



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ADOPTION NO 21 OF 2017

IN THE MATTER OF ADOPTION OF BABY CV

ML

EMA.....APPLICANTS

VERSUS

THE CHANGE TRUST.....RESPONDENT

JUDGMENT

1. On 18th October ,2013 EMA moved to this court as a sole applicant vide an Originating Summons dated 27th September, 2013 seeking to adopt the Minor herein. During the pendency of these proceedings, she formalized her marriage to ML on the 5th April, 2018. In view of this marriage arrangement, the whole proceedings took a different trajectory by the court ordering for the two to jointly apply for orders to adopt the baby. By the order of the court dated 2nd October 2019, the original Originating Summons was marked as withdrawn.
2. Vide a further originating summons dated 1st February 2021 and filed on 2nd February 2021, ML and EMA (hereinafter referred to as the 1st and 2nd applicants respectively) sought for orders as follows; that the Honourable court do declare baby C V a Kenyan citizen; that the court do dispense with the consent as required under section 158 of the Children Act; that the applicants be authorized to adopt baby CV; that upon making the adoption order the child be known as LIL; upon making the adoption order, HAR be appointed as the legal guardian of the child; that the Registrar General do enter the adoption order in the adopted children's register.
3. The application is supported by particulars contained in a statement jointly sworn on 10th February, 2021 in which the applicants stated that they are living together as husband and wife having celebrated their marriage on 5th April, 2018 hence desirous to adopt the baby herein.
4. Briefly, the 1st applicant is an Italian national born in Roma Italy on 25th November 1959. He grew up and schooled in Italy up to university level. He started working in Italy as an Architect until 1991 when he came to Kenya for holiday. Having settled in Malindi, he was convinced to stay and develop one villa. Subsequently, he formed his own company called [particulars withheld] limited which was concerned with developing villas within Mombasa and Malindi where he owns several properties among them hotels and restaurants.
5. In 1998 he met the 2nd applicant a Kenyan citizen born on 17th April 1973. Having fallen in love, they started cohabiting as husband and wife. They were blessed with a baby girl known as T in June, 2004. Unfortunately, the baby died the year 2008 out of a mysterious ailment. They later formalized their union through a civil marriage celebrated on 5th April, 2018.
6. Professionally, the 2nd applicant is a secretary by training. She is engaged in joint business with her husband among them [particulars withheld] cafe.
7. The applicants' motivation to adopt the baby is borne out of the desire to cool down on the stress they suffered after losing their biological child and also for the second applicant to find joy and fulfillment of being a mother again.
8. Regarding the child estimated to have been born on 16th December, 2014, he was on 18th December, 2014 found having been abandoned in front of Mama Lucy Kibaki Hospital Nairobi, at the gate. Found together with the child was a bag of clothes and also a receipt from Rehema hospital issued to one RO. Inquiries from Rehema hospital revealed that the said R had given birth in their facility on 16th December, 2014 but secretly left the hospital without clearing the bill. However, the particulars of RA and the father of the child could not be traced as the ante natal card was missing.
9. Subsequently, the child was admitted at Mama Lucy new born children unit where she was attended to until 29th January, 2015 when she

was discharged and admitted at Imani children's home for care and protection. The incident was reported at Soweto police station vide OB No 16/16/01/2015.

10. On 23rd September, 2015, the subject was finally committed to the Imani Children's Home vide P&A case No 221/2015 Nairobi children Court. Every effort by the police to trace the parents and or close relatives to the baby could not bear any positive results. This is evidenced from their final letter Soweto police station dated 9th October, 2015. Six months having lapsed, the child was subjected to the adoption process. On 9th December, 2015, the baby was declared free for adoption by Change Trust Adoption Society vide its case committee meeting held on 14th November, 2015. A certificate S/No.xxxx was issued to that effect. The child was then placed for care and control of the 2nd applicant on 9th December, 2015 pursuant to section 157 of the Children Act.

11. Consequently, the 2nd applicant initiated adoption proceedings on 18th October 2017 as a sole applicant. Having formalized her marriage with the 1st applicant, she withdrew the Originating Summons and filed a joint Originating Summons on 2nd February, 2021.

12. During the pendency of the original Originating Summons, the court was moved vide a Chamber Summons dated 27th September, 2017 wherein SAU was appointed as guardian Ad litem. The Director Children Services and the guardian Ad litem were directed to file their respective social inquiry reports in respect of the minor and the applicant then the sole applicant.

13. Prior to the hearing, the Director Children services through the County children, Coordinator Mombasa filed his report dated 5th March, 2019 and 25th February, 2012, thus recommending the adoption. The Change Trust adoption society filed two reports dated 14th November, 2015 and 9th October, 2019 also recommending the adoption. Equally, the guardian Ad litem filed hers dated 4th February 2012 thus recommending the adoption.

14. According to the three reports, the applicants are suitable to adopt the baby and that the adoption is in the best interests of the child. They described the applicants as financially stable, loving and caring.

15. During the hearing, both applicants urged the court to grant their prayers. They confirmed that they had understood the consequences of adoption and that it is permanent. The first applicant (Pw3) told the court that he has been married to the second applicant for 23 years. He further told the court that he has never married any other woman during his lifetime whether in Italy or Kenya. That he does not have any other child outside their marriage.

