



**REPUBLIC OF KENYA**

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

**ADOPTION CAUSE NO. E007 OF 2020**

**IN THE MATTER OF BABY MM (INFANT)**

**JWM.....APPLICANT**

**JUDGMENT**

1. The applicant herein moved this court vide the Originating Summons dated 1.10.2020 and brought under Sections 157 (1) and 158(1) of the Children's Act and Rules 4 and 14 of the Adoption Rules and seeking for orders;-

1) .....spent.....

2) *That the consent of the infant's natural parents be dispensed with.*

3) *That the applicant be authorized to adopt MM (infant).*

2. The application is supported by the applicant's supporting affidavit and wherein she adopted her statement sworn on 1.10.2020 in support of her application for adoption orders.

3. KKPI in its report filed on 2.11.2021 recommended that the child is available for adoption and further that, adoption would be for his best interest and (annexed to the said report) a certificate to declare the child free for adoption. A report by the guardian ad-litem (EWNM) dated 1.07.2021 recommended the adoption of the child herein by the applicant as it is in his best interests.

4. I have considered the application herein, the annexures thereto and all the documents filed before this court. It is my view that the main issue for determination is whether the application herein ought to be allowed as prayed.

5. The law on adoption is provided for under the Children's Act No. 8 of 2001. Section 154(1) donates jurisdiction to this court to make an adoption order. Under Section 156 of the Act, no arrangement for adoption of a child ought to be commenced unless the said child is at least six weeks old and has been declared free for adoption by a registered adoption society in accordance with the rules as prescribed. Section 157 requires that the child concerned should have 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 evaluated and assessed by a registered adoption Society in Kenya.

6. I note that the applicant herein is a sole applicant and pursuant to Section 158(1) of the Act, an adoption order may be made upon the application of a sole applicant but the said applicant must have attained the age of 25 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.

7. Section 158(2) – (4) provides for further conditions which the applicant ought to comply with, in filing the application for adoption which includes consent by the parent but the court can dispense with the said consent in the case of the parents or guardian of the child, that has been abandoned, neglected, persistently failed to be maintained or persistently ill-treated. (see **Section 159**).

8. The applicant, in the statement in support of the application for adoption order, averred that the minor herein was approximately nine (9) years old and was referred from Meru Police Station through Imenti North District Children's Officer to Mother Maria Zanelli Children's Home. The letter dated 20.01.2011 from OCS Meru Police Station indicates that the child herein was found abandoned on 22.12.2011. The report to declare the child fit for adoption by KKPI Adoption Centre indicates that the child herein is estimated to have been born on 28.03.2011. As such, at the time of the application herein, the child was more than six (6) weeks old. The child was also declared free for adoption by KKPI Adoption Centre, a registered Adoption Society in the report filed on 2.11.2021.

9. The applicant averred that the child herein was received in her care and possession on or about 5.09.2013 and thus he had been in the continuous care and control of the applicant for a period of eight years preceding the filing of the application. She further annexed to the application, copies of her national identity card and wherein it was indicated that she was born in 1965. As such, at the time of making the application herein, she had attained the age of twenty five years, was at least twenty one years older than the child and had not attained the

age of sixty five years. From the records, it is clear that the child herein was found abandoned in Meru town and was rescued by a good Samaritan. The report by KKPI Adoption Society indicates that the child remains unclaimed and that his family cannot be traced. As such, the consent by the parent is hereby dispensed with by virtue of section 159.

10. However, the applicant herein is a sole female applicant and she intends to adopt a male child. Under Section 158(2)(b) of the Act, an adoption order ought not to be made in favour of a sole female applicant in respect of a male child unless the court is satisfied that there are special circumstances that justify the making of an adoption order. The Children Act has not stated what constitutes the special circumstances but the National Adoption Committee on 13<sup>th</sup> 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 or not to issue an adoption order. The guidelines are as follows: -

*i. When the child is a relative.*

*ii. Where 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 died or become permanently incapacitated.*

(See **In re Adoption of Baby JKM [2017] eKLR** and **MVM Vs MVM [2020] eKLR**)

11. The question, therefore, is whether there are special circumstances warranting the grant of the adoption order to the applicant herein. In the same breadth, I also note that the applicant is neither related to the child nor does the child have special needs. I also note that the applicant does not have a child and has not previously adopted any.

12. However, the orders sought by the applicant relate to a child. In law, in any matter concerning a child, the best interest of the child is 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.

13. When it comes to determining the best interest of a child it is important to consider the evidence before the court in regards to parenting ability of the parent seeking to adopt the minor. The court in assessing the best interest of the child is mandated to evaluate and balance all the elements necessary to make a decision in every situation unfolding.

14. The objective is to reach a decision 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 a 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 sound 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**).

15. The options available to this court is either to deny the applicant the adoption order and observe section 158(2)(b) or to allow the orders prayed herein with regard to the question on what is best for the child herein.

16. The report by the guardian ad litem and the social worker indicates that, the applicant has bonded well with the child herein and that she has great love for him and deeply desire to look after and care for him; the applicant is prepared to provide for a suitable home for the infant and that 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.

17. At this point, it is of importance to have in mind that the report filed by KKPI Adoption Society indicates that this child remains unclaimed and equally in need of alternative family care and that he stands to benefit from family love, care and provision as opposed to being in an institutional care and that adoption would be in his best interest. Having considered the documents presented before this court, I am of the view that it is in the best interest of this minor that the applicant be granted the orders sought.

18. I am satisfied that this applicant is qualified to adopt this minor in the circumstances and as such:

*i. The consent of the infant's natural parents is hereby dispensed with.*

*ii. The applicant is allowed to adopt the infant herein.*

19. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1<sup>ST</sup> DAY OF DECEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant