



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**ADOPTION CAUSE NUMBER 5 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR ADOPTION OF BABY MA**

**AND**

**JWM.....APPLICANT**

**J U D G M E N T**

**BRIEF FACTS OF THE CASE**

1. Before me the Originating Summons dated 14<sup>th</sup> February 2020 seeking an adoption order under **Sections 157,158(1) (b) and 160 and all other enabling provisions of the Children’s Act 2001 and Legal Notice No.75 of 2002**. The Applicant is a Kenyan Citizen and single.
2. The summons also seeks that;
  - i. The consent of the biological parent of BABY MA be dispensed with since the child was abandoned so soon after birth;*
  - ii. That the Applicant be authorized to adopt BABY MA and the child be known as JJM henceforth;*
  - iii. That the Registrar-General do make the appropriate entries in the adopted children’s register in respect of JJM, and*
  - iv. That the court does issue such other orders as may be necessary in the best interest of the child.*
3. The Application is supported by the Applicant’s statement in support thereof sworn on 14<sup>th</sup> February, 2020. It is also supported by the Report from the Adoption Society Little Angels Network declaring the child free for adoption, the court documents from the Children Court Nairobi committing the child to Rehema PEFA Home and the documents from Korogocho Police Post confirming the child had not been claimed by anyone since her abandonment had been reported, and investigations to trace family had come up with nothing.
4. The applicant has also annexed further documentary evidence to support her application; Certificate of Good Conduct, Recommendations from Family, Friends and Church, Physical (health) and Financial Ability to support the child.
5. From the documents, the child herein was born on 2<sup>nd</sup> November 2016 and abandoned by the mother at Mercy Le Hanna Community Health Clinic.
6. The matter was reported to the Korogocho Police Station vide OB xxxx. She was placed with Rehema PEFA Children’s Home on 22<sup>nd</sup> March 2017 pending court committal.
7. A Committal Order was made in respect of the child by the **Children’s Court at Nairobi Children’s case Number 37 of 2015**.
8. On 28<sup>th</sup> February 2014, Little Angels Network declared the subject free for adoption.
9. The child was committed to the Applicant’s care by the Little Angels Network and Rehema PEFA children’s Home and she has lived with the subject since 8<sup>th</sup> August, 2016.
10. The said Little Angels Network and Rehema PEFA children’s Home have no objection to the Applicant adopting the child.
11. The Applicant’s sister SNM has agreed to be the Legal Guardian of the child and has undertaken to care for the child in case of any incapacity of the Applicant. The Applicant is emotionally fit and healthy, practicing Christian and has never been charged or convicted of

any criminal offence.

12. The following reports have been filed in support of this case;

- ü Letter from Korogocho Police Post evidencing that the child herein was abandoned.
- ü Little Angels Network Certificate declaring the child free for adoption.
- ü Little Angle report declaring a child free for adoption pursuant to section 156 (1).
- ü Applicant's Certificate of lease.
- ü Little Angel's pre-placement Report.
- ü Foster Parent Agreement.
- ü Medical particulars of the prospective adopter
- ü Christian Outreach Ministries' letter dated 13<sup>th</sup> September 2018 recommending the Applicant fit for adoption.
- ü Police Clearance Certificate.
- ü Consent of Legal Guardian dated 14<sup>th</sup> February 2020.
- ü Report of Guardian *Ad Litem* filed on 17<sup>th</sup> July 2020.
- ü County Children Officer's Reports recommending the Applicants as suitable adoptive parents.

13. I heard oral evidence from the applicant and the legal guardian on 25<sup>th</sup> June 2021. The Applicant testified and satisfied the court that she is a suitable adoptive parent.

14. The only issues for determination are;

- i. Whether the baby is free for adoption*
- ii. Whether the applicant has complied with the requirements for suitability to adopt.*
- iii. Whether the adoption is in the best interests of the child.*

**(i) Whether the baby is free for adoption**

15. The child herein was abandoned at birth and rescued to a children's home. Her parents are unknown and therefore their consent could not be obtained. All efforts to trace them as stated by the police were in vain. The report from County Children Officer's dated 29<sup>th</sup> July, 2020 expressly indicates that the Minor herein was declared free and available for adoption by Little Angels Network. A certificate declaring the child herein free for adoption pursuant to **section 156(1) of the Children's Act 2001** was filed on 19<sup>th</sup> February 2020. Hence based on the above that the child herein is free for adoption.

**(ii) Whether the applicant is fit to adopt the baby**

16. 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.”*

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

*“Any child who is resident within Kenya whether or not is a Kenyan citizen or was or was not born in Kenya.”*

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

*“158. Adoption applicants*

(2) *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.”*

19. The Applicant is not younger than twenty five (25) years or older than sixty five (65) years. She is fifty seven (57) years old. **Section 158 of the Act** has thus been complied with.

20. The documents and reports filed are favourable as there is nothing adverse against the Applicant.

21. Affidavit of means filed show that the Applicant is qualified and able to take care of the child. Further the home visits by the Adoption Society and the Children Officer established that the Applicant has the financial capability to provide for the upkeep and education of the child.

22. The reports filed in Court pursuant to these visits also do recommend the Applicant request to adopt the *child herein*. The applicant expressly confirmed that she will take care of the child and therefore she has met the requirement set under **Section 158 (1), (2) and (3) of the Children Act**.

**(iii) Whether the adoption is in the best interests of the child**

23. 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.*

**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.”*

**Section 4 (3) of the Act** 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.***

24. 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”.***

25. **Article 4 of the African Charter** on the Rights and welfare of the Child puts it thus;

**BEST INTERESTS OF THE CHILD**

*In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.*

26. **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.”***

27. The rights and welfare of the child as provided for our **Constitution** and the **Children Act** will surely be fulfilled by the acquisition of full parental responsibility by the applicant. The Applicant has been fostering the child and they have bonded very well. There is no doubt that leaving the child under the Applicant’s care is safe, paramount and it is for the best interests of the child.

28. Consequently the applicant’s Originating Summons is allowed and the following orders do hereby issue.

**(1) THAT the consent of the biological parent of BABY M A be and is hereby dispensed with.**

**(2) THAT the Applicant be and is hereby authorized to adopt BABY MA who shall henceforth be known as JJM.**

**(3) THAT the Registrar General do make the appropriate entries in the Adopted Children Register and issue a certificate.**

**(4) THAT SNM be and is hereby appointed legal Guardian of the child.**

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

**(6) Orders accordingly.**

**DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF NOVEMBER, 2021.**

**MUMBUA T. MATHEKA**

**JUDGE**

**IN THE PRESENCE OF;**

**COURT ASSISTANT EDNA**

**MRS. MBECHÉ FOR APPLICANT**