



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ADOPTION CAUSE NO. 77 OF 2020

IN THE ADOPTION OF

BABY MZ ALIAS ZM ALIAS M. Z.....THE CHILD

AND

DKK.....1ST APPLICANT

CMM.....2ND APPLICANT

JUDGMENT

The Applicants, DKK and CMM, filed an Originating Summons dated 23rd November, 2020 under sections 154, 156(1), 157(1), 158(1), (a) (i), 4, 6, 7, 160 (1), (2), (3), (4), 161, 163, 164(1), and 170 of the Children Act No. 8 of 2001 and Section 24 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya seeking the following orders:

1. That the child be presumed to be a Kenyan citizen by birth.
2. That the Director of Immigration be authorized to issue the child with a Kenyan Passport.
3. That the Applicants, DKK and CMM, be authorized to adopt the child to be known as **MMKK**.
4. That **IBM** be appointed as the legal guardian of the child in the event of death or incapacity of the Applicants before the child is of full age and fully self-reliant.
5. That the Registrar General do make an entry of this adoption in the adopted children register.
6. That the court be pleased to make any further orders it deem necessary.

In support of the Originating Summons, the Applicants have filed a Statement dated 21st September, 2020 together with their Affidavits, explaining that the child B.M.Z. was abandoned by the biological mother at St. Francis Xavier Catholic Church Naivasha; That the said biological mother never returned and that his estimated date of birth is 28th April, 2017. The matter was reported at the Naivasha Police Station by good Samaritans where it was recorded on OB Number 21/21/05/2017. The child was admitted at Naivasha County Referral Hospital until 26th, April 2017 when he was released and admitted to New Life Home Trust Children's home on the same date. The Children's Court in Naivasha Sub- County in Care and Protection Case No. 106 of 2018 formally committed the child to the New Life Home. The Naivasha Police Station in its letter dated 17th September, 2018 confirmed that it had not received any claim for the child neither did the investigations on the child's parentage bear fruits. The Police Station issued a further letter on this matter dated 20th March, 2020 reflecting the proper details on the occurrence book number. The child was placed with the Applicants, for foster care on 7th December, 2018 through the foster care agreement. Consequently, the child was freed for adoption by the Little Angels Network Adoption Society by their certificate dated 31st October, 2018.

The Applicants are Kenyan Citizens, both born in 1974. They hold National Identity Card numbers xxxx and xxxx respectively. They have been married since 28th August, 2004 according to their attached marriage certificate. They have no biological children. They have assumed financial responsibility for the child's medical care, education and general upkeep and have attached copies of title deeds and bank account statements. They have also been examined and found to be physically and emotionally fit to parent the child and a medical report is attached.

The Applicants have been cleared by the police from any criminal record through the certificates dated 25th March, 2020.

On 18th January 2021 this court appointed JM as Guardian Ad Litem upon application by the Applicants and directed that the Guardian Ad Litem and the Director Department Children Services investigate the suitability of the Applicants to adopt the child and file their respective reports within 45 days. Both reports are in the court file.

The Report by Guardian Ad Litem is dated 1st March, 2021. It is based on home visit on 6th February, 2021. She states that she found the child well settled, adjusted and very attached to the Applicants with whom he has developed a strong bond of belonging in the family. She states that the Applicants desire to adopt is evident and they are attached to each other and seem happy together. She also states that the Applicants are emotionally, mentally and financially ready to take care of the child. She states that the Applicants are fully committed to the child and that they have bonded well as family. She recommends that the Applicants be allowed to adopt the child.

The report from the Children Services is dated 4th March, 2021. It is prepared by Nancy Waswa, Principal Children Officer and countersigned by Patrick Hoyd Isadia, Deputy Director on behalf of the Director Children Services. The report recommends that the Applicants have met the prerequisites for adoption as provided in section 157 and 158 of the Children's Act of 2001. The report also recommends that the Applicants be granted the orders sought and be allowed to adopt the child as they have shown their capability to do the same.

