



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
ADOPTION CAUSE NO.45 OF 2018
IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001
AND
IN THE MATTER OF CM(CHILD)
AND
IN THE ADOPTION MATTER OF AN APPLICATION FOR ADOPTION BY JV & RCM
JUDGMENT

1. Vide an Originating Summons dated 3rd March 2018, the applicants **JV** and **RCM** sought to be allowed to adopt baby CM. That upon adoption, the child be known as CMM and CC be the child's legal guardian in case of incapacity of the applicants.
2. The 1st applicant is an American citizen living and residing in Kenya. The 2nd applicant is a Kenyan citizen. The applicants are legally married under the Marriage Act (now repealed) and together have 2 biological children. The 1st applicant is a Postdoctoral Fellow at [particulars withheld] while RCM is a [particulars withheld] at East African Breweries Limited in Nairobi.
3. The child herein the subject of these proceedings was born on 15th July 2006 to the 2nd applicant RM and one CMK. The baby has been in the mother's custody since birth and with the 1st applicant from the age of 4 years. The biological father to the child CMK has given his consent to the adoption of the child as per his affidavit dated 3rd March 2018.
4. The guardian ad litem report filed on 20th July 2018 recommends the adoption of the child. The Director Children services in their report dated 22nd August 2018 noted that the applicants are financially able to cater to the needs of the child and that the child has bonded well with his adoptive father since 2012. The report however does not recommend the adoption since the 1st applicant is a foreigner and this affects the adoption of the child as there is a moratorium order in place. The director however leaves it open to the discretion of the court to determine the same in the best interest of the child.
5. During the hearing, both parties pleaded with the court to allow the adoption citing the best interest of a child principle as the determining factor in granting the orders sought. They also acknowledged that they understood the consequences of the adoption and that the same is permanent.
6. I have considered the application herein, supporting materials and the stake holders' reports. The key issues for determination are: Firstly, whether the applicants have met the necessary requirements for grant of adoption orders and, secondly, whether the adoption is in the best interest of the baby.
7. The Constitution and the children's Act underscore the best interests of a child. **Article 53(2)** provides that "A child's best interests are of paramount importance in every matter concerning the child." Further, **Section 4(2) and (3)** of the Children's Act provide that "in all actions concerning children all public and private bodies, courts of law and legislative authorities, when exercising powers under the Act, shall treat the interest 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, and (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."
8. In the instant case, the first applicant is a non-Kenyan citizen while the 2nd applicant is a Kenyan. The Director Children Service's report is

positive about the adoptions save for the caveat imposed by an existing moratorium which prohibits intercountry adoptions. There is no dispute that the first applicant has been staying with the baby as a step father since he got married to the mother when the baby was 4yrs. The biological father has given the necessary consent thus supporting the adoption.

9. This court is aware of the Moratorium on Inter-Country Adoption of Kenya Children” that was declared on 27th November 2014 by the Cabinet. The Cabinet approved an indefinite moratorium on inter-country adoption of Kenya children by foreigners, and also revoked all licenses to conduct adoptions in Kenya with immediate effect. However, each case shall be determined on its merits (**see the case, In re M (Baby) [2017] eKLR.**

10. Moreover, the 1st applicant is a resident working in Kenya and therefore the closest father the baby knows and fully bonded with throughout his life. For all purposes and intents, this is a kinship adoption which goes beyond child trafficking a mischief the moratorium is intended to cure. In the case of **CC (Child) (2017) eKLR** the court held;

Given the fact that baby C does not have any other known parent other than the step father (1st applicant) and biological mother (2nd applicant), she cannot be separated nor can she lead an independent separate life. She needs parental care, protection and guidance from parents and wherever possible resides with her parents. (See article 19 of the African Charter on the rights and welfare of the child and article 12 of the convention in the rights of the child). This being a kinship adoption, the same shall be classified as a local adoption.

Similar position was held in the case of **J.M. (minor) (2018) eKLR Adoption Case No. 259/2014 Nairobi** and in the case of **Baby I.J. (minor) (2015) eKLR.**

11. In the spirit of Article 53(2) of the constitution, the best interest of the child to be adopted by the applicants reigns supreme so that he can enjoy paternal love and equal treatment just like his siblings. It will also put the baby on equal footing with his siblings as areal brother hence eliminate any form of discrimination and inequality.

12. Accordingly, in exercise of the power conferred upon this court under Section 154 of the Children Act to make an adoption order, it is my finding that the application dated 20th November, 2017 is merited and the same is allowed in the following terms:

- a) **That JV and RCM be and is hereby authorized to adopt CM and who shall henceforth be known as CMM**
- b) **That CC a sister to the 1st applicant is hereby appointed as the legal guardian of the child in the event that the Applicants die, or are incapacitated by ill-health.**
- c) **That the Registrar General be and is hereby directed to enter this adoption into the Register of Adoptions.**
- d) **That the guardian ad litem is hereby discharged.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH JULY 2019.

J.N. ONYIEGO

JUDGE