



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

ADOPTION CAUSE E001 OF 2020

IN THE MATTER OF BABY AZ (MINOR)

MWC).....APPLICANT

JUDGMENT

1. The Applicant herein moved this court vide the Originating Summons dated 28.10.2020 and brought under Sections 154, 156, 157, 158, 159, 160, 163, 164 and 170 of the Children's Act seeking for orders;-

(a) That the Applicant be authorized to adopt baby AZ who is to be known as JAW and the Registrar General be directed to enter this adoption into the Register of Adoptions.

(b) That MWN and DNM be appointed as legal guardians of the minor.

(c) That the child be presumed to have been born in Kenya.

2. The application is supported by a Statement in Support of the Application and an Affidavit of the Applicant both sworn on 28th October, 2020. She adopted the said statement sworn on 28.10.2020 in support of the application. She averred that the infant was born to an unidentified mother and was abandoned 3 weeks after its birth at Casualty in the General Provincial Hospital at Nakuru and the case was reported at Nakuru Central Police Station vide OB No. 53/21/11/2017. Nakuru Children's Court committed the child to Kardesh Ber Nea Children's Home for safe custody vide Care and Protection Case No. 345 of 2018.

3. The main Applicant has fully bonded with the minor at the nuclear and extended family levels which have accepted the minor. She is aware of the responsibilities ensuing the adoption.

4. The Applicant is employed at [particulars withheld] as a Secretary and is able to meet the financial needs of the minor without strain. She is committed to rise the minor in Christianity faith. She has no criminal record. She states that Buckner Adoption Agency confirmed in its Report to the Applicant that the minor was free for adoption vide Certificate number xxxx on 23.11.2018. That no pecuniary consideration has been paid to the Applicant to receive the child and further that she has no adverse interests to those of the child having no other application in relation to the said minor.

5. Further that her sister, MWN and her husband DNM have voluntarily accepted to be the child's legal guardian in the eventuality that the Applicant is incapacitated or unable to care for the child. That the said legal guardians have five children of their own and have the financial means to take care of the child.

6. The Applicant prays that if an adoption order does issue, the child be known as **JAW**. She states no previous application has been made by any person relating to the said child.

7. At the hearing of the application herein, the court directed that the prerequisite reports be filed and which directions were complied with. Buckner Kenya Adoption Agency in its report dated 09.08.2021 recommended that the child herein was available for adoption and further that adoption would be in the best interest of the minor. The guardian *ad-litem* (MM) further filed a Report dated 09.08.2020 recommending the adoption by the Applicants of the minor herein as it's in her best interests.

Determination

8. I have considered the application herein and all the documents filed before this court and it is my view that the main issue for determination is **whether the same is merited.**

9. Adoption is provided for under the Children's Act. Section 154(1) of the Act bestows this court with the power to make an adoption order. Section 156 further requires that for any arrangement to be commenced for the adoption of a child, the said child should be at least six weeks

old and be declared free for adoption by a registered adoption society in accordance with the Rules prescribed in that behalf.

10. Section 157 further allows for adoption of a child whether or not the child is a Kenyan citizen, or was or was not born in Kenya and 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.

11. Section 158(1) further requires that in an application for adoption and where there is joint application (as it is in this case) at least one of the joint Applicants must have attained the age of twenty-five years and 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.

12. Section 158(3)(d) is to the effect that an adoption order shall not be made if in the case of joint Applicants, if they are not married to each other; Section 158 (2)-(4) further provides for conditions which Applicants ought to comply with in filing the application for adoption. Amongst those conditions is the consent by the parent. However, Section 159 gives this court the powers to dispense with the said consent 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.

13. In the instant case, the consent to an adoption order in respect of the minor herein sworn on 20.03.2019 by Dickson Masindano and Irene Ogutu- the Director of Buckner Kenya Adoption Services and social worker respectively indicates that the minor herein was born on 28.10.2017. As such, at the time of the application herein, the child herein was more than six (6) weeks old. The child was also declared free for adoption by Buckner Kenya Adoption agency, a registered Adoption Society in the report dated 09.08.21.

14. The Applicant averred that the child herein was received in their care and possession on or about 24.12.2018 and thus she had been in the continuous care and control of the minor for a period of three consecutive months preceding the filing of the application. The Applicant herein annexed to the application copies of their national identity cards wherein it was indicated that they were born in 25.04.1976. As such, at the time of the application, the applicant had attained the age of twenty-five years and was at least twenty-one years older. She also has not attained the age of sixty-five years.

15. From the records, it is clear that the child herein was found abandoned at casualty department at Nakuru General Provincial Hospital and the case was reported at Nakuru Central Police Station. Investigations commenced to trace the mother or relatives of the said minor but were futile. Thus, no one had come forward to claim the minor herein. Consequently, the consent by the parent(s) is hereby dispensed with by virtue of Section 159.

16. The National Adoption Committee on 13th January, 2010 formulated guidelines where special circumstances may be found for sole Applicants, with respect to Section 158(2) and which guidelines must as far as possible guide this court when determining whether to issue the adoption order. The guidelines are as follows:

i. When the child is a relative.

ii. When the child has special needs and the applicant is willing and has capacity to take care of the child.

iii. Where the applicant has adopted or has another biological child or children over whom she is willingly exercising parental responsibility.

iv. Where the child to be adopted has a sibling who is also being adopted by the applicant.

v. Proposed applicant is the only person available to adopt the child.

vi. Where the applicant is the legal guardian of the child or children appointed by will or in adoption proceedings and the parents die or become permanently incapacitated.

(See **In re Adoption of Baby J K M [2017] eKLR** and **MWM –vs- MVM (2020) eKLR**).

17. The question therefore is whether there are special circumstances warranting the grant of the adoption order to the applicant herein.

18. I note that the Applicant is not related to the child; neither does the child have special needs. I also note that the Applicant does not have other children and has not previously adopted other children and neither does the child have a sibling who is being adopted by the applicant. It was not proved that the Applicant herein is the only person available to adopt the child and neither is the Applicant the legal guardian of the child herein appointed by will or in adoption proceedings and the parents die or become permanently incapacitated.

19. In law, in any matter concerning a child, the best interests of the child are paramount. (See **Article 53(2) of the Constitution and Section 4(3) of Children Act**). The principle of the best interest of the child ensures that decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health and emotional development into young adulthood. When it comes to determining the best interest of a child it is important to consider the evidence laid before the court with regards to parenting ability that is the question whether the parent requesting the adoption order is genuinely able to meet the child's physical and emotional needs.

20. The court in assessing the best interests of the child is mandated to evaluate and balance all the elements necessary to make a decision in a specific situation or a specific child(ren). The objective is to reach a decision based on National Law that guarantees the rights of the child

and promotes its wellbeing, safety and development. The court must therefore weigh and balance all the relevant factors of the case with a bias to the rights of the child and the consideration of the obligations of public authorities and service providers towards the child. The determination is therefore a process for the identification of a durable solution expected to have significant implications of the child's present and future life. Each case must be determined on its own special circumstances. (See **MWM –vs- MVM [2020] eKLR**).

21. The report by the guardian ad litem dated 8.11.2019 indicates that the Applicant has bonded well with the child herein. The report states that the adopting parents have great love for the minor and deeply desire to look after and care for her. The Applicant is prepared to provide a suitable home for the infant and she understands that an adoption order is irrevocable and that the order will make her responsible for the maintenance and upbringing of the said child. She has the means and income to maintain the child.

22. Having considered the circumstances of this case, the documentation availed in court and the pleadings herein, I find that the Applicant is suitable and fit to adopt the child. It would not be in the best interest to disrupt the life of the child who has bonded well with the Applicant since 24.12.2018 when the child was taken to the care and possession of the Applicant.

23. The best interest is that the child grows up in a home set up and in a family. The Applicant has committed to treat the child as if she is born by her. Accordingly, I find the application herein merited. The orders sought herein ought to be granted in terms of prayers 1, 2 and 3 of the Originating Summons that:

- (a) **That the Applicant be authorized to adopt Baby AZ a minor who is to be known as JAW and the Registrar General be directed to enter this adoption into the Register of Adoptions.**
- (b) **That MWN and DNM be appointed as the legal guardian of the minors.**
- (c) **That the child be presumed to have been born in Kenya**
- (d) **There shall be no orders as to cost.**

DATED AND DELIVERED AT NAIVASHA THIS 11TH NOVEMBER, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Miss Ambaka for the Applicant.*