



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ADOPTION CAUSE NO. 32 OF 2020 (OS)

AND

IN THE MATTER OF THE CHILDREN'S ACT (NO. 8 OF 2001)

AND

IN THE MATTER OF BABY SAM

AND

AN APPLICATION FOR ORDERS OF ADOPTION OF BABY SAM

BY

SMAR and his wife AMJ

JUDGEMENT

1. By the Originating Summons dated 17.3.2020 the Applicants SMAR and his wife AMJ both Somali nationals, seek to adopt their grandchild known as Baby SAM. The child was born on 16.6.12 of the Applicants' school going son, AMA and UMA also a school going girl. The parents of the child showed no interest in him and separated and disappeared. Their whereabouts remains unknown to date. In November 2012 when the child was 6 months old, the Applicants aware of the child's neglected and malnourished state, took over his care and have been doing so since. By an order of 14.11.17, the Children's Court at Nairobi *vide* Miscellaneous Children's Case No. xxx of 2017, granted sole legal custody of the child to the Applicants.
2. The Applicants have been assessed by Change Trust, a registered adoption society and taken through the adoption process and its implications. The society's case committee sitting on 1.11.19 approved the Applicants as having met the legal and social requirements to adopt the child. On the same date, the adoption society declared the child free for adoption *vide* its certificate serial No. xxxxx.
3. This Court did on 14.10.2020 appoint SMF as guardian *ad litem* for the child pending the hearing and determination of the adoption application, in accordance with Rule 8 of the Adoption Rules.
4. The Applicants have gone through the requisite assessments, and reports in respect thereof have been duly filed. Change Trust which arranged the adoption of the child filed its report dated 1.11.19. For the Director of Children Services was filed a report dated 21.12.2020 by Ezekiel Kimani, Principal Children Officer and countersigned by Mary Mbuga, Assistant Director. SMF the Guardian *ad litem*, also filed her report dated 22.12.2020. I have carefully assessed the said reports. All are favourable, and recommend the proposed adoption.
5. The child has been in continuous care and control of the Applicants for a period of about 9 years which is more than the statutory 3 months required under Section 157 of the Act. Although the male applicant is over 65 years old, the female Applicant is less than 65 years old. None of the Applicants is younger than 25 years and both are more than 21 years older than the child. Accordingly, Section 158 of the Act has been complied with. The Applicants have been made aware of the consequences of an adoption order as well as the rights of an adopted child. They shall assume all parental rights and duties of the biological parents in respect of the child.
6. This is not a local adoption. The circumstances of this case are unique in that the Applicants came into Kenya as Somali refugees. They have 9 children 8 of whom were born in Kenya. The female Applicant has now acquired American citizenship. The Applicants intend to relocate the family and the child to the United States of America where the female Applicant is working. This is however a kinship adoption as the Applicants are the paternal grandparents of the child.

7. After a careful assessment of the reports filed herein, this Court has formed the opinion that it would be in the best interest of the child to be adopted by the Applicants. They will provide a home for the child to grow up in together with their children who are still under the care of the Applicants. The Applicants have nominated a relative, ARFM to be the legal guardian of the child, in the event of the Applicants dying or becoming incapacitated before the child is of full age.

8. The Applicants have sought that the child be declared a citizen by birth. Article 14 of the Constitution of Kenya, 2010 stipulates who is a citizen of Kenya by birth as follows:

1. A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.

4. 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.

9. In the present case, the father of the child was born in Kenya. However, none of his parents was a Kenyan citizen on the day of his birth. Both his parents, were Somali refugees. As regards the mother of the child, no evidence was adduced to demonstrate that she was a Kenyan citizen. Accordingly, the Court is unable, from the material placed before it, to declare that the child is a Kenyan citizen by birth.

10. The Applicants also seek that the Director of Immigration be authorised to issue the child with a Kenyan passport. Given the finding of the Court on the child's citizenship, this is an order that cannot be granted and the Court declines to grant the same.

11. Having taken into account the foregoing factors, and this being a kinship adoption, this Court has formed the opinion that it would be in the best interests of the child that he be adopted by the Applicants and makes the following Orders:

a. The Applicants SMAR holder of Refugee identity card number 78xxxx and his wife AMJ holder of Refugee identity card number 40xxxxx are hereby allowed to adopt Baby SAM who shall henceforth be known as SAM.

b. I direct the Registrar General to enter this order in the Adoption Register.

c. ARFM is hereby appointed legal guardian of the child in the event that the Applicants die or are otherwise incapacitated before the child attains the age of 18 years.

d. SMF, the guardian *ad litem* is hereby discharged.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2021

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **Court Assistant**