



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

ADOPTION CAUSE NO. E067 OF 2020

IN THE MATTER OF THE CHILDREN'S ACT 2001

IN THE MATTER ADOPTION OF BK.....CHILD

AND

LA.....APPLICANT

JUDGMENT

1. Before this Court is the Originating Summons dated **24th July 2020** in which the Applicant **LA** seeks the following orders:

- “1. THAT the consent of the biological parents of BK be and is hereby dispensed with since the infant was abandoned by her biological mother.**
- 2. THAT the Applicant be and is hereby authorized to adopt BK and the child be called RR henceforth.**
- 3. THAT the Registrar-General do make the appropriate entries in the Adopted Children's Register in respect of BABY RR.**
- 4. THAT the court does issue such other orders as may be necessary in the best interest of the child.”**

2. The summons was supported by the statements of the Applicant and was canvassed by way of vive voice evidence on the online platform.

3. The Applicant in her evidence told the court that she is a single mother of three sons aged **26 years, 21 years and 14 years**. She stated that she now wished to adopt the Subject child who was found abandoned at **Kenyatta National Hospital, Nairobi County**.

4. The Applicant stated that her children have welcomed the Subject child and already consider him as their brother. She confirmed that she understands the legal implications of an adoption order and undertook to accord to the child all rights and privileges due to a biological child including the right to inherit.

ANALYSIS AND DETERMINATION

5. I have considered this Originating Summons as well as the material placed before the court. The prerequisites for an adoption order set out in **section 156(1) of the Children's Act 2001** which provides as follows: -

“159(1) No arrangement shall be commenced for the adoption of a child unless the child is at least (6) weeks old and has been declared free for adoption by a Registered Adoption Society in accordance with the Rules prescribed in that behalf.”

6. The Subject child is believed to have been born on **27th October 2007**. He is therefore now aged **fourteen (14) years** and is well above the **six (6) week** age limit provided for in the Law. **KKPI** which is a registered Adoption Agency have annexed to their Report a Certificate Serial Number **xxx** dated **21st November 2012** declaring the child Free for Adoption. I am satisfied that all the legal prerequisites for an adoption order have been met.

7. The duty of this court is to analyze the material before it to determine whether the Applicant is a suitable adoptive parent. The Applicant is

a Kenyan Citizen as evidenced the copies of her Kenya National Identify Card, which are annexed to the Summons (Annexure '9'). The Applicant told the court that she is a Catholic Christian who worships at the **Divine Mercy Catholic Church**. She intends to raise the child in the Christian Faith.

8. The Applicant stated that she was once married under customary law but that marriage broke down. She has therefore raised her three sons as a single mother.

9. The Applicant was working at **[Particulars Withheld]**. She has annexed copies of her pay slips to the Summons. She has also annexed copies of bank statements. The Applicant has now re-located to the **USA** in the year **2019** where she works as a **Nursing Assistant**.

10. The Applicant is of sound physical and mental health. She has also annexed a copy of her clearance certificate issued by the **Kenya Police Service** (indicating that she has no criminal record). The Applicant has appointed her cousin **EOA** as the legal Guardian for the child. The said **EA** has signed a consent to act as legal Guardian dated **27th July 2020**. One of the adult children of the applicant namely **JW (PW5)** testified in court. He told the court that they were aware of and supported their mother's intention to adopt the Subject child. **PW 5** told the court that they already consider the child as a member of their family.

11. Finally, it has not escaped the attention of this court that the Applicant who is female is seeking to adopt a male child. **Section 158(2)** of the **Children Act** provides as follows:-

(2) An adoption order shall not be made in favour of the following persons unless the court is satisfied that there are special circumstances that justify the making of an adoption order—

(a) A sole male applicant in respect of a female child;

(b) A sole female applicant in respect of a male child;

(c) An applicant or joint applicants who has or both have attained the age of sixty-five years;

(d) A sole foreign female applicant.” (own emphasis)

12. Therefore in order for an order of adoption to be made in the case of a female Applicant adopting male child, the court must be satisfied that special circumstances exist.

13. In considering a similar situation **Hon Justice John Onyiego** in **RE ADOPTION OF BABY P.B [2016] eKLR** stated as follows: -

“The key question is, are there special circumstances that would warrant the Court to allow the Applicant being a female to adopt the baby who is a male. Section 158(2) has donated to the Court wide discretionary powers in determining what entails special circumstances under which it can allow a female Applicant to adopt a male child. What then constitutes special circumstances. Under Article 53(2) of the Constitution and Section 4(2) and (3) of the Children Act, the primary consideration before a Court, anybody, organization or institution makes any decision or order affecting child is the best interests of a child.

In the case of IN RE ADOPTION OF BABY JKM (2017)eKLR Judge Achode allowed a female Applicant to adopt a male child who was found abandoned somewhere in some village. The Court took into consideration special circumstances as per the guidelines of the National Adoption Committee dated 13th January 2010 pursuant to Section 155 of the Children's Act for a female Applicant wishing to adopt a male child. The elements are particularized as hereunder:-

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. The applicant is the only person available to adopt the child, and

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.”

