



REPUBLIC OF KENYA

High Court at Mombasa

Adoption Cause 9 of 2012

IN THE MATTER OF AND APPLICATION FOR THE ADOPTION OF MASTER G N

AND

IN THE MATTER OF SECTIONS 154, 157, 158, 159 AND 160 OF THE CHILDREN ACT 2001 AND
LEGAL NOTICE NO. 75 OF 2002

JUDGMENT

Before court is the application made by **R W N** (hereinafter referred to as '*the Applicant*') seeking to adopt the child **G N** (hereinafter referred to as '*the child*'). The matter came up for hearing on 23rd October, 2012 on which date the court did approve the appointment of **J W M** as the '*Guardian ad litem*' in this matter.

The applicant testified before the court on 13th December, 2012. She explained that she came to know the biological mother of the child one **G W** (hereinafter referred to as **G**) as a [information withheld] who she took into her home as a house help and lived with her for ten (10) years. When the said **G** fell pregnant with the child she approached the applicant for help as she was in dire straits being jobless and having been abandoned (so she claimed) by the father of the child. Once again the applicant took in **G** and supported her throughout the pregnancy by renting a house for her. Following the birth of the child in February, 2010 the applicant welcomed both **G** and her son into her home for two months. Thereafter **G** left to live with her baby in [information withheld]. This was however short-lived. She returned to the applicant when the baby fell ill and once again the applicant extended a helping hand. Eventually the child was left in the custody and care of the applicant and it was agreed that she commence proceedings to adopt the child.

Upto this point all was well. The court did observe the applicant as she testified. She was a mature woman whose only desire was to provide a good home for the child who had lived in her home practically since his birth. Similarly I was able to observe the child in my chambers. He was a healthy, happy two year old boy who had obviously been the beneficiary of proper physical and medical care. The court had opportunity to peruse the report of the Adoption Agency which recommended the adoption. The applicant has a home and is in good employment. The court has no doubt that she is possessed of sufficient finances to provide a good home and education for the child.

The child's biological mother **G W** testified before the court on 8th December, 2012. She conceded to having signed the consent form at the [information withheld] (the Adoption Agency) authorizing the applicant to adopt her child. However, upon coming before court **G** declared that she had changed her mind and was no longer willing to give up her child for adoption. The question which this court must now

determine is whether the initial consent signed by **G** is binding on her notwithstanding her declared intention to repudiate that consent.

The law in Kenya governing adoption is found in the Children Act 2001. Section 158(4) of the said Act provides as follows:

“(4) Subject to section 159 an adoption application shall be accompanied by the following written consents to the making of an adoption order in respect of any child.

(a) The consent of every person who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child.” [my emphasis]

Thus the law clearly requires that the biological parent of a child avail written consent **before** an adoption order can be made. In this case as is conceded by **G** she did provide such written consent. The question of whether or not **G** signed a consent is not in any doubt. However, she has now indicated her desire to **withdraw** that consent.

Counsel for the applicant submitted that the written consent once given is irrevocable. However, I do not find anything in the Children Act to suggest that such a consent is irrevocable. On the contrary section 159 (5) clearly provides as follows:

“Any person’s consent to the making of an adoption order may be withdrawn prior to the filing of the application without the leave of the court and with the leave of the court any time after the filing of the application for the adoption order but prior to the making of the order.”

No adoption order has yet been made. Thus the law allows **G** to withdraw her consent to the adoption with the leave of the court. The consent form which **G** signed bears the following phrase:

“I understand that an adoption order is permanent, absolute and irrevocable.”

What was deemed to be **irrevocable** here was the adoption order **not** the consent. In this case no court has as yet given an order for adoption.

The Constitution being the supreme law of the land provides at Article 53(1) that:

“Every child has the right

(a)

(b)

(c)

(d)

(e) 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”

My understanding of this provision is that the constitution recognizes the right of each child to live with and be raised by their biological parents. In determining this case the court is under an obligation to adhere to section 4(2) of the Children Act 2001 which provides:

“In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” [my emphasis]

In this case **G** being a parent of the child has indicated her desire to raise her child on her own. The right to be raised by his/her own parent is in my view in the best interests of any child.

Much has been made of the fact that the applicant is of better financial means than **G** and as such she is able to offer the child a more comfortable and/or luxurious lifestyle. In my view it would be a mistake to determine the worth of a parent or adoptive parent using financial might as basis. As I have stated earlier, I have absolutely no doubt about the fitness of the applicant as an adoptive parent. However, the fact that **G** is of humble means does not mean that she should be denied the right to raise her own child. It is a fact that many persons of humble means in this country and elsewhere have raised upright, respectable and successful children. The fact that the applicant is in a position to offer the child a more comfortable life does not mean that she is better qualified to parent him.

I now come to the role played in this whole saga by the [information withheld], the Adoption Agency. I must confess that they have acted in a disappointing manner and did not carry out thorough and exhaustive investigations into this matter.

PW3 G A A a programmes officer testified on behalf of the Adoption Agency. She confirms that she is the one who handled this case. She states that she met both the applicant and **G** and that upon explaining all the legal consequences of adoption to **G** she signed the consent form. Upon cross-examination **PW3** admitted that she relied wholly on what **G** told her. She made no attempt to seek out and interview the child's father. She confirms that she later met the child's father in February, 2013 and he told her that he was not aware of the adoption process concerning his son. This is information which if **PW3** had done deeper investigations she would have discovered. As it now turns out there is a father in the picture whose consent was not obtained and who has a right to determine the future of his son. Finally **PW3** admits that the circumstances of **G** have now changed. She has a job and earns a salary. **PW3** concludes by stating:

“It is my opinion and that of our network that the adoption process be terminated. This is due to what has now transpired. The child is the priority in an adoption process. For the child to benefit from the adoption the process must be done with good will and trust.”

It is clear that there was no full disclosure from **G** regarding the presence and role of the child's father in his life. This adoption cannot proceed without taking into account the wishes of the child's father.

All in all this is a very unfortunate case. The applicant has acted at all times in good faith and seeking the best for the child. **G** on the other hand has acted in a duplicitous and immature manner. However, she still remains the biological mother of the child. In addition I have not been convinced that **G** is an unfit mother. Although **G** did initially leave her son in the custody of the applicant her intention was not to abandon nor neglect him. There is evidence that **G** visited the child regularly in the applicant's home and even on occasion took him away to visit her mother. There has been no allegation of cruelty or child abuse towards the child by **G**. I was able to observe **G** and her son before me. She has a clear affection for her son and cuddles him on her lap. It was evident that the child also recognizes and knows **G** to be his mother. This mother /child bond ought not be broken. That being the case the best interests of the child dictate that he be raised by his own biological parent. This will ensure that he grows up with a clear identity and with exposure to all his blood relatives as well as their culture and traditions. This certainly would serve the best interests of the child.

Given that **G** has made known her intention to withdraw her consent before the adoption process has been finalized, I hereby grant her leave to do so. The consent though given freely cannot be used to usurp the constitutional rights of this child as provided by Article 53(1)(e).

Finally, based on the foregoing and taking into account the best interests of the child, I do permit **G** to withdraw her consent to this adoption. As such this application for Adoption is declined and I make no order on costs.

Dated and delivered in Mombasa this 31st day of May, 2013.

M. ODERO

JUDGE

In the presence of:

Mrs. Kipsang for Applicant

Respondent in person

Court Clerk Mutisya