



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

**Adoption Cause 154 of 2006**

**IN THE MATTER OF ADOPTION CAUSE EN- THE CHILD**

**MSR.....1<sup>ST</sup> APPLICANT**

**TMR.....2<sup>ND</sup> APPLICANT**

**JUDGMENT**

The two applicants are citizens of U.S.A and have married on 28<sup>th</sup> December 1996 which is, of course, a monogamous marriage. They are born on 16<sup>th</sup> October 1973 and 7<sup>th</sup> July 1972 respectively.

The 1<sup>st</sup> applicant is working as a missionary with Baptism World Missionaries based in Thika since the year 2000. They have also annexed their health certificates to show that they are mentally and physically fit. The current work permit of 1<sup>st</sup> applicant is expiring in February, 2009 and he is expecting its renewal the application whereof is already submitted.

The applicants are practicing Christian faith and they are inculcating the said faith in the child.

The applicants have four biological children, last two are born after the child EN was placed under their care on 14<sup>th</sup> September 2005. She was abandoned on birth at Kenyatta National Hospital. As per her case summary, kept by the hospital dated 2<sup>nd</sup> March, 2005, she was born in September 2004 and was discharged to Happy Life Children's Home on 2<sup>nd</sup> March, 2005. The officer in charge of Kenyatta Police Post vide his letters of 28<sup>th</sup> February, 2005 and 15<sup>th</sup> March, 2005 confirmed that the efforts to trace the child's mother has not borne any fruits. The Senior Resident Magistrate, Children Courts, Nairobi on 22<sup>nd</sup> March, 2006 committed the child to the aforementioned home.

The child was placed under the care of the applicants on 14<sup>th</sup> September, 2005. Their reason for proposed adoption, despite the fact that they have four biological children, is to assist a homeless child with a warm and loving home, personal parental love and sense of belonging. According to them, giving money to support a child is not enough.

In the 1<sup>st</sup> assessment report dated 8<sup>th</sup> November, 2007 from Children's Department, it is observed that the child has been positively assimilated in the home. She has been accepted by all and has blended and bonded with applicants and their children, especially the older two. They have also produced certificate of good conduct from Kenya Police they having stayed in Kenya since 2000.

However, the report also have raised concern, as the court has also done so, as regards the position of

the child when she will eventually be taken back to U.S.A. They also, like I did, raised their apprehension regarding her position in a foreign country.

Thus, the applicants filed Supporting Affidavit sworn on 21<sup>st</sup> February 2008 by the first applicant and further statements dated 29<sup>th</sup> May 2008 and 18<sup>th</sup> July 2008 both made by the 1<sup>st</sup> applicant.

Although there is some discontent amongst the bar as regards interpretation of section 162(b) of the Children Act by the court, I must address the issue by stating that the U.S.A does not automatically accept the adoption order made by this court. The applicants are “residents” of Kenya by virtue of entry permits periodically issued by the Kenyan immigration department and I do note that they have been residing in Kenya since the year 2000. They have taken over the foster care of the child in question in the year 2005 and have been staying with the child since then. They do hope that their entry permit would be extended which expires in February, 2009. But if not, then what? I do further state that the applicants are still citizens of U.S.A and I cannot ignore the fact or reality that eventually they would return to U.S.A. This is the reason the court wanted to make sure that, in such eventuality, the interest and right of the child would be taken care of and preserved.

The paramount issue which the court is enjoined to take into consideration is the best interest and welfare of the child. This consideration runs through all the provisions of the Children Act and section 162(b) thereof is not an exception. The section does not forbid the court not to ask for protection and preservation of the child’s welfare and interest in the case of foreign applicants who are technically residents of Kenya. There are countries which accept this court’s order for adoption as final care and binding and there are some countries which do not. The U.S.A is one of such countries which is not accepting the adoption orders issued by Kenyan courts, as final ones.

With these facts in my mind, I asked for further facts from the applicants.

In the further statement of 29<sup>th</sup> May, 2008, the applicants have annexed provisions of Child Citizenship Act, 2000(CCA) which became law on 27<sup>th</sup> February 2002.

