



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ADOPTION CAUSE NO. E076 OF 2020**

**IN THE ADOPTION OF**

**BABY V ALIAS V. UALIAS UNKNOWN ALIAS**

**NAMELESS ALIAS ABANDONED BABY BOY.....THE CHILD**

**AND**

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

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

**JUDGMENT**

The Applicants, JKM and PWM, filed an Amended Originating Summons dated 7<sup>th</sup> June, 2021 basing it on sections 132(12), 154, 156(1), 157(1), 158(1), (4) (d), 159 (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 and all other enabling provisions of the law. The Applicants are seeking the following orders:

1. That **CWM** of P.O. BOX xx-01000 Thika, in the Republic of Kenya be appointed Guardian *ad litem* (*spent*).
2. That the Director of Children Services, Ministry of Labour, Social Security and Services investigate the Applicant's fitness to adopt and file a report.
  - 2A. That the Applicants be authorized to adopt BABY V alias VU alias UNKNOWN alias NAMELESS alias ABANDONED BABY BOY to be known as JMK.
3. That the child be presumed to be a Kenyan citizen by birth.
4. That the child's date of birth be 20<sup>th</sup> August, 2018 and the place of birth be Nairobi.
5. That the Registrar General be directed to enter the adoption in the Adopted Children Register.
6. That the Director Immigration be authorized to issue the child with a Kenyan Passport.
7. That **SNM and LMK** be appointed the legal guardians of the child in the event of the death or incapacity of the Applicants before the child is of age or independent.
8. That the court be pleased to make any further orders it deem necessary.

The Applicants are Kenyan Citizens born in 1969 and 1973 respectively. They have been married since 14<sup>th</sup> December, 2002 according to their attached marriage certificate. That they have one adopted child **JMK(son)**. The 1<sup>st</sup> Applicant is a Branch Manager working at [Particulars Withheld] Kenya while the 2<sup>nd</sup> Applicant is a Lecturer working at [Particulars Withheld]. They are financially stable to provide for the child. They have attached copies of their financial documents. They are also healthy, physically and emotionally fit to parent the child as per the attached medical reports. They have been cleared by the police from any criminal record through the good conduct certificates dated 18<sup>th</sup> and 15<sup>th</sup> June, 2019 respectively. They have been assessed by Buckner Kenya Adoption Services and found fit to adopt. They have proposed to have **SNM and LMK** appointed as legal guardians of the child. The Applicants also state that they live in a home with a comfortable environment suitable for nurturing the child. They have not made any previous application seeking to adopt in respect of the child, neither has any previous application been made by any person relating to the adoption of the child herein.

Buckner Kenya Adoption Services considered the application by the Applicants to adopt the child and investigated the Applicants. The Applicants were found eligible and were approved for adoption by the Buckner Kenya Adoption Services Case Committee sitting on 21<sup>st</sup> June 2019 . they were placed with the child for fostering on 31<sup>st</sup> July 2019.

The Applicants proposed CWM as Guardian Ad Litem and through Chamber Summons dated 22<sup>nd</sup> October 2021, this court appointed her and on 18<sup>th</sup> January, 2021 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 have been filed.

The Report from the Children Services is dated 3<sup>rd</sup> March, 2021. It is prepared and signed by Mary Atati, Principal Children Officer and countersigned by Patrick Hoyd Isadia, County Coordinator Children Services – Nairobi County on behalf of the Director Children Services. The Report is favourable. It shows that the child has been living with the Applicants since 27<sup>th</sup> July, 2019; that the Applicants have the requisite financial capacity, medical cover and home environment fit for a child and that the child was declared free for adoption on 21<sup>st</sup> June, 2019 vide certificate number 0371. The Report observes that the Applicants have met all the requirements for the local adoption in accordance with the Children’s Act

The Guardian Ad Litem Report is dated 24<sup>th</sup> February, 2021. The Guardian Ad Litem states in that report that she has made several visits with the adoptive parents at their home. She has observed the Applicant’s social and economic status and found them fit to adopt the child.

I need to point out that the Report by the Guardian Ad Litem omits to mention the two proposed legal guardians. The Report mentions only one of them, **SNM**. Likewise, the Report by the Director of Children Services refers to other people who are not the proposed legal guardians. In the course of amending the Originating Summons, the Applicants changed the names of the people they wished to propose as legal guardians. This amendment to the pleadings was done on 7<sup>th</sup> June 2021 after the Report had been filed. The Report was not amended to reflect the changes in the proposed legal guardians. However, I note that the error in referring to the earlier proposed legal guardians is a genuine error and is not meant to mislead the court. The only mistake was that counsel for the Applicants omitted to alert the Director of Children Services to make the necessary changes in the report. This, in my view, does not prejudice this application since the two proposed legal guardians have consented to be so appointed through their affidavit sworn on 3<sup>rd</sup> June 2021.

The Applicants have proposed **SNM and LMK** as legal guardians. **SNM** is the brother to the 1<sup>st</sup> Applicant and together with his wife **LMK** they have consented to being appointed Legal Guardian.

I have considered this matter. This adoption fulfills the provisions of the law. Under **Section 157 of the Children Act (No. 8 of 2001)**:

***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.***

From the documents made available to the court, it is clear to me 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 27<sup>th</sup> July, 2019 and has been under their care and protection ever since.

I also note that the provisions of **Section 158 of the Children Act (No. 8 of 2001)** are complied with. The Applicants have demonstrated that they are aged 51 years and 48 years respectively meeting the age requirements. The reports by the Guardian Ad Litem and the Director Department Children Services give good and positive recommendations in regard to the capability of the Applicants to adopt the child.

I also note that consents of the parents or guardians of the child, as required under **Section 159 of the Children’s Act**, could not be obtained because the child had been abandoned and his mother or other relatives are unknown. Documents presented in court have shown the police from Kasarani Police Station investigated the whereabouts of the mother and relatives of the child without success. By a letter dated 10<sup>th</sup> May, 2019 the Police indicated that the child was abandoned and there are no known biological parents or relatives of the child.

Section 159 of the Children’s Act states 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 14<sup>th</sup> 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.*

I am satisfied with the evidence placed before the court to prove that the child was abandoned.

In all matters and decisions affecting the child, the cardinal requirement enshrined under Article 53(2) of the Constitution of Kenya 2010 and Section 4(2) and (3) of the Children's Act is the consideration of the best interest. Considering that the minor was abandoned, it will be in his best interest that he gets a home where he can grow up in a conducive environment with a loving family. The above provisions echo the UN Convention on the Rights of the Child (CRC), which Kenya ratified on 30 July 1990, where in Article 3 it is provided 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.*

I am satisfied that the Applicants are better placed to adopt the child. I am therefore persuaded to allow this Originating Summons, which I hereby do and grant the following orders:

*1. That consent of biological parents of the child is dispensed with.*

*2. That JKM and PWM, the Applicants herein, are authorized to adopt BABY V alias VU alias UNKNOWN alias NAMELESS alias ABANDONED BABY BOY to be known as JMK.*

*3. That JMK is presumed to be a Kenyan citizen by birth.*

*4. That JMK's date of birth is 20<sup>th</sup> August, 2018 and the place of birth is Nairobi.*

*5. That the Registrar General is hereby directed to enter this adoption in the Adopted Children Register.*

*6. That the Director Immigration is hereby authorized to issue the JMK with a Kenyan Passport.*

*7. That SNM and LMK are hereby appointed the Legal Guardians of JMK in the event of the death or incapacity of the Applicants before the child is of age or independent.*

*8. That CWM is hereby discharged from being Guardian Ad Litem.*

Orders shall issue accordingly.

Dated, signed and delivered this 1<sup>st</sup> day of July 2021.

S. N. MUTUKU

JUDGE