



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J)

ADOPTION CAUSE NO. 2 OF 2019

IN THE MATTER OF BABY NG

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION OF NG

BY

CWW1ST APPLICANT

AND

ANG.....2ND APPLICANT

JUDGMENT

Background

1. The applicants are husband and wife, married customarily in the year 2000, and solemnized their marriage in 2010, under the Marriage Act. They make their home in Kekopey, Gilgil, and have no children as ANG has blocked fallopian tubes. CWW works with [Particulars Withheld] Limited and ANG is a business woman. They have a shared motivation towards adoption and desire to give the gift of adoption and family life to Baby NG based on their strong Christian values.
2. Baby NG was found on 2nd March, 2014 within Ruaka area abandoned by an unknown person or persons. The good Samaritan happened to be a policeman, Peter Githendu, who reported the abandonment at Ruaka AP Post vide OB No[.....] On 3rd March, 2014, the baby was referred to Kenyatta National Hospital for medical intervention and named N (later named NG). He was estimated to have been born on 21st February, 2014, and remained at the hospital until 21st March, 2014, and released to Imani Children's Home for further care and protection.
3. The child was admitted at Imani Childrens' Home on 21st March, 2014, and the Department of Children Services applied to the Children's Court for committal orders, vide a letter dated 15th August 2015. Committal Orders to Imani Children's Home were issued by the Childrens' Court at Nairobi in **Protection & Care Case No 193 of 2015**, on 23rd September, 2015. Committal was for the care and custody of the child for a three-year period at the Imani Childrens' Home.
4. The child had not been claimed by anyone at any police station, or at the hospital or at the Imani Childrens' Home, and all efforts to trace the child's relatives were unsuccessful. Accordingly, pursuant to Regulation 16 of the Adoption Regulations, 2005, the Case Committee of Change Trust at a meeting held on 14th November, 2015, was satisfied that the child was available for adoption which would be in the best interest of the child.
5. Thus, a Certificate to Declare a Child Free for Adoption No. [...] was issued by Change Trust pursuant to Section 156(1) and the Adoption Regulations. All the information and documentation regarding the history of the child was verified and availed to Change Trust.
6. The applicants approached Buckner Kenya Adoption Services on 10th February, 2017 seeking to adopt a child. The organization assessed the applicants and their backgrounds, evaluated their referees, and the applicants' capacities to adopt a child. The organization's Case Committee on 27th April, 2018, approved the applicants as fit to adopt a child, in particular a baby boy aged between 2 to 3 years.
7. By an application by way of Exparte originating summons filed on 11th April, 2019, the applicants seek to be authorized to adopt the

minor child known as NG. The application is made under **Sections 4, 154, 156(1), 157(1), 158(1)(a) and (4a), 159(4),(6),(7) and (8)(a) and 160(1),(2) and (4), 162,163,164(1) and 170** of the **Children’s Act No 8, 2001, Section 24** of the **Interpretation and General Provisions Act, Section 9** of the **Immigration Act** and the **Constitution of Kenya**.

8. In addition, the applicants by *ex parte* chamber summons of even date and heard on 12th November, 2019, had obtained this Court’s orders which: appointed GVC, a social worker, as guardian ad litem in these proceedings, and directed that the Children’s Services Department at Naivasha do investigate the applicants’ fitness to adopt or otherwise and file a report in respect thereof.

9. The Department of Childrens’ Report dated 15th January, 2020 was filed in court on 20th January, 2020. It notes in material particulars that: the child, NG, has been living with the applicants since 1st September, 2018; that the applicants have the requisite financial capacity and home environment fit for a child; that the child has a legal guardian, namely, Ms CN; that the child was free for adoption. The report makes the following final recommendation:

“The child has now learnt that this is his home and knows no other family. He is adequately provided for, loved and cared for well. He lacks nothing and is happy in the company of the applicant(s).

It is therefore in the child’s best interests that he be adopted by the prospective adoptive parents.”

10. The Guardian ad litem, GVC also filed a report as guardian ad litem and a professional social worker, on 7th February, 2020. She states that her role was to safeguard the best interests of the child, NG; consider the wishes and desires of the minor, ensure the minor’s safety, and generally to be the eye of the court in this matter in her observations of the child. Her report details the child’s status, her interviews with the child at the placement home of her prospective adoptive parents, the child’s schooling at Ridges Academy where he is in Pre-primary 2, the bonding and attachment of the child with the prospective adoptive parents. She observes that:

“...the name the applicants call him (the child, NG) is NKW;

....

that the applicants have fully committed themselves financially, socially and emotionally to bring up the child”

The guardian ad litem concludes:

“I therefore recommend that the adoptive parents be allowed to adopt the child. They are capable of providing parental care and have good plans for the minor in this adoption matter.... I highly support the adoption of the minor for it will be in the best interest of the child”

11. I have carefully read the substantive adoption application, the statement in support of the application for adoption, the 1st applicant’s supporting affidavit and the documents attached to the said affidavit at pages 20-70 in the bound bundle of documents of the applicants’ application.

12. It may be noted at the outset, that **Article 14(4)** of the **Constitution** relates to children found in Kenya who appear to be less than eight years old and whose nationality and parents are not known. **Article 53(2)** of the **Constitution** requires that the Court treat as paramount, the child’s best interests in any matter concerning the child.