The law under **section 157 of the Children Act (No. 8 of 2001)** provides that: -

(1) Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was or was not born in Kenya: Provided that no application for an adoption order, shall be made in respect of a child unless the child concerned has been in the continuous care and control of the applicant within the Republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants, as the case may be evaluated and assessed by a registered adoption society in Kenya.

I have noted that the Applicants have had continuous care and control of the child for a period of three consecutive months preceding the filing of their application. The child was placed with the Applicants on 7th December, 2018 and has been under their care and protection ever since.

Section 158 of the Children Act (No. 8 of 2001) ***provides that an adoption order may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants:***

(a) has attained the age of twenty-five years and is at least twenty-one years older than the child but has not attained the age of sixty-five years; or

(b) is a relative of the child; or

(c) is the mother or father of the child.

In this case the Applicants have demonstrated (a) above and the Guardian Ad Litem and the Director Department Children Services reports give good recommendations as to the capability of the Applicants to adopt the child. This provision has been complied with.

On the issue of consents from the parents of the child the law provides under **Section 159 of the Children's Act** that;

(1) The court may dispense with any consent required under paragraphs (a), (b), and (c) of subsection (4) of section 158 if it is satisfied that—

(a) in the case of the parents or guardian of the child, that he has abandoned, neglected, persistently failed to maintain or persistently ill-treated the child:

Provided that—

(i) abandonment may be presumed if the child appears to have been abandoned at birth or if the person or institution having care and possession of the child has neither seen nor heard from a parent or guardian of the child for a period of at least six months.

In re TP(Child) [2021] eKLR the court held under [par. 14] that:

From the record and material presented before this court, the minor was abandoned by her mother. Although it was not very clear on the specific effort made to trace the mother who delivered the child, police department confirmed through their initial and final letter dated 14th October, 2016 that the mother could not be found. Consequently, the need for consent pursuant to section 159 of the Children Act is dispensed with.

In this matter it has been clearly shown and evidenced through the attached letters from the Naivasha Police station dated 17th September 2018 and 20th March 2020 that the child was abandoned and there are no known biological parents or relatives of the child.

The Applicants have proposed IBM as legal guardian. She is also a sister to the 2nd Applicant. She has consented to being appointed Legal Guardian vide her signed Guardian letter of consent dated 23rd September, 2020.

I have considered whether this adoption is in the best interests of the child and the cardinal requirement enshrined under Article 53(2) of the constitution and section 4(2) and (3) of the Children's Act to take the best interest of a child into consideration before making any decision affecting the affairs of the child. Considering that the minor was abandoned, it will be in his best interest that he gets a home and parents where he will receive love, care and protection. International law also provides for the best interest of the child under the UN Convention on the Rights of the Child (CRC), which Kenya ratified on 30 July 1990. Article 3 of the Convention provides that: -

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

In conclusion, I am satisfied that the law and correct procedure have been followed in this matter. The Applicants have satisfied the requirements of local adoptions. They will provide a conducive home for the child; offer him love and protection and good, protected upbringing thereby furthering the best interest of the child principle. Consequently, I hereby grant an adoption order and issue the following specific orders:

- 1. That consent of the parents of the child is hereby dispensed with.***
- 2. That the Applicants, DKK and CMM, be authorized to adopt the child to be known as MMKK.***
- 3. That the child be presumed to be a Kenyan citizen by birth.***
- 4. That the Registrar General is hereby directed to make an entry of this adoption in the Adopted Children Register.***
- 5. That the Director of Immigration is hereby authorized to issue MMKK with a Kenyan Passport.***
- 6. That IBM is hereby appointed as the legal guardian of the child in the event of death or incapacity of the Applicants before the child is of full age and fully self-reliant.***
- 7. That JMis hereby discharged from being Guardian Ad Litem.***

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JUNE 2021.

S. N. MUTUKU

JUDGE