The provisions under the title “what are the conditions for Automatic Citizenship under Child Citizenship Act, do not cover the status of the child.

***“What Are the Conditions for Automatic Citizenship Under the CCA?”***

**Foreign-born children who are residing in the United States will acquire citizenship automatically if:**

- 1. If the child has at least one United states citizen parent (by birth or naturalization); and**
- 2. The child currently is under 18 years of age; and**
- 3. The child currently is residing in the United States in the legal and physical custody of the United States citizen parent, pursuant to a lawful admission for permanent residence.**

**If adopted, the child must meet all of the above requirements as well as satisfy the requirements applicable to adopted children under section 101(b)(1) of the Act.”**

Looking at the aforesaid provision, the adopted child must satisfy the requirements of section 101(b) (1) of the Act in order to be eligible to acquire automatic citizenship. Thus, currently those adopted children who migrate to the United States (or adjust status in the United States to that of a lawful permanent resident) under section 101(b) (1) (e) of the Act or under section 101 (b) (1) (f) of the Act have to undergo further processes and thereafter they could have a full, final and complete adoption, and become qualified children.

This is where the court's concern lies, because under section 322 of the Act, a foreign born child residing outside the United States must be lawfully admitted and maintain such lawful status until the application for certificate of citizenship is approved. Thus this child has to acquire the lawful status before she acquires the citizenship of United States.

The U.S Citizen parents have to establish that the child is in their (his/her) legal custody, and in the case of an adopted child, a determination that the U.S citizen parent has legal custody will be based on the existence of a final adoption decree. However, I am further relieved to note that in the case of an adopted child a determination that a parent have a legal custody will be based on the provisions of the adoption executed under the laws of the state or country of residence.

In further statement dated 18<sup>th</sup> June, 2008, the applicants have averred that they have filed the form 1.600 A and that they have been issued with the notice of favorable determination from U.S Citizenship and immigration services. The said notice indicates that the applicants on completion of this proceedings, shall be required to file orphan petition under form 1-600.

The applicants have also annexed their certificate as to criminal records from state of Wisconsin Department of justice. Thus apart from the certificate of good conduct from Kenyan Police, they have satisfied this court that they do not have any criminal records back at home. (United States).

Moreover a letter at 4<sup>th</sup> April 2008 from Mukwongo Baptist Church in United States, the employer of the 1<sup>st</sup> applicant, does confirm that on their return to United States the church shall provide adequate housing to the applicants and their children. Similarly the 1<sup>st</sup> Applicant's parents have also confirmed that, in any other eventuality, they shall provide adequate accommodation to the applicants and their family.

The applicants have also appointed one JR as the legal guardian of the child who has accepted the said responsibility (Ann. MSR 11).

With these additional evidence produced by the applicants, under the directions of the court, the Director of children services, Kenya, also has confirmed that his department shall have no objection if the adoption order is granted to the applicants.

The Adoption Society Little Angles Network, being satisfied with the applicants' capacity and ability to adopt the child, has recommended the adoption. It has issued a certificate to declare the child free for adoption on 8<sup>th</sup> November, 2006 (certificate no. 0000950.)

The guardians ad litem have the same opinion and have recommended the adoption.

After satisfying myself with the facts and provisions of laws of United States as regards Children's Citizenship, I order as under :-

- 1. The Applicants MSR and TMR are authorized to adopt Baby EN to be known henceforth as WSR, whose date of birth shall be 21<sup>st</sup> November 2004.**
- 2. The Applicants shall appoint JR as legal guardian of WSR.**
- 3. The Applicants shall file form 1-600 in respect of WSR within 45 days from the date of this order.**
- 4. The Registrar of Adoption shall enter the above orders in his register.**
- 5. I discharge guardian ad litem**

Orders accordingly.

Dated and signed at Nairobi this 26<sup>th</sup> day of September, 2008.

**K.H.RAWAL**

**JUDGE**

**26.9.08**