



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Adoption Cause 194 of 2006

IN THE MATTER OF

ADOPTION OF BABY G W *alias* D P AND E O A APPLICANTS

JUDGMENT

The applicants are married and have filed the application for orders, to allow them to adopt the child herein. Although they both had attained age of sixty five by the time they filed the application, they had not shown that fact in the application and have not shown special circumstances to allow them to adopt the child despite that handicap.

It was only at the time of hearing of the application, the court noted that fact and allowed the applicants to show the special circumstances as required under Section 158 (2) (c) of the children Act 2001, (Act 8 of 2001).

The applicants themselves do not have any biological children, from their marriage solemnized on 2nd September, 1972. However, the 1st applicant has three children from his previous marriage all of whom have attained majority and are settled in their own lives. The applicants have appointed their son from the previous marriage A O A to act as legal guardian of the child herein as well as for the other child Barnabas who have been adopted by them previously. Another daughter Annabel who was previously adopted died at the age of 19 years and thereafter they have filed this application.

It is no doubt that the applicants have a good and reputable social status in the society and are financially capable. It is also true that they have been looking after the child since 22nd November, 2000 after a care agreement was signed by them with New Life Home who had the custody of the child. However, committal order from the children's court Nairobi was issued on 21st September, 2005, after the child was admitted to the care of the said Home on 24th August, 2000. Thereafter the aforesaid, care agreement was entered into.

There is adequate evidence on record that the child who was born on 7th August, 2000 at the Reproductive Health Services, Estleigh Clinic and Maternity, she was abandoned by the mother who absconded leaving the child. It is also not in dispute that the child is under care and custody of the applicants since November, 2000 and I saw in her a confident and content child. The consent to adopt was given by the Director of the said Home on 15th December, 2003.

Thus except for the age of Applicants, they do qualify to adopt the child.

In their further statement filed on 11th June, 2008 and verifying affidavit sworn on the same date, the applicants, have this to state:

1. 6. THAT I wish to state that I am 73 years old while my husband is 67 years old and my understanding of special circumstances entails the following:

- a) That my husband and I have been unable to get children of our own due to medical reasons.
- b) That my husband has three biological children from his first marriage, who are all grown up and have since left the home leaving enough room for other children to be brought up.
- c) We have previously adopted two other children, A O A and B O A.
- d) That our daughter, Annabel, passed away aged 19 years while undergoing surgery and after mourning her for a while we decided to open our lives and begin a new family in 2000 and adopted Barnabas who is now 10 years old.

- e) To complete our family we wanted a sister for Barnabas and a daughter for ourselves and in the year 2000 we got care and control of Baby G W who was about 4 months old at the time.
- f) In the last seven years of her life she has lived with us and for all intent and purposes is our daughter and it is thus it is in the child's best interest that she remain in our home.
- g) That my husband and I enjoy good health, have love for children and have the financial capability to raise Baby G.
- h) In the event of our deceased or incapacitated, our eldest son has agreed to act as the legal guardian of the child. Find herein attached and marked 'EA-1' a copy of the said consent.
- i) Beginning a second family at our age does not seem unusual for us as some of our friends have done the same and in particular the Guardian ad litem in this cause who adopted a child when he was 70 years old.

Section 158 (2) (c) of the Act stipulates: namely

“(2) An adoption order shall not be made in favour of the following persons unless the court is satisfied that there are special circumstances that justify the making of an adoption order:

- a)
- b)
- c) *an applicant or joint applicants who has or both have attained the age of sixty five years.”*

The wording of the aforesaid statutory provisions are very clear and do not require any elaborate interpretation wherein the court has been given discretion to grant the adoption, despite the age handicap, to the applicants provided the court is satisfied as regards special circumstances to justify the grant of order.

There cannot be a rule of thumb to define or describe the special circumstances which shall and would vary as per the facts of each case. However, it can be stated that those circumstances should point to the welfare of the child, the appropriate provisions for the child in case of death of the applicants, their physical and mental status at the time of filing the application etc. These circumstances are not exclusive but can be inclusive of other factors to be considered by the court.

In the matter concerning the children it is trite law that the court should look primarily for the best interest of a child. Section 4 (2) and (3) of the Act also give the similar guidelines in the actions concerning children. They stipulate:

“2. 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.

3. All judicial and administrative institutions, and all persons in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –

- a) safeguard and promote the rights and welfare of the **child**;
- b) conserve and promote the welfare of the child;
- c) secure for the child such guidance and correction as **is necessary for the welfare of the child and in the public interest.**

The applicants have given their background, the reason for adoption and special circumstances in their original and further statements.

Furthermore the report of the Director of Children Services dated 20th September, 2007 filed in the cause has also ably given following further special circumstances, namely;

“The Applicants have had the custody of the child since being placed with them on 22.11.2000. The child has therefore not known any other parents other than the applicants.

The applicants have already adopted a son Barnabas who is now ten years old. He has been well catered for, proof that another child adopted in the family would thrive, everything being equal.

As leaders in this country, they set a good example to their peers and other Kenyans to come forward and offer adoption as an alternative family care for deserving children.”

Those factors in my considered view put the applicants in the category of court's justification or capable of receiving court's discretion provided in Section 158 (2) (c) of the Act.

Over and above that, to ensure that the child shall have financial cushion, I had asked and the Applicants have agreed and undertaken to hold, a property bearing L.R. No.209/10345/6 situate along Brookside Drive, Westlands, Nairobi jointly owned by them, in trust for the child herein and B J O A in equal shares.

I do note that A O A the eldest son in the family has accepted to be the legal guardian of the child, and I do appoint him as such.

The Adoption Society has declared the child free for Adoption vide their certificate dated 20th December, 2006. The reports of the Adoption Society, the Director of Children services and Guardian ad litem have unhesitatingly recommended the adoption.

In view of the premises aforesaid, I grant the order that the Applicants herein be and is hereby allowed to adopt Baby G W alias D to be named as S E M G J O A, whose date of birth shall be recorded as 7th August, 2000.

The orders be recorded in the Adoption Register.

The Guardian ad litem is hereby discharged.

Dated and signed at Nairobi this 27th day of June, 2008.

K.H. RAWAL

JUDGE

27.6.08