16. I have considered the application herein, materials in support and testimonies by various witnesses. Issues that arise for determination are; whether the child is available for adoption; whether the applicants are suitable to adopt the baby; whether the adoption is in the best interests of the child.

17. The child was found having been abandoned by the mother two days after delivery. The motive for abandoning a minor of tender age is only known by the mother. Nobody has made any claim over the baby. Despite every effort to trace the parents or close relatives nothing fruitful has been forthcoming. This is clear from the aforesaid police final letter. To that extent the requirement for consent does not apply.

18. Since the child has fully bonded with the applicants to separate them will deprive her a bright future. Regarding her nationality, Article 14 (4) of the Constitution provides solace on abandoned children by providing that;

“A child found in Kenya who is, or appears to be less than 8 years of age, and whose nationality or parents are not known, is presumed to be a Kenyan citizen by birth”.

19. In view of the above constitutional provision, the baby herein is presumed to be a Kenyan citizen. Further, the child being a resident in Kenya is qualified to be adopted pursuant to section 157 of the children Act.

20. Having been declared free for adoption while over six weeks the minimum age limit for any adoptive child, I am left with no other conclusion except to hold that the child is suitable for adoption.

21. Concerning the adoptive parents' suitability, they have been described as financially stable jointly and separately owning properties worth millions of shilling inter alia; a building at Nyali in which they reside worth 15 million, 1.5 acre land with a building along Malindi - Lamu road worth 250 million generating one million income monthly; a plot at Bamburi valued at 2 million; a car worth 1.7 million and earnings of kshs 50,000 per month from a restaurant in Malindi. They are loving and caring, morally upright, physically and mentally fit. They appreciate the consequences of adoption and that it is permanent.

22. However, there is the question of whether the first applicant who is an Italian national could be allowed to adopt the baby in view of the cabinet moratorium of 2015 barring intercountry adoption otherwise known as international adoption. The Change Trust was of the opinion that various courts have upheld adoption where anon-national is a resident in Kenya. I am aware of the existence of the moratorium whose objective is to protect innocent children from child trafficking. It was effectively targeting adoption declarations or orders under section 162 of the Children Act which provides;

“An adoption order may be made in respect of a child upon the joint application of two spouses who are not Kenyan citizens and not resident in Kenya (in this act referred to as an “international adoption”) if they-

(a) have obtained the consents specified in paragraphs (e) of Sub- section 4) of the section 158; and

(b) have satisfied the court that the country where they ordinarily reside and where they expect to reside with the child immediately after the making of the adoption order will respect and recognise the adoption order and will grant resident status to the child; and

(c).....”

23. My understanding of the moratorium is that, it only bars adoption by non-Kenyans who are not residents in Kenya. From the reading of Section 162, non-Kenyan citizens who are residents within Kenya and who intend to reside with the child in Kenya cannot be subjected to the general cabinet moratorium on inter country adoption. See adoption cause No 99/2017(OS) Nairobi in the matter of baby S.S. where Judge Muchelule held as follows in respect of section 162 that;

“By this definition, the adoption in question is not an international adoption. This is because the 1st applicant is a Kenyan citizen. The second applicant is a Dutch national married to the 1st applicant and they both live in Kenya”

24. The judge went ahead and declared the moratorium as being unconstitutional by stating that;

“It follows that the moratorium dated 29th January, 2015 that was issued by the cabinet regarding inter country and resident adoptions was, in the face of Section 162 of the children Act, in excess of power, illegal, and unconstitutional. Until the Act has been amended to exclude inter country and resident adoptions, the courts are bound to allow these adoptions. The courts are bound to exercise their powers under the Act”.

25. Similar position was held in the case of In re of PM (baby) (2017) eKLR, In re of baby K R (2015) e KLR and In re adoption D K (minor) (2020) e KLR where a British male National married to a Kenyan woman was allowed to adopt the baby on account of the best interests of the child.

26. In view of the above case law and the fact that the moratorium has been declared unconstitutional, it is my finding that the applicants have met the requisite requirements to adopt the baby.

27. Is the adoption in the best interests of the child? Ultimately, the answer lies in the circumstances under which the child was rescued? The baby was abandoned by the mother presumably two days after delivery. Since 2016, nobody has claimed her. The child like any other baby is in need of basic provision like food, shelter, clothing, education and medical care. She also needs parental care and guidance. All these are available in the applicants’ hands.

28. In making any decision concerning a child, Article 53 (2) of the Constitution and section 4 (2) and (3) of the children Act does underscore the best interests of a child principle as the primary consideration.

29. In the instant case, it is my finding that it is in the best interests of the child that she be adopted by the applicants. Accordingly, the application is allowed with orders that;

(1) The applicants are authorized to adopt baby CV who shall henceforth be known as LIL

(2) That the child’s date of birth shall be 16th December,2014 and place of birth Embakasi Nairobi.

(3) That the consent of the minor’s parents is dispensed with.

(4) That the child is declared to be a Kenyan citizen.

(5) That the guardian Ad litem is discharged.

(6) That the Registrar General is directed to enter the adoption in the adopted children’s register.

(7) That HAR is hereby appointed as the legal guardian to the minor in the event of any incapacitation befalling or death of the applicants.

Dated, signed and delivered virtually at Mombasa this 7th day of May, 2021.

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J. N. ONYIEGO

JUDGE