Confirmation of abandonment

13. The final police letter dated 11th June, 2015, from Ruaka AP Police Post to Imani Rehabilitation Agency states:

“Referring to OB Number[...], this is about the said child (N) who had been found at Ruaka having been abandoned. So far no one has come to this end to claim about the child”

14. Similarly, by virtue of the Adoption Society’s (Buckner Kenya Adoption Services) Report to Declare a Child Free for Adoption and the Certificate to Declare a Child Free for Adoption dated 14th November, 2015, the abandonment of the child NG, is reiterated and confirmed. Clearly, therefore, neither the police nor the institution to whom the committal for care and protection were given, have received a claim for the child.

15. Accordingly, legal abandonment may thus be presumed in terms of the proviso to **Section 159(1)(a)(i)** of the **Children Act**, which provides as follows:

“(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”

16. This court confirms, finds and holds that the child, NG, was and is deemed to be abandoned in law. As such the court hereby dispenses with the provision for consent for adoption by a parent or guardian or any other person, required under section 158(4)(a-f) of the Children

Act.

Whether an Adoption Order can be made

17. This court has power pursuant to **section 154** of the Children Act, to make an adoption Order. However, for adoption to take place:

- a child must be at least six weeks old and free for adoption;
- the child concerned must have been in the continuous care and control of the applicant within Kenya for a period of three consecutive months preceding the filing of the application; and
- that both the child and the applicant have been evaluated and assessed by a registered adoption society in Kenya.

18. The above requirements are provided for in Section 156-157 of the Children Act which contains the prerequisites for adoption and as to children who can be adopted. The sections provide as follows:

“156. (1) No arrangement shall be commenced for the adoption of a child unless the child is at least six weeks old and has been declared free for adoption by a registered adoption society in accordance with this rules prescribed in that behalf.

(2) It shall not be lawful for any person whether being a parent or guardian of a child or otherwise, or for an adoption society by whom arrangements for adoption of a child are made, to place a child into the care and possession or control of a person who proposes to adopt him, if an adoption order in respect of the child cannot be lawfully made in favour of that person.

(3) Any person who contravenes the provisions of this section shall be guilty of an offence and liable to imprisonment for a term not exceeding six months or to a fine not exceeding ten thousand shillings or to both.

157. (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: Provided that no application for an adoption order, shall be made in respect of a child unless the child concerned has 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 or applicants, as the case may be evaluated and assessed by a registered adoption society in Kenya.

(2) Any person who contravenes the provision of subsection (1) of this section shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding twenty thousand shillings or to both such imprisonment and such fine.”

19. As already noted, the Department of Children’s Services in its report requested by the Court recommended the applicants for adoption of the child. Similarly, the Guardian ad litem and the Legal guardian have all recommended adoption of the child by the applicants as being in the best interests of the child. These are the persons who have been given legal standing to make statements on behalf of the child.

20. The reports show that the applicants have taken the child to their home; that they have the financial ability to take care of the child; that their home environment is safe secure and satisfactory; that the applicants have asserted that the child will have inheritance rights and that the child is relating well with them.

21. In my view, the applicants have complied with all the requirements of the law for purposes of adoption and that it is in the best interests of the child that they be permitted to adopt the child.

Disposition

22. The Court is satisfied that the provisions of Part XII of the Children Act on adoption have been complied with. In exercise of the powers of the court under section 163 prior to making an adoption order, the court notes:

- a) The relevant consents were dispensed with under section 159 of the Act this being an abandonment case in respect of a baby abandoned at about two weeks after birth;
- b) That the best interests of the child have been taken into account, it being noted that the child is not able to indicate his wishes except as perceived by the Legal Guardian and Guardian ad litem, all of whom recommend the adoption by the applicants;
- c) That the applicants have the ability to educate and take care of the child and have not received or agreed to receive any reward in consideration for the adoption;
- d) That there is no one whose consent can be lawfully received, and no one is capable of so doing;
- e) That the applicants are not relatives of the child, and no relatives of the abandoned child have ever come forward;

f) That both the applicants and the child have been assessed and evaluated by Change Trust and Buckner Kenya Adoption Services, duly registered under the Children Act, and the evaluation reports and supporting documents availed to the court.

23. This court is satisfied that in the present case, this is an abandonment adoption, and is also a local or domestic adoption. The court is also satisfied that the applicants are suitable persons with the demonstrated financial and social means to provide and care for the Child, and have been doing so for a considerable period prior to making this application. It is also noted that the applicants and the Minor have a sound relationship and bond well.

24. For all the above reasons, I allow the prayers sought in the Originating Summons and hereby order as follows:

- a) The Applicants CWW and ANG are hereby authorized to adopt the Minor NG aka NKW.
- b) That the child be and is hereby renamed NKW.
- c) That the child be and is hereby presumed to be a Kenyan citizen having been found abandoned in Kenya approximately two weeks after birth.
- d) That the child's birth date is hereby declared to be 21st February, 2014, in Nairobi County.
- e) That the Registrar General is hereby directed to enter this Order in the Adoption Register for adopted children.
- f) That the Guardian ad litem, GVC is hereby discharged and that CNW is hereby appointed as the legal guardian of the child herein
- g) Costs of this application to be borne by the applicant.

Administrative directions

25. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

26. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

27. Orders accordingly.

Dated and Delivered via Teams Video-conference from Nairobi this 21st Day of May, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Ms Kimenyi for the Applicants
2. Court Clerk - Quinter Ogutu