Similar position was held in the case of; IN RE BABY J. I (MINOR)eKLR and IN RE G. W. (BABY) (2008)eKLR-

“In the instant case, the Applicant has a biological child on whom she is willingly exercising parental responsibility. It is in the best interests of the baby herein that he gets a home, parental guidance, emotional, social and moral upbringing by a responsible parent. Further, the child is assured of basic necessities like food, shelter, clothing, medical care and education

all of which the Appellant is capable of providing.

Considering that this is a local adoption and the baby having bonded very well as evidenced during their appearance and hearing in Court. I am fully persuaded that gender issue cannot be an impediment towards the realization of the best interests of the baby. [own emphasis]

14. The Applicant herein has raised three sons singlehandedly. She has told the court that her heart went out to the Subject child after his abandonment in the parking lot at **Kenyatta National Hospital**. The Applicant met the child at the hospital when she used to go to visit a sick nephew.

15. The Applicant followed up to check on the child even after he had been admitted in the Childrens Home and despite knowledge of his medical condition she still persisted in the desire to adopt him. This is clear evidence of the Applicants desire to provide this child with a home and the gender issue should not be an impediment. No other person has come forward to adopt the child. I am satisfied that ‘**special circumstances**’ to exist to allow this adoption.

16. The Subject child was found abandoned in the parking lot at **Kenyatta National Hospital** on **10th February 2011**. At the time of his rescue, the child was about **four (4)** years old. The child abandonment was reported at **Kenyatta Police Post**. He was taken back to the hospital for treatment, which is where the Applicant met him.

17. On **21st December 2011** the **Nairobi Childrens Court** committed the child to **Nyumbani childrens** Home for care and protection. Thereafter on **28th February 2013** the child was released to the custody of the Applicant under a Foster Care Agreement. (Annexure ‘**8**’). The child has lived with the Applicant and her family to date.

18. The Subject child was abandoned at the tender age of **4 years**. Efforts to trace his biological parents have borne no fruit. To date no person has come forward to claim the child. A final police letter dated **31st May 2011** (Annexure ‘**6**’) indicates that the parents/relatives of the child have not been traced. In the circumstances, there exists no known person from whom consent for this adoption can be sought and/or obtained. I therefore waive the requirement for consent in the line with section **159(1)(a)** of the **Children Act, 2001**.

19. **Article 14** of the **Constitution of Kenya, 2010** deals with the question of Citizenship. **Article 14(4)** provides as follows: -

“(4) A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.”

20. The child herein was found abandoned in Nairobi aged about **four (4) years**. I declare the child to be a Kenyan Citizen by birth.

21. In deciding upon any matter involving a child, Courts are obliged to give priority to the best interest of the said child. **Section 4(2)** of the **Children Act 2001** provides:-

“(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 interest of the child shall be a primary consideration”. (Own emphasis)

22. The Subject child was abandoned by his mother/parents. No person has come forward to claim him. The child faced an uncertain future living in childrens homes and other similar institutions. This adoption allows the child the opportunity to be raised in a stable and loving home environment.

23. **Section 76(3)(a)** of the **Children Act** provides:-

“Where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters—

a. The ascertainable feelings and wishes of the child concerned with reference to the child’s age and understanding.”

24. The court did interview the child. At **fourteen (14)** years of age, he was of an age where he could speak for himself. The child informed the court that he understood that the adoption proceedings would make him a child of the Applicant. The child told the court that he has experienced no problems living with the Applicant and her family. Indeed the child has lived with the family since the year **2011** (a period of **ten (10) years**) and this is the only family he knows. The Applicant has enrolled the child at **[Particulars Withheld] Academy** where he is in **Grade 6**. The child expressed his willingness and desire to be adopted by the Applicant.

25. I have perused the reports prepared by the **Adoption Agency**, the **Guardian Ad Litem** and the **Director Childrens Services**. All three reports were positive and all recommended the adoption. A home visit was conducted which found that the Applicant and her family reside in a three bed-roomed house in **Buruburu Phase 1**. The house is well secured in its own compound with adequate room and facilities for the child.

26. Based on the foregoing, I find that this adoption is in the best interests of the child. Accordingly, this court allows the Originating Summons dated **24th July 2020** and makes the following orders: -

(1) The Applicant LA is authorized to adopt the child known as BK.

(2) Upon adoption the child shall be known as RR.

(3) The child is declared to be a Kenyan Citizen by birth and is entitled to all the rights and benefits under the Constitution of Kenya and all applicable laws.

(4) The Registrar General is directed to make the relevant entry in the Adopted Childrens Register.

(5) EOA is appointed as the legal Guardian for the child.

DATED IN NAIROBI THIS 3RD DAY OF DECEMBER, 2021

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MAUREEN A. ODERO

JUDGE