



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ADOPTION CAUSE E002 OF 2020

RK AND CF.....APPLICANTS

- VERSUS -

LAN.....RESPONDENT

Coram: Justice Reuben Nyakundi

M/s Mercy Ngugi Advocate for the Petitioners

RULING

RK and CF, hereinafter the petitioners are Kenyan citizens, residents of Malindi who have moved this court vide an originating sermons under the Civil Procedure Act and the Children's Act for an adoption order of a minor, one EN alias AKR. The petitioners deposed in the affidavit dated 11th November 2020 and additional evidence in court to the effect that the court finds them suitable to adopt the minor as provided for under the Constitution and the Children's Act.

The grounds canvassed the affidavit evidence and sworn evidence briefly establishes the following characteristics favourable for the grant of an adoption order;

- a. That both of the petitioners are of sound mind and Kenyan citizen by birth aged below the age of 65 years old. Being a statutory requirement for any petitioner seeking leave of the court for grant of an adoption order.**
- b. That they have been residents in Kenya for more than 10 years and intend not to change their citizenship or country of residence at any one time or during the subsistence of this adoption order.**
- c. That the petitioners be recognized as having solemnized and celebrated their marriage union on 17th December 2006 and since then, they have enjoyed their relationship and cohabited together as husband and wife.**
- d. That both petitioners acknowledge and give testimony as professing the Christian faith.**
- e. In the course of the period under review , the petitioners have not been cited of any criminal conduct under the Kenyan Penal law or any other such statute which creates a criminal offence.**
- f. That the minor was identified by Life Rescue Center which on application placed the minor under their care as foster parents.**
- g. The petitioners also assert that both are financially stable to make provisions for the minor's welfare and best interests during her lifetime until she attains the age of maturity. In the event of an inheritance, each petitioner covenants to make provision for the minor as a heir to the testate or intestate succession.**

Besides the above evidential material, a brief background has been given by the adoption agency and the children's officer who on investigation found the petitioner fit and suitable to adopt the minor within the set criteria under the Children's Act and attendant regulations.

Determination

Whether the petitioners qualify to be appointed as adoptive parents of the minor. According to Section 4 of the Children's Act, any orders

made for adoption ought to sufficiently fall within the threshold of the cluster on survival and best interests of the child. Subsection 2 states, **“In all actions concerning children, whether undertaken by public or private social welfare, institutions, courts of law, administrative authorities or legitimate bodies, the best interests of the child shall be a primary consideration”**. From this provision, the courts award joint custody in cases where both parents can properly perform their duties as parents and where such orders serve the interest of the child and full promotion of his or her rights.

This has been amplified in a plethora of cases what the court ought to construe in application of this nature as having met the criteria in regard to adoption of a minor. In this regard, **Forsythe v Jones² SCCA 49 of 1999 per Harrison, JA**; adumbrated as follows:

“A Court which is considering the custody of the child, mindful that its welfare is of paramount importance must consider the child’s happiness, its moral or religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards the true welfare. These considerations, although the primary ones, must also be considered with the conduct of the parents, as influencing factors in the life of the child and its welfare”.

In the case of **JVC (1970) AC 668**, the court captured what it thought will constitute the definition of welfare theme, **“As when all relevant facts, relationship, claims and wishes of parents risks choices and other circumstances are taken into account and weighed, the cost be followed will be that which is most in the interest of the child”**. The overall thematic scheme of the regulatory framework of the principle is that due focus and priority should be given to the political, economic and social interests of the child whenever the decisions made are directly or indirectly likely to affect the minor or children set to be adopted. The best interest of the child in the 1959 UN Declaration of the Rights of the Child embodied and expressly recognizes the principle of the best interests of the child in Article 2 of the Declaration and provides as follows;

“The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be the paramount considerations”.

In the present case, the choice made by the petitioners to adopt the minor must be determined in the exact context of the above principles. The position reflected herein is that the minor set to be adopted falls within the category recognized under Section 157, 158, 159 and 160 of the Children’s Act. The evidence adduced fundamentally accords the court that both the petitioners and the minor are Kenyan citizens. The first petitioner is aged 42 years whereas his wife is at the prime age of 39 years old. Therefore, meeting the criteria of the minimum age of 25 years but below the capped age of 65 years old. The petitioners have also demonstrated that they are not related in terms of consanguinity and affinity with the minor or in any way have familial relationship. Their respective affidavits and evidence on oath is corroborated by the independent inquiries undertaken by the adoption agency and the Directorate of Children’s Services. The effect of it is that the petitioners do not follow within any of the exclusion clauses to bar them from adopting the minor. In addition to the main justification for adoption, material placed before the court shows that the parents of the minor are unknown and therefore under Section 159 (1) of the Act, consent of the parents is dispensed with.

Ultimately, the best interests of the child being a primary consideration, it is clear that the minor is in need of a home and foster parents to ensure her survival, best interests and all other encompassing rights during her lifetime. Moreover, the guiding principle also recognizes that in adoption proceedings, guardian ad litem be identified to voluntarily agree to join hands with the petitioners to an adoption in taking measures to protect the best interests of the child. From the record, the guardian ad litem gave evidence relevant on the paramountcy of the welfare principle which assured the court that the upbringing of the minor is in safe hands in all circumstances as set out in Section 4 of the Children’s Act.

While addressing matters arising in these proceedings, the best interests of the child clearly favour a course to be made by granting the reliefs in the originating summons dated 11th November 2020. In conclusion, I am persuaded from the facts of the case, this is a need case for an adoption order under Section 154, 157, 158, 159 and 160 of the Children’s Act. I accordingly make the following declarations;

- a. That the petitioners RKM and CFC be and are hereby granted leave of the court to adopt AKR.**
- b. That RKM and CFC shall retain full custody of the minor and shall be required to provide for the minor in her best interests until the age of maturity.**
- c. The guardian ad litem is appropriately and legally recognized in terms of Section 164 of the Children’s Act.**
- d. That the registrar of Births and Deaths shall move under the provisions of the statute to issue a birth certificate to the minor henceforth as particularized in the originating summons. There shall be no order to cost.**

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2021.

.....

R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. [info@mercyngugiassociates.com]