



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**ADOPTION CAUSE NO. 6 OF 2018**

**IN THE MATTER OF AN APPLICATION OF BABY J Also known as JW(BABY)**

**O S M & Z R Y .....JOINT APPLICANTS**

**AND**

**CHAGE TRUST .....RESPONDENT**

**JUDGMENT**

1. Through an originating summons dated 9<sup>th</sup> November, 2017 and filed on 16<sup>th</sup> February, 2018, OSM and ZRY (hereinafter the 1<sup>st</sup> and 2<sup>nd</sup> applicants respectively), moved to this court pursuant to Sections 11, 154, 156, 157, 158, 159, 160, 161, 164 and 170 of the Children Act seeking orders that; Baby J also known as JW be declared as a Kenyan citizen; the applicants be authorized to adopt baby J also known as JW; the court does dispense with the requirements for consent as required under section 159 of the children Act; upon adopting the baby he be known as TOM : upon adoption, RSM be appointed guardian of the child; Registrar General to enter the adoption order in the adopted children's register and costs be in the cause.
2. The application is supported by a statement in support thereof jointly made and sworn on 9<sup>th</sup> November, 2017 by the applicants. The applicants are Kenyan citizens born in 1973 and 1976 respectively. They celebrated their marriage on 19<sup>th</sup> December, 2012 under Islamic Law. A marriage certificate to that effect marked annexure. "B" was attached as proof of the said marriage.
3. The couple has not been blessed with any biological child. However, the 1<sup>st</sup> applicant was engaged in a first marriage out of which he was blessed with three biological children namely; MO, Kheri O and NO. Following his divorce with the first wife the year 2015, he assumed custody of the three children.
4. Having miscarried three times due to medical complications, the second respondent in consultation with her husband (1<sup>st</sup> applicant) opted to adopt a baby as they await their luck to get their biological baby. They are also engaged in another process seeking to adopt another baby by the name of LJ whom they are already staying with.
5. On their economic status, the 1<sup>st</sup> applicant is a tour operator owning two nine-seater vans which generates about kshs 120,000 per month. He also owns rental houses at Likoni from which he earns kshs 50,000 monthly income. On her part, the second applicant does earn about kshs 15,000 per month being rental income from some houses she manages.
6. Concerning the baby estimated to have been born on 10<sup>th</sup> May, 2012, she was abandoned at Kenyatta

National Hospital at the age of about 1 month old. According to the report by change trust adoption society, the biological mother to the baby one WJ was taken to Rabi maternity for delivery. After delivery, she was referred to Kenyatta hospital as the child was premature.

7. While in company of her alleged husband SG, they took the baby to Kenyatta National Hospital where the mother absconded on 12<sup>th</sup> June 2012 thus abandoning the baby.

8. The incident was referred to Kenyatta police post vide OB No XXXXX/2012. On 24<sup>th</sup> July, 2012 the minor was admitted at hope house babies home. Vide protection and care case No 569 of 2012 Nairobi Children's court, the baby was on 26<sup>th</sup> November,2012 formally committed to Hope House Babies Home. Via their letter dated 19<sup>th</sup> Febraury,2013 Kenyatta police post confirmed that no one had claimed the child since abandonment.

9. Six months having lapsed, adoption process commenced with the child being declared free for adoption on 17<sup>th</sup> August,2017. He was then placed under the care and control of the applicants for a mandatory three months period preceding the adoption proceedings.

10. Upon instituting these proceedings, the applicants sought the appointment of KRK as Aguardian Ad litem. Pursuant to a chamber summons dated 9<sup>th</sup> November, 2017, the court on 18<sup>th</sup> July 2018 appointed the said KRK as the guardian Ad litem. Consequently, the Director children services and the guardian Ad litem were directed each to file an assessment and evaluation report.

11. Prior to the hearing, the office of the Director Children Services filed its report dated 2<sup>nd</sup> June 2018. Equally, the guardian Ad litem filed his dated 20<sup>th</sup> August, 2018. Change trust prepared their report although undated thus recommending the adoption. The three reports described the applicants as suitable, financially stable, committed Muslims with no criminal record, responsible parents, and generally mentally and physically fit to adopt the baby.

12. During the hearing, the applicants expressed their desire to adopt the baby. They also acknowledged the fact that adoption is permanent and that the child will have a right to inherit their property.

13. I have considered the Originating Summons herein, supporting affidavits, various stake holders' reports and testimony by the applicants. Issues that emerge for determination are; whether the minor is legally available for adoption; Whether the applicants are suitable to adopt the baby and, whether the adoption is in the best interests of the baby.

14. The minor herein was abandoned by her biological mother at Kenyatta National Hospital while aged one month old. Every effort to trace the parents or close relatives have failed to bear any fruit. This is evidenced from the investigation and report by Kenyatta police post initial and final reports dated 12<sup>th</sup> June, 2012 and 19<sup>th</sup> February 20113 respectively in which the police service confirmed that their effort to get the parents to the minor were futile. In the circumstances, consent from the parents or guardian as required under section 159 of the Children Act is dispensed with.

15. It is also clear from Change Trust report that they also tried to trace the parents through the telephone contacts given to the hospital but the same was out of service. The child has been declared free for adoption and has been staying with the applicants since 2013.

16. The child has fully integrated with the adoptive parents and siblings to be. The child has already identified herself with the adoptive family hence separating her will subject her to mental anguish and ultimately ruin her future.

17. Article 14(4) of the Constitution does presume citizenship to children below 8 years found in Kenya by stating;

**“A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth”.**

18. In view of the above constitutional provision, the minor herein is presumed to be a Kenyan citizen. Regarding her age qualification, she is over six weeks and below 18 years being the recommended age bracket for a child to be adopted. Further, considering that the child was declared free for adoption with nobody claiming her, it is my finding that she is suitable for adoption.

19. Concerning the suitability of the applicants, they are financially stable, Muslims with no criminal record, responsible and caring parents. They are Kenyans aged between 25 and 65 years being the age bracket for adoptive parents pursuant to Section 158 of the Children Act. They have fully bonded with the baby. They understand the consequences of adoption process. Consequently, this being a local adoption, I am satisfied that the applicants have met the requisite requirements to adopt the baby.

20. As to whether the adoption is in the best interests of the child, it is clear from the circumstances under which the baby was abandoned. The parents abandoned the baby in hospital after delivery. Since 2012, they have not been heard of. They gave a false phone number nowhere to be found. The child has gotten loving and caring parents. Obviously, the child is entitled to parental love and care, generational identity, provision of basic necessities like food, shelter, clothing, education and medical care. All these are now available in the hands of the applicants.

21. Under Article 53(2) of the Constitution and section 4 (2) and (3) of the Children Act, before a court or any Administrative institution decides to make any decision concerning the affairs of a child the cardinal consideration must be the best interests of the child.

22. In the circumstances of this case, the best interests of the minor will be served and taken care of by the applicants. He is assured of inheritance and provision of basic necessities. Justice and the best interests of the child herein demand that the application be allowed with orders that;

- a. OSM and ZRT are hereby authorized to adopt baby J also known as JW who henceforth shall be known as TOM.**
- b. That the child's date of birth shall be 10<sup>th</sup> May, 2012 and place of birth Nairobi Kenya**
- c. That the consent of her biological parents is dispensed with.**
- d. That the child is hereby presumed to be a Kenyan citizen.**
- e. That the adoption herein be entered in the adopted children's register by the Registrar General.**
- f. That the guardian Ad litem is hereby discharged.**
- g. That RSM be and is hereby appointed as a legal guardian to the baby in the event of death or eventuality befalling the applicants.**

**Dated, signed and delivered virtually at Mombasa this 4<sup>th</sup> day of March 2021**

**J.N. ONYIEGO**

**JUDGE**