them back to the applicants. The applicants then treated the minors and watched them around the clock. Within a fortnight, the said minors were on the road to recovery. Attempts by the 2nd applicant and her daughter to take them (minors) back to their maternal grandmother during the third week proved futile as the grandmother requested them to stay with the minors. If the applicants had returned the minors to their grandmother, chances are that the minors would have died.

In my humble view therefore, the applicants did not go knocking on the minors' grandmother's home seeking to take care of the children. The applicants intervened so as to give the minors needed care and protection which their grandmother could not give. The intervention by the applicants was thus a matter of life and death for the minors.

For the foregoing reasons, I am satisfied that the best interests of the minors in this case is to have their basic needs, as highlighted elsewhere in this judgment, met. I note that the 1st applicant is a trained nurse and he is therefore able to take care of the minors especially in their tender years. On the other hand, the 2nd applicant though employed can work from home and therefore be able to take care of the minors. The two applicants have genuinely bonded with and loved the minors and in their missionary work, they have promised to bring the minors back to Kenya so that they do not forget their roots. What more can this court ask for than the assurance that the minors will have a good life and parents who will take care of them just as if they are their own. The rest of it we leave to the Almighty God.

So that all the loose ends in this matter regarding documentation are put to rest, the applicants shall file the following documents with the court within sixty (60) days from today:-

1. Fresh home study report in lieu of the one dated 8th August 2012.
2. *The original copy of authorization by the US Department of Homeland Security.*
3. *Full size photographs of themselves.*
4. *Certified copies of certificates of Birth of applicants' 4 children.*

I therefore grant the adoption orders sought in terms of prayers (1) of the originating summons dated 20th February 2014, subject to the conditions set out in paragraph 55 hereinabove. The Registrar General is directed to enter this adoption order in the register.

**Delivered, dated and signed at Kisii this 23rd day of October, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:-

Mr. Okemwa (present) for Applicants

Mr. Bibu - Court Assistant