



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ADOPTION CAUSE NO. 41 OF 2015

IN THE MATTER OF THE CHILDREN ACT, 2001

AND

IN THE MATTER OF EA AKA BM A (MINOR)

AND

DKK.....1ST APPLICANT

MDK.....2ND APPLICANT

JUDGEMENT

1. By an application brought to court by way of Originating Summons dated the 26th March 2018 as amended on the 16th October 2019 pursuant to **Sections 154, 156, 157, 158, 159, 160, 163, 164 and 170** of the **Children Act 8 of 2001**; the applicants herein sought for the following orders:

- a. That the Applicants (*names withheld*) be authorized to adopt EA aka BM (*name withheld*) a child who is to be known as AJK**
- b. For the Registrar General to be directed to enter the adoption in the Adoption register.**
- c. That SW the grandmother to the infant (2nd interested party) be allowed to have reasonable access to the minor.**
- d. That JM and MK (*names withheld*) be appointed as the legal guardians of the minor.**

2. The application is supported by the joint statement of the applicants herein and the annexures thereof.

3. The applicants are in a monogamous union. They got married on 30th September 2000 under the African Christian Marriage and Divorce Act. A copy of the Marriage Certificate was produced in evidence.

4. The male applicant is an electrician and a businessman while the female applicant is a receptionist. While they desire of a child, they have not been blessed with one for reasons beyond their control hence their wish to adopt the minor who is the subject matter herein.

5. The minor is said to have been rescued by well-wishers after his mother abandoned him at a chicken pen of a homestead belonging to DK (name withheld) at a place known as Kerarapon near Ngong Town on the 3rd January 2017. The members of the public reported the matter at the Kerarapon Police post and later Ngong Police station. When the subject was rescued a clinic card was found indicating that the he was born on the 21st December 2016.

6. The Ngong Police station referred the case to the Director **Mahali Pa Maisha Children's Home** (The Home) for temporary care and protection as they commenced investigations into the matter, they also informed the Children's Officer in Kajiado North Sub-County who applied for committal Orders at Ngong Law Courts under case No. 21/17 which orders were granted on the 21st January 2017.

7. Upon admission to the home on 4th January 2017 the child was taken to Kitengela Medical Services for examination and was found to be of good health condition. The Children Officer, Kajiado North Sub-County did a social inquiry and managed to trace the child's father AM (name withheld) who acknowledged paternity of the child. The child's mother was later found, apprehended and charged with child neglect.

Meanwhile the children officer on 27th July 2017 applied for, and was granted further committal Order to the Home for six months as the case of the mother was ongoing. The mother was sentenced to 3 years' probation and institutional rehabilitation.

8. However, the mother of the child absconded her clinics at the probation office and disappeared. The man who claimed paternity also disappeared. Thereafter a letter from Ngong Police Station dated 27/7/2017 to the Director of the home stated that no-one had come forward to claim the child or raised any issue regarding him. It therefore recommended legal action be taken.

9. Against the above background the case committee of **Buckner Kenya Adoption Services (BKAS)** as prescribed by **Regulations 16 of the Adoption Regulations 2005 (Legislative Supplement 21)** deliberated on the matter in a meeting held on 29th September 2017. The committee was satisfied that the minor herein is available for adoption and further that the adoption would be in the child's best interest. It issued a certificate declaring THE child Free of Adoption on 29th September 2017.

10. On 14th August 2017 the applicants herein made an application to Buckner Kenya Adoption Services seeking to adopt a child. Upon being qualified to adopt a child by the agency the home released the child into their custody on 30th October 2017.

11. On 31st May 2018 Buckner Kenya Adoption Services filed a declaration report. The same was favorable to the applicant. The Report cited the applicants as being persons of good standing with favourable income to cater for the minor.

12. Following an application, the Court on the 14th June 2018 appointed **MAO guardian ad litem** in these proceedings. Further the Court required that the said *guardian ad litem* and the Director Children Services investigate the suitability of the applicants in adopting the child and file their respective reports within 45 days thereof.

13. A report was filed by **Nancy Waswa** a Children Officer on the 17th August 2019. Whereas the report found that the applicants were suitable for the adoption as they could take care and be responsible for the basic needs and parental love of the child it was their finding that the adoption Society overlooked a number of aspects as follows;

a. The relatives to the mother of the child (deceased) are accessible; the deceased mother JNW (2nd Interested Party) aged 42 years stays at a place known as Muniwiini in Gatundu South with two other children; JW (name withheld) in form 3 and DK(name withheld) in Pre-unit. SW (1st Interested Party) 27-year-old who is a sister to the deceased resides in Juja married with two children aged 8 years and 4 years. A paternal grandmother to another child of the deceased takes care of said male sibling of the child herein and who is aged 6 years schooling at [Particulars Withheld] Primary school in class 1.

b. The deceased died on the 30th June 2019 and was buried at her paternal grandparent's home.

c. After her death the 1st Interested Party presented herself to the probation Ngong department claiming to be given custody of the child in the matter.

14. Upon receipt of the report the Applicants were aggrieved by the same and made known their concerns as follows;

a. That in making the recommendation, the Department of Children Department failed to consider the report made by the sub county children officer who recommended for the child to be adopted and who had made all efforts but failed to trace the minor's relatives.

b. That the children's officers in its report failed to provide a home study on the fitness of the 1st Interested Party to take parental responsibility and consent from her spouse and therefore the best interest of the child stands to be compromised by the said recommendation.

c. That the said report failed to give reasons as to why the 1st Interested Party acquired interest in the minor herein after the minor's mother died, despite the fact that there is another child who is being taken care of by its great grandmother.

d. That the court ought to be provided with sufficient facts on the 1st Interested Party or any other person who seeks custody before the custody Orders are granted.

15. By summons dated the 16th October 2019 the applicants urged the court to direct the 1st Respondent to compile a home study report on the 1st Interested Party and summons do issue to the 2nd Interested Party to appear in court.

16. **Buckner Kenya Adoption Service also filed a supplementary report on 23rd October 2019.** It stated that they had tried to trace persons mentioned in the case upon the minor's abandonment through the documents availed but the same bore no fruits. That the child was freed for adoption on 29th September 2017 and placed the applicants on 30th October 2017.

They stated further that, on 15th July 2019 the 1st Interested Party visited their offices making claims over the minor based on a note allegedly written by the deceased three (3) days prior to her demise. Upon receipt of the claim a joint assessment was done on 24th July 2019.

17. The supplementary report by Buckner adoption agency noted that the family only contacted the probation office after the demise of the mother of the child. However, there had been no effort made to trace the child in two and a half years after abandonment by the parents despite the fact that the child was abandoned at only one week after birth.

18. A supplementary report was equally filed on 5th December 2019 by the 1st Respondent. The report contained a more detailed interview with the relatives of the child. The report opined that little if any investigations were done to trace the child's mother and since the relatives of the child have appeared and are asking for the child, the child was therefore not free for adoption.

The report recommended that the child be granted to the 2nd Interested Party who is the child's grandmother. The report equally acknowledged the trauma that may be associated with this process and suggested that the child be placed temporarily at the Nairobi Children Rescue Centre for bonding purposes.

19. Two letters from the Assistant Chief and Chief Gatukuyu Location dated 16th August 2019 and 8th January 2020 respectively confirm that the 2nd Interested Party is the grandmother of the minor herein. They state that the mother to the child died on 30th June 2019. And confirm further that a brother to the minor aged six years old has been under the care of a great-grandmother.

20. The applicants filed a letter from the great grandmother of the minor and witnessed by Area chief Mangu Location where the great grandmother of the minor resides. It in part states that the mother of the minor herein left another child in her custody. Further the 1st Interested Party has never been concerned with the care of the said minor herein and therefore should not be granted custody of the child subject matter.

21. This Court summoned and heard the testimony of the 1st and 2nd Interested Parties and that of the great grandmother of the minor. The 2nd Interested Party, grandmother to the child testified that indeed the mother of the child gave birth to her first child in the year 2010. The child currently stays with the great grandmother. That she runs a Hotel where she earns Kenya Shillings Fifteen thousand (Kshs. 15,000/=) every month. That besides the mother of the child (now deceased) she has three other children, the 1st Interested Party, another aged 19 years old and in Form four and a son aged 5 years old. She told the court that it is the 1st Interested Party who informed her of the child herein.

22. The 1st Interested Party testified that she is the sister to the mother of the child (now deceased). That she is aged 28 years old. She works in a grocery in Juja where she earns Kenya Shillings four hundred (Kshs. 400/=) per day. She is married. She knew and understood that the child had been taken to the children's home between the period December 2018-January 2019. That the mother of the child had agreed to take the child from the children's home. That the mother of the child left in January 2019 and would later on meet her demise in July of the same year. That she is willing to adopt the child.

23. The great-grandmother of the child confirmed that she has been living with the child's brother since he was 1 ½ years old and now aged 10 years old. She suggested that the child should go to the grandmother because she wants the child. She provided this as the sole reason.

Analysis and Determination

24. **Section 154 of the Children's Act 2001** grants this court jurisdiction to make an adoption Order authorizing an applicant to adopt a child. The prerequisites for the grant of an adoption order are contained in **Sections 156, 157, 158 and 159** of the **Children Act**. Of importance however, is that in any matter concerning a child, the best interest of the child is of paramount importance.

25. The principle that the "**best interest of the child is of paramount importance**" is enshrined in the Constitution whose article 53(2) provides thus:

"A child's best interests are of paramount importance in every matter concerning the child."

26. On the hand Section 4 of the Children Act provides as follows:

" (1) ...

(2) 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.

(3) 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 is necessary for the welfare of the child and in the public interest.

(4) ..."

27. The Children's department has taken issue that prior to the issuance of the certificate freeing the child for adoption no adequate investigations were done to trace the child's relatives stating that the certificate was hurriedly issued .

28. Rule 16 of the Child (Adoption) Regulations 2005 provides for the setting up of a case Committee under the Adoption Agency. **Rule 18** provides that where a child has been placed into the care and possession of an adopter the society shall make enquiries and obtain a social workers report on matters set out in the Sixth Schedule. Some of the queries listed in the schedule include;

Are there any relatives who have offered to provide a home for the Child? Yes/No..... IF yes give details.....

29. Section 158 (4) of the Children’s Act provides that an adoption application shall be accompanied by written consents to the making of an adoption order in respect of any child including the consent of every person who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child.

30. Section 159 of the Act allows the court to dispense with the consent provided under Section 158 in the following circumstances;

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;

(ii) persistent failure to maintain may be presumed where despite demands made, no parent or guardian has contributed to the maintenance of the infant for a period of at least six consecutive months and such failure is not due to indulgence;

31. The court has taken due consideration of the steps taken by the adoption Agency in this case in line with the Regulations and the Children’s Act. The Child herein was abandoned at one week old allegedly at his biological grandfather’s residence. A report filed by the Sub County Children’s Officer at the time recommended that the minor be committed for one year at the home. In C & P Case No. 21 of 2017 at the Chief Magistrates Court in Ngong Law Courts the court in line with Section 119 of the Act granted placed the child at the home. A letter from Ngong Police Station dated 27/7/2017 (6 months after the placing Order was made) stated that no-one had claimed or raised any issue with regard to the child.

32. The 1st and 2nd Interested Parties have conceded that they only approached the Children’s office and the Adoption Agency about two years after the demise of the mother to the child.

33. From the facts cited this is a clear case of abandonment of the child by its biological parents, who knew that the child had been placed at home and seemed unconcerned.

The 1st and 2nd Interested Parties have not made any averments of their efforts to trace the child herein during the years 2017- July 2019. The averments made by the 1st Interested Party that she was aware that the child was in the custody of a children’s home and that the mother of the child was visiting the child cannot be a defence towards the neglect and abandonment of the child by her. The grandmother and great grandmother testified that they knew of the child at some point prior to the demise of the mother of the child. None of the three kins of the child contacted the home or the children’s officer to claim the child or even just to make contact.

34. With the information from the Ngong police and against the above background the court finds that the adoption agency had no way of tracing and obtaining the consent of the child’s relatives and therefore ought not be blamed for failing to contact them. Due procedure was adhered to prior to the issuance of the certificate declaring the child free for adoption.

35. Of major concern to the court are the following facts;

- a. The child was abandoned on the 3rd of January 2017 at its paternal grand father’s homestead
- b. The child has been in the custody and care of the applicants since September 2017; 5 years.
- c. The parents of the child knew his whereabouts and since the mother is reportedly deceased, the father has not claimed him
- d. The court was informed that there is a road traffic accident claim in court relating to the child’s mother.
- e. The child’s brother aged 10 has been in the care of a 72-year-old great grandmother since age 1 ½
- f. The claim by the said kin is rather lukewarm with no follow up unless prompted by the children’s department
- g. No application for kinship adoption has been placed before the court

h. No detailed home visit or suitability report of the child's kin has been placed before court for consideration.

36. The Court has considered the competing interests of the applicants against that of the 1st and 2nd Interested Party. The Applicants herein are male and female adults aged 48 years and 44 years of age respectively and in monogamous relationship. As far as the requirement of age is concerned the applicants have complied with **Section 165 of the Act**. They have also attached certificate of good standing hence compliance with **Section 159 of the Act**. The declaration report filed by the adoption Agency shows that the applicants being persons of good standing and with considerable income enough to cater for the minor. There is also attached memorandum, medical reports of the applicants and recommendation letters which are favorable to the applicants hence complying with the provisions of Section 159. The applicants have also been with the minor for more than 5 years today compliance with **Section 157 of the Act**.

At the time of placement with the applicants the minor was aged 10 months old.

37. The 1st and 2nd Interested Party on the other hand base their claim by virtue of being the immediate relatives to the child. They have urged that the 2nd Interested Party; the grandmother of the child be granted custody. They have the support of the Children's Department. Which in its report alludes to likely trauma to be suffered by the child if removed from the applicants' custody associated with the long stay the child has had with the intended adoptive parents and recommends temporarily placing of the child at Nairobi Rescue Centre for bonding processes.

38. The history of this case clearly show that the relatives of the child have not been part and parcel of his life since birth. The brother to the minor herein as noted elsewhere in the judgement resides with his great-grandmother who is aged 72 years of age, and no explanation came forth why 2nd Interested Party does not stay with this grand son. or why the 1st Interested Party has not shown an interest in the said child. The court also considered the length of time before the relatives surfaced. The court also takes note of the capacity of the relatives to take care of the minor herein from their own testimony and the element of identity and kinship relations.

39. **Article 20 of the United Nations Convention on the Rights of the Child ratified, 1990 (domesticated in the Children Act, 2001).**

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

40. **In re SK & SSM [2021] eKLR** the Court cited the case of **Weller & Others v Associated Newspapers Ltd {2015} ALL ER (D) 194:**

“This best interest may be held in a variety of different contexts for example the balancing exercise must always be undertaken in children's cases as in adult cases although a child's right is not a trump card in the balancing exercise, the primacy of the best interests of a child means that, where a child interest would be adversely affected, they must be given considerable weight.”

41. The **Guidelines for the Alternative Family care for Children in Kenya** provides that a child may be reunified with his/her family if the following conditions are met:

a) Child's family has been traced and verified

b) Reasons for separation have been established and addressed and, where possible, follow-up mechanisms put in place

c) Child has agreed to be reunified with his/her parents or extended family members. (If the child is unwilling to return to the family, his/her reasons should be objectively evaluated and the decision made in the best interests of the child.

d) Assessment has been conducted to verify that family reunification and reintegration is in the best interests of the child

e) Child's family are willing to take him/her back and are mentally and physically capable of taking care of the child”

42. The **Guidelines on Kinship at page 49** recommends that where a child requires permanent alternative care, an assessment should be made to determine whether the current family members wish to take permanent, legal responsibility for the child, either through kinship adoption, kafaalah or legal guardianship, and whether such arrangements would be in the child's best interests.

43. Against all odds this court must place the best interest of the child first as the competing interests of the parties ought to take second place. The court has not been given adequate answers as to where the 1st and 2nd respondent were during the ten (10) months the child had been placed in the Children's Home. Why for the three-year period between December 2016 to July 2019 the 1st and 2nd Interested Parties did not take up responsibility for the child while their daughter/sister was alive and had given the child to the home and lastly why the keen interest towards the child at this time?

44. In as much as financial consideration ought not to disqualify adoption, the court has also taken due consideration of the reasons afforded

by both parties and their capacities to provide for the child. The applicants herein have considerable incomes. From the time they have been with the child they have offered him proper medical care and upbringing. The respondents are not clear how they shall cater for the child, the child will be an added burden to them. It is peculiar that the 1st and 2nd Interested Party left the brother to the child at the custody of the great-grandmother, now 70 years old as opposed to their joint care. It is also peculiar that the great grandmother is averse of the intent of the 2nd Interested Party and was categorical that she could not take proper care of the child herein. This much has been corroborated by her actions during the lifetime of the child's mother. She clearly was aware of the conditions the child lived in but did not take it upon herself to provide better facilities for the upkeep of the child. The child was left at the whims of the mother who had clearly abandoned him. Again, even when it was clear to the other relatives that the child had been abandoned none of them came forward to provide parental responsibility over the child.

45. The court has also formed the opinion that to include the interested parties in the life of the child for now will be disruptive and not to his best interest of the child. The decision to include them as and when is entirely left to the adoptive parents as is ordered herein below.

46. Having keenly considered the facts of this case bearing in mind that of paramount importance in the circumstances is the best interests of the child, and pursuant to the power conferred upon this court under **Section 154** the Court directs and Orders as follows;

4M and MK be and are hereby appointed as the legal guardians of the minor.

DELIVERED AND SIGNED AT GARISSA THIS 4th DAY OF NOVEMBER, 2021.

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ALI ARONI

JUDGE