



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ADOPTION CAUSE NUMBER 21 OF 2019

AND

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

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION OF GW & D N N

AND

IN THE MATTER OF KINSHIP ADOPTION

BY

AWG.....APPLICANT

J U D G M E N T

1. Before the court is an Originating Summons dated 6th August 2019 on the application for an adoption order under **Section 154, 156(1), 157(1), 158(1)a, 4(a), 159(4), (6); (7), (8)a, 160(1), (2), 162, 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 Law of Kenya and all other Enabling Provisions of the Law.**
2. The Applicant herein AWG is seeking authority to adopt **G W & D N N** born on 4th July 2006 and on 6th June 2009 respectively as evidenced by their birth certificates.
3. The applicant seeks that consent of the biological father be dispensed with, the guardian *ad litem* **PKN** be appointed as the Legal Guardian in respect of the children, the Registrar General be directed to make the appropriate entries in the Adopted Children's Register and to issue a certificate to that effect, henceforth the children do assume the Applicant's Maiden name, **W** as their respective surnames and that the Registrar of Births and Deaths be directed to issue the children with Certificates of Birth in the name of **GW** and **DNW**.
4. The Application is supported by the Applicant's statement sworn on 6th August 2019.
5. The Applicant is a Kenyan adult born on 2nd February 1974 currently a green card holder resident of the United States of America and is a sister to their mother and therefore their maternal aunt. The Applicant is divorced and she has four biological children; two are adults and two are minors aged 16 and 9.
6. The Applicant is a nurse by profession and she is financially stable and able to take care of the children's needs.
7. The Applicant is a protestant, healthy and she has no criminal record as evidenced by her Church's Recommendation Letter, Medical Report and a receipt for an application for Certificate of Good Conduct.
8. The Applicant desires to adopt the children following the demise of their mother on 6th October 2017. The Death Certificate is attached to Applicant's Supporting Affidavit to the Originating Summons.
9. The biological father of the children is unknown and has never come forth to claim the children; the children are thus considered total orphans.

10. The Applicant's said four biological children do not have any objection to this Application. Save for the last born child, their consents thereof are attached to Applicant's supporting Affidavit to the Originating Summons.

11. The two subjects have no objection to their adoption by their aunt.

12. PKN who is the Applicant's brother has agreed to be the children's legal guardian and he does not have any objection to the Applicant being granted legal custody of the children. There is an annexed consent form in that respect.

13. The following documents were filed in respect to this adoption.

- **The Report by Child Welfare Society of Kenya dated 14th July, 2021.**
- **The Report from Albemarle County Department of Social Services dated 12th July 2021.**
- **Notarized Affidavit of the Adoptive parent/Applicant.**
- **Affidavit of Legal Guardian sworn on 6th August 2019.**
- **Consent of Guardian ad Litem dated 6th August 2019.**
- **Nyahururu Sub county Children Officer's report dated 16th January 2019.**
- **Consents to adoption sworn on 10th May 2021 by the Applicant's siblings who are the uncles and aunt to the children namely;-**
 - (i) ZKN
 - (ii) JMN
 - (iii) BNN

EVIDENCE OF THE PARTIES

14. The Originating Summons on the application was heard on 18th August 2021. The Applicant adopted her statement in support of the application. The child G W testified in favour of the adoption being granted to the Applicant. She confirmed the applicant is their Aunt and they have a close and good relationship. The legal guardian P—P;.L, testified that he understands his role as a legal guardian and undertook to take care of the children in case of any incapacity of the Applicant.

15. The only issue for determination is whether the adoption order ought to issue. Have the children been declared free for adoption? Has the applicant complied with all the legal requirements? Is this order if issued, in the best interests of the two minors?

16. The biological mother of the children died on 6th October 2017. Their biological father is unknown and has never come forth to claim them. Prior to the hearing of the adoption application, Child Welfare Society of Kenya prepared and filed a report dated 14th July, 2021 declaring the children herein free and available for adoption.

17. This is a Kinship Adoption. The applicant is related to the children since the children's biological mother is her sister. The children's mother is deceased. According to the **Guidelines for Alternative Family Care of Children in Kenya page 153;**

“Kinship adoption is adoption by adopters who are kin or relatives within the extended family of the child.”

18. The Applicant is a Kenyan citizen by birth and an American citizen by registration. She holds a dual citizenship and is domiciled in the United States of America.

19. **In re J N A [2018] eKLR court** held that ;

“The indefinite moratorium issued by the Kenyan cabinet on 27th November, 2014 involved inter-country and resident adoptions of Kenyan children by foreigners. It does not affect adoptions by Kenya applicants, even those living abroad. Dual citizenship in our country is anchored in Article 16 of the Kenyan Constitution.

According to the Guidelines for Alternative Family Care of Children in Kenya page 153, “kinship adoption is adoption by adopters who are kin or relatives within the extended family of the child.” Kenyans living abroad and wishing to adopt a Kenyan child will adopt as Kenyans by way of domestic adoptions. This is therefore considered to be a local adoption.”

20. By virtue of **Section 154 of the Children Act**, the High Court has the statutory power donated by the Act to entertain an application for an adoption order. The said **Section 154(1) of the Children Act** provides:

“Subject to this Act, the High Court may upon an application made to it in the prescribed form make an order (in this Act referred to as “adoption order”) authorizing an applicant to adopt a child.”

21. **Section 157 of the Act** sets the criteria as to who may qualify for adoption as:

“(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”

22. **Section 158 of that Act** which the applicants invoked states as follows:

“158. Adoption applicants

(1) 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.

(3) An adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them—

(a) is not of sound mind within the meaning of the Mental Health Act (Cap.248);

(b) has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule to this Act or similar offences;

(c) is a homosexual;

(d) in the case of joint applicants, if they are not married to each other;

(e) is a sole foreign male applicant:

Provided that the court may refuse to make an adoption order in respect of any person or persons if it is satisfied for any reason that it would not be in the best interests of the welfare of the child to do so.”

23. The applicant has fulfilled the legal requirements as she is a relative of the children and falls within the legal age bracket.

24. From the report by the Child Welfare Society Kenya, the applicant has been supporting the children and their mother even before their mother’s demise. Thereafter she has continued to cater for their needs while under the care of their uncle. Their report recommends the adoption for reasons that the Applicant will provide a stable home and opportunities for the children to thrive. The children have consented to the Applicant adopting them. They have a close relationship with the Applicant. Further the Applicant’s family members are aware of the proposed adoption and support it.

25. A perusal of the report from Albemarle County Department of Social Services dated 12th July 2021 indicates that a home visit was made by an officer from that department. It is confirmed that appropriate arrangements have been made for the children’s smooth transition to the Community where the applicant lives including school enrolment.

26. The Director of Children Services (DCS) also recommends the applicant as a capable adoptive parent.

27. According to the **Article 53 of the Constitution**;

“(a) Every child has the right to a name and nationality from birth.

(b) To free and compulsory basic education.

(c) To basic nutrition, shelter and a health care.

(d) To be prevented from abuse, neglect, harmful cultural practices, forms of violence, inhuman treatment and punishment and hazardous or explosive labour.

(e) To parental care and protection, which includes equal responsibilities of the mother and the father to provide for the child, whether they are married to each other or not.

(2) A child's best interest are of paramount importance in every matter concerning the child."

28. Section 6 of the Children's Act No. 8 of 2001;

"(1) A child shall have a right to live with and to be cared for by his or her parents.

(2) Subject to Sub-Section (1) where the Court or the Director determines in accordance with the Law, that it is in the best interests of the child to separate him or her from the parents, the best alternative care available shall be provided for the child."

29. Section 4 (3) of the Act states that;

"in all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to:

(a) Safeguard and promote the rights and welfare of the child.

(b) Conserve and promote the welfare of the child.

(c) Secure for the child such guidance and correction as a necessity for the welfare of the child and in the public interest."

30. The best interest of the child's right is a principle derived from **Article 3 of the United Nations Convention** on the rights of the child that:-

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

31. In **Re B (BABY)[2018] eKLR** the court stated that,

"The purpose of Kenya's Constitution and Children Act is to protect and promote the welfare of Children by providing them with stable family units. The fundamental concern therefore in every adoption cause provision is of the best interest of that very child...It is that family unit that the constitution contemplates under Article 45 which also has to take responsibilities in fulfilling the obligations enjoined in Article 53 of the same Constitution."

32. The child needs parental care and guidance, food, shelter, education and clothing. The applicant demonstrated she is in a position to provide for the children the above necessities and to love and take care of them.

33. The Applicant further successfully demonstrated that she has the psychological and emotional capacity as well as the material resources to raise the children in a loving home environment.

34. The children love her and have consented to being adopted by the Applicant. It is therefore in the best interest of the children that the Applicant be allowed to adopt them in order to give them a home and to look after them.

35. From the record, it is clear that the proposed adoptive parent and the proposed legal guardian understand the duties and responsibilities the adoption order embodies.

36. From the foregoing it is evident that the children are available for adoption the applicant is suited for the adoption and it is in the best interest of the children herein. Hence the application is allowed in the following terms;

(i) THAT the Applicant be and is hereby authorized to adopt GW & D N N.

(ii) The Consent of the children's biological father is hereby dispensed with.

(iii) THAT the children shall henceforth be known as GWW& DNW.

(iv) THAT the Registrar General be and is hereby directed to enter this adoption order in the Adopted Children's Register and to issue a certificate to that effect.

(v) THAT PKN be and is hereby appointed the legal guardian of the children.

(vi) THAT the Guardian Ad Litem be and is hereby discharged.

DATED, DELIVERED AND SIGNED AT NAKURU THIS 11TH DAY OF NOVEMBER, 2021.

MUMBUA T. MATHEKA

JUDGE

IN THE PRESENCE OF:

CA EDNA

MS NGUGI FOR APPLICANT

APPLICANT