



REPUBLIC OF KENYA



KENYA LAW
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**In re NCH (Minor) (Adoption Cause 03 of 2019)
[2023] KEHC 18319 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
ADOPTION CAUSE 03 OF 2019
RN NYAKUNDI, J
JUNE 12, 2023**

IN THE MATTER OF

PFO 1ST APPLICANT

WPO 2ND APPLICANT

JUDGMENT

1. Before this Court is the Originating Summons dated 27th March, 2019 by which the Applicants herein seek the following orders: -
 1. That an order of adoption be issued in favour of PFO holder of Passport No [...] and WPO holder of passport No [.....] residing in Eldoret within Uasin Gishu County and of Post Office Box Number [.....] - 30100 Eldoret for the adoption of baby NCH.
 2. That the Registrar General be directed to enter the name of baby NCH in the Adopted Children's Register in the Prescribed form.
 3. That costs of this summons be in the cause.
2. The Application was supported by the statement of the Applicants sworn on the same date and was canvassed by way of vive voce evidence.
3. The Applicants are an American couple who currently live and work in Kenya. The couple have one biological child together. The Applicants currently work in Kenya at the [Particulars Withheld], as a Technical Advisor and a Visiting Lecturer respectively. The Applicants have been working and living in Kenya since January 2007 and own a home in Elgon View, Eldoret which they bought in the year 2014. The Applicants desire to adopt baby NCH aged two (2) years (8) months who was born on 14th July, 2016.
4. Baby NCH was an abandoned child and on being found was given shelter at Lewa Children's Home vide a Court order issued on 17th August, 2016. The minor is a Kenyan citizen and the Applicants



herein are currently her legal guardians pursuant to the Court order that was issued 6th September, 2016. The subject baby has been under the custody of the Applicant herein for two years now and they have since enrolled her at [particulars withheld] Nursery School, the same school that their biological son attends.

5. The Applicants maintain that they have the legal capacity and ability to give baby NCH a home with parental care and love that she needs just like their biological son.
6. The Applicants informed the Court that pursuant to the Court order of 11th April, 2017, they have travelled three times with baby NCH to the United States of America and that their family members are aware of and support their intention to adopt the child.
7. The Applicant have also since included baby NCH in their private Health Insurance and are doing everything in their power to ensure that baby NCH is financially stable now and, in the future, and as such have included in their respective final Wills and Testaments in equal amounts with their biological son.
8. The 2nd Applicant has since acquired Kenyan citizenship and is now a Kenyan citizen having been issued with a Certificate of Registration.
9. Prior to the hearing of the adoption, the Applicants were interviewed by Little Angels Network, a registered adoption society who visited their home and prepared a report which is filed in court. They also issued a Certificate declaring the child free for adoption. The Certificate is dated 21st August, 2019.

Analysis and Determination

10. The jurisdiction of the court on adoption orders is expressly provided for under the *Children's Act*. That is in Section 185 (1) (2) (3) & (4) which deals with the category of children eligible for adoption. Whereas Section 186 sets out as to who may apply to adopt a child in Kenya. In addition, Section 187 donates the power to the court to dispense with consent from the biological parents of guardian. The criteria which must be satisfied by the Applicant or Applicants is expressed in the following language:-
 - (a) That in the case of the parent or guardian of the child, the parent or guardian has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child;
 - (b) That in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of I 5 5 9 2022 children the child, that person has persistently neglected or refused to make contribution in accordance with the order; or
 - (c) That in any other case, except in respect of the consents required under section 186(8)(c) and (9), the person whose consent is required cannot be found or is incapable of giving his or her consent, or that his or her consent has been unreasonably withheld.
- (2) Without prejudice to the generality of subsection No 29 (1)(a) (a) abandonment shall be presumed in any case where the child appears to have been abandoned at birth h, or if the person or, where the institution having care and possession of the child, that institution has lost all contact with a parent or guardian of the child for a period exceeding one year; and (b) persistent failure to maintain the child may be presumed where, despite demands made, no parent or guardian has contributed to the maintenance of the child for a cumulative period of one year.
- (3) The Court may dispense with the consent of the spouse of the applicant for an adoption order if satisfied that the person whose consent is to be dispensed with cannot be found or is



incapable of giving consent, or that the spouses have separated or divorced and are living apart, and that such separation is likely to be permanent.

- (4) The consent of any person to the making of an adoption order in pursuance of an application under this Part may be given, either unconditionally or subject to conditions with respect to the religious persuasion in which the child is to be brought up, without knowing the identity of the applicant for the order, and where the consent given by any person is subsequently withdrawn on the grounds only that he or she does not know the identity of the applicant, the consent shall be deemed as being unreasonably withheld.
 - (5) In considering whether or not to dispense with the consent required under this section, the Court shall regard the interests of the child as paramount and, subject thereto, give priority to the interests of the parents, guardians or relatives of the child over those of the applicants
11. Article 53 of the *Constitution* of Kenya 2010, provides overarching principles which must apply whenever any decision concerning a child is to be considered. the *Constitution* of Kenya 2010 categorically provides that:
- A child’s best interests are of paramount importance in every matter concerning the child.”
12. This principle finds a firm place in the law in Section 4(2) and 4(3) of the *Children’s Act* No 8 of 2001 and is echoed by Article 4 of the *African Charter on the Rights and Welfare of the Child* which provides that:
- In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.”
13. It is a universal theme of our constitution, the children’s Act, the various international and domestic instruments that the courts in reaching decisions that will affect a child a key criterion of importance is to be accorded his or her best interests. However, that is just part of the considerations which ought to influence the decision based on specific facts presented before the session Judge of Magistrate. The doctrine of best interest must rank higher than any other considerations. It is therefore a question of striking the balance alongside other competing considerations. The approach is for the court to assess the components of what constitutes the best interest of that child and how those interests can be protected by evaluating the reality of the child’s life and prevailing circumstances.
14. The subject-child was born on 14th July, 2016. She is now aged about 7 years old and is above the six (6) week age limit provided for in law. The court appointed Applicants to act as the Guardian ad litem for the minor vide the order dated 6th September, 2016. From the adoption agency and the Director of Children Reports, there is evidence of acclimatization of the child with the adoptive parents. She has therefore, become a family member of the foster parents during the period under the review which for me is sufficient integration. The Applicants for that matter remain to have the ultimate say over the child’s survival rights. It is clear that the best interest of the child would be met if an adoption order is issued by this court to provide a legal avenue to ring-fence the child’s best interest. The word Welfare in this case must be construed and interpreted in this widest sense. Without being exhaustive, it is all what is equalised in the *Constitution* and the spirit of the provisions in the Children’s Act on the paramountcy of the best interest. The Applicants are therefore under a duty to consider the moral, religious, social, economic, and physical well –being of the child without neglecting the ties of affection. Parental responsibility under the Children’s Act means all the rights, duties, powers, responsibilities, and authority, which by law a parent of a child has in relation to the child and his or her property. In relation to this application, given the special circumstances of the child the consent provided for in



Section 187 is hereby dispensed with for the child's best interest. This complexity in decision making is often aggravated in times where efforts to piece together the factual information on how the child became a subject of abandonment and subsequently undermining her best interests. In *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) AC 112 at p. 184 the court observed that "When a court has before it a question as to the care and upbringing of a child it must treat the welfare of the child as the paramount consideration in determining the order to be made. There is here a principle which limits and governs the exercise of parental rights of custody, care and control. It is a principle perfectly consistent with the law's recognition of the parent as the natural guardian of the child: but it is also a warning that parental right must be exercised in accordance with the Welfare principle and can be challenged, even overridden, if it be not".

15. It affords this court to move the child from the harm threshold likely to undermine her rights by issuance of an adoption order to ensure to a degree to guarantee greater protection of the best interest rubric rights
16. The Court observes that the Applicant have no criminal record as evidenced by the Police Clearance Certificate No PCC-xxxxxxx issued by the Directorate of Criminal Investigation (DCI) on 27th February, 2017 and the Criminal Watch Dog report dated 3/1/2019 issued by the California State.
17. It is evident that the Applicants have fulfilled all the legal requirements relating to the adoption of the child. This Court is satisfied that the Applicants are qualified and able to take care of the child. The home visits by the Adoption Society and the established that the Applicants have the financial and emotional capability to provide for the upkeep and education of the child. It is evident that in the period that the Applicants have had the custody of the child, the child has bonded well with them. The child considers the Applicants her parents.
18. From the foregoing, the court is of the considered view that it is in the child's best interest to be adopted by the Applicants. Accordingly, I allow the prayers sought in the Originating Summons dated 27th March, 2019 and order as follows:
 1. The Applicants PFO and WPO are authorized to adopt the child known as Baby NCH.
 2. The Registrar General is directed to make the relevant entry in the Adopted Children's Register. In addition to issue birth certificate instrument.
 3. The Director of Immigration be and is hereby ordered to enter her name in the Adopted Children's Register including issuance of passport in any event.
 4. The Guardian ad litem is hereby built in this context.
 5. No orders on costs.It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 12TH DAY OF JUNE 2023

.....

R. NYAKUNDI
JUDGE

