



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**ADOPTION CAUSE NO. 103 OF 2019**

**IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001 AND THE ADOPTION RULES**

**AND**

**IN THE MATTER OF ASJ (MINOR)**

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

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

**JUDGMENT**

(1) Before this Court is the Originating Summons dated **19<sup>th</sup> July 2019** by which **SSD** (the 1<sup>st</sup> Applicant) and **MBG** (the 2<sup>nd</sup> Applicant) seek for orders:-

**“1. SPENT**

**2. SPENT**

**3. THAT the Applicants be authorized to adopt ASJ a minor to be known as AMG.”**

(2) The application was premised on the following grounds:-

**(a) That the biological parents of the child are divorced.**

**(b) That the Applicant and the biological mother of the child got married on 6<sup>th</sup> March 2016.**

**(c) That the Applicant is desirous to adopt the said child.**

**(d) That the Applicant has been living with the child and taking care of his needs since 6<sup>th</sup> March 2016.**

**(e) That the biological father of the child has persistently failed to maintain the child and/or participate in the child's life for the past 8 years.**

**(f) That it is in the best interest of the child that the orders sought are granted.**

The Summons was disposed by way of viva voce evidence on the online platform.

(3) The 1<sup>st</sup> Applicant **SSD** is the biological mother of the subject child. The 1<sup>st</sup> Applicant was initially married to one **SNC** who is the biological father of the child as is evidenced by the annexed copy of the child's birth certificate Serial No. [...] [Exhibit No. '4']. The child was born to the couple on **6<sup>th</sup> June 2013** during the subsistence of the 1<sup>st</sup> Applicant's first marriage.

(4) However the 1<sup>st</sup> Applicant separated from her first husband when the child was only **six (6)** months old and filed for Divorce in **2014**. On **30<sup>th</sup> May 2018** a Decree Absolute dissolving the marriage was issued by the **Bungoma Magistrate's Court** [Exhibit '3']. The 1<sup>st</sup> Applicant was granted custody of the child.

(5) Thereafter on **6<sup>th</sup> March 2016** the 1<sup>st</sup> Applicant entered into a second marriage with **MBG** (the 2<sup>nd</sup> Applicant). The 2<sup>nd</sup> Applicant told the Court that he has lived with the child and has been a father figure providing for all the child's needs since the year **2016**. The 2<sup>nd</sup> Applicant now seeks to adopt the child in order to formalize his position as the child's father and to enable the child acquire requisite documentation in the name of the 2<sup>nd</sup> Applicant.

(6) The Applicants have presented this application jointly. They both confirm that they understand the legal implications of an Adoption order and undertake to accord to the child all rights due to a biological child including the right to inherit.

#### **ANALYSIS AND DETERMINATION**

(7) I have considered the evidence adduced in open Court as well as the various Affidavits and Reports filed in this matter. The Preliminary requirements for the making of an Adoption Order are set out in **Section 156(1)** of the **Children's Act** which provides as follows:-

**“159(1) No arrangement shall be commenced for the adoption of a child unless the child is at least six (6) weeks old and has been declared free for adoption by a Registered Adoption Society in accordance with the Rules prescribed in that behalf.”**

(8) The subject child was born in **Bungoma** on **6<sup>th</sup> July 2013**. He is now about **eight (8)** years old well above the **six (6)** week age limit provided for by law. Annexed to the Summons is the original copy of the Certificate Serial No. [...] dated **26<sup>th</sup> June 2019** issued by **CHANGE TRUST** a Registered Adoption Agency declaring the child Free for Adoption. Accordingly I find that all the prerequisites for Adoption have been met.

(9) The Court has a duty to assess the suitability of the Applicants as Adoptive parents to the child. As stated earlier the 1<sup>st</sup> Applicant is the biological mother of the child. There is obviously no better person to parent a child than that child's biological mother. The 2<sup>nd</sup> Applicant is the husband of the child's biological mother. The Applicants are a couple who got married to each other on **6<sup>th</sup> March 2016** under the **Hindu Marriage and Divorce Act 1961**. A copy of their Marriage Certificate is annexed to the Summons [Exhibit '2']. The 1<sup>st</sup> Applicant is a Kenyan citizen as evidenced by the copy of her National Identity Card [Exhibit '1a'] whilst the 2<sup>nd</sup> Applicant is a citizen of **India** as shown by the annexed copy of his Passport No. [...] [Exhibit '1(b)'].

(10) This court is aware of the moratorium barring the adoption of Kenyan children by Foreign Nationals. However in special circumstances that moratorium can be waived. This is a case where the Foreigner (2<sup>nd</sup> Applicant) is legally married to a Kenyan citizen (1<sup>st</sup> Applicant) under the Kenyan law. He is now seeking to adopt the biological child of his Kenyan spouse. The couple who are resident in Kenya have made this country their home. There is no indication that they intend to relocate in the near future. In my view as this is a kinship or Family Adoption, special circumstances exist to warrant the waiving of the moratorium.

(11) The biological father of the child who is aware of the Applicant's intention to adopt the child has given his consent to the adoption. The consent which is dated **1<sup>st</sup> July 2019** was filed in Court on **19<sup>th</sup> July 2019**. The biological father has had no contact or communication with the child following the divorce with the child's mother. I therefore find that the written consent has been sought and obtained in line with **Section 158 4(a) Children Act**.

(12) The Applicants are in a stable family union. They have jointly cared and provided for the child for the past **five (5)** years. The family support their decision to adopt the child. Both Applicants were examined and found to be medically fit. The 2<sup>nd</sup> Applicant works as a Manager in a firm run by a relative whilst the 1<sup>st</sup> Applicant is a home-maker who occasionally takes on catering jobs to boost the family income. The 2<sup>nd</sup> Applicant has annexed copies of his payslip indicating that he earns approximately **Kshs. 60,000/-** per month [Exhibit '5']. I am satisfied that the Applicants are financially stable and have sufficient means to provide for the child.

(13) The Applicants have appointed as Legal Guardians for the child the parents of the 1<sup>st</sup> Applicant. The said Applicants have both signed a consent to act as Legal Guardians in the event of the demise of the two (2) Applicants.

(14) The Applicants live with the child in their family home in **Ngara**. A home visit conducted by the **Director Children's Department** found that they occupied a spacious two bed-roomed house where the couple live with the brother of the 2<sup>nd</sup> Applicant. The home was found to be in a secure compound, with several neighbours and other children whom the child could interact and play with. The Applicants profess the **Hindu** faith and regularly attend **Temple** with the Child. Based on the above I am satisfied that the Applicants are suitable adoptive parents.

(15) In deciding upon any matter involving a child Courts are obliged to give priority to the best interests of the said child. **Section 4(2)** of the **Children Act** provides:-

**“(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 interest of the child shall be a primary consideration.” [own emphasis]**

(16) This is a kinship or family adoption. The child has already lived with the Applicants for the past **five (5)** years. They have enrolled him in school at **[Particulars Withheld] Academy**. I was able to interview the child online. He was a cheerful articulate boy who seemed happy and well cared for. The child has undoubtedly bonded with the Applicants who he refers to as his mother and father.

(17) The 2<sup>nd</sup> Applicant wishes to adopt the child in order to legalize his relationship with the child as father and to give the child his name and identity. The Court was told that the child's biological father (who has consented to the adoption) has had no contact with the child for

several years. The child is already in a stable family unit. The reports filed by the **Director Children's Services**, the **Adoption Agency** and the **Guardian Ad Litem** all recommend the Adoption. In my view this adoption certainly serves the best interests of the child.

(18) Finally I do allow this application and I make the following orders:-

- (1) The Applicants are authorized to adopt the child **ASJ**.
- (2) Upon adoption the child will be known as **AMG**.
- (3) **SMD** and **KSD** are appointed as the Legal Guardians of the child.
- (4) The Registrar-General is directed to make the relevant entry in the Adopted Children's Register.

**DATED IN NAIROBI THIS 14<sup>TH</sup> DAY OF MAY, 2021.**

.....

**MAUREEN A. ODERO**

**JUDGE**