



**REPUBLIC OF KENYA**

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

**ADOPTION CAUSE NO. 3 OF 2019(O.S)**

**IN THE MATTER OF THE CHILDREN’S ACT**

**AND**

**IN THE MATTER OF ADOPTION OF BABY SWM (A CHILD)**

**AND**

**IN THE MATTER OF**

**SWM.....CHILD**

**AND**

**TM AND EMN.....APPLICANTS**

**JUDGMENT**

1. The applicants herein **TM AND EMN** [full names withheld] lodged in this court an originating summons dated 31<sup>st</sup> March, 2019 seeking for orders that, first, **OKO** and **GOA** [full names withheld] be appointed as guardians litem of baby **SWM** [full name withheld] second, that the applicants be allowed to adopt baby **SWM** and, finally that the names of the infant be changed from Baby **SWM** to **EPA**. Fourth, that the court makes an appropriate entries in the Adopted Children Register and that the Director of Children Department make as assessment and prepare a report on the applicants.
2. The applicants swore a joint affidavit and statement in support of the Originating Summons. They deposed that they are aged 45 and 45 years old respectively and currently reside in Siaya County and are citizens of Kenya of African Race.
3. **They exhibited consents of proposed guardians ad litem and reports by the said guardian ad litem on the applicants.** They also annexed certificates of fitness of the said proposed guardians *ad litem*s, affidavit for dispensation with consent of parents of the infant owing to the fact that she was born out of an incestuous relationship as per the report dated 31/5/2018 by **Little Angels Network Adoption Society**. They further annexed a placement file from the Adoption Society detailing the process that the applicants have gone through to be declared fit to adopt the infant.
4. When the matter was placed before me for directions, I directed the Siaya County Children’s Officer to file a comprehensive report on the applicants’ suitability to adopt the infant. The said report was filed in court on 30<sup>th</sup> October 2019 and the County Coordinator Children’s Services **Mr. Jemin Otieno K’onyango** attended Court to verify the said report on 6/11/2019.
5. The applicants are Church Elder and Deaconess of Crisco from 2009. They are involved in supporting orphans and vulnerable children in the society. They are married with two of their own children who are boys and they wish to adopt the infant herein who is a girl and who has been in their custody for a period exceeding three months from 16th August 2018 by Little Angels Network, an Adoptive Society duly registered as such under the Children Act, cap.141.
6. In a report by the said Adoption Society filed in court on 4<sup>th</sup> February 2019 declaring baby **SWM** free for adoption, the latter is said to have been born on 16<sup>th</sup> August 2017 and that she was given up on 14/9/2017 by her biological parents who both signed consents witnessed by their biological parents giving her away as she was born out of an incestuous relationship which is against the taboo of the community of both parents who were both minors aged 16 years. **On 31 May 2018** the Adoption Society issued a Certificate of declaring a child for adoption of the infant.
7. The applicants herein have been interviewed by the Adoption Society on several occasions and the Coordinator Children’s Services Siaya has also placed in Springs of **Life Children’s Home at B** [name withheld] on 23/8/2017 after the family of the biological parents met and

decided not to keep the child in the community owing to the consanguine relations between the boy and girl parents of the baby.

8. The Coordinator Children's Services observed that the applicants were counseled on adoption by Amani Counseling Centre Kisumu and the Little Angels Network and are prepared to adopt the child as they have experience in raising their own children. They also have sufficient means to care for their humble family. They have shared their desire with immediate family members who have no issue. The Child relates well with his prospective adoptive parents well and is without any manifest medical or health concerns. The adoptive parents have a medical report dated 28<sup>th</sup> December 2017 from Siaya County Referral Hospital, giving them a clean bill of health, both physically, psychologically and mentally.

9. The Children's Coordinator upon visiting the applicants observed that the house in which the applicants and the child live is a rental two-bed-roomed self-contained house. It is serviced with piped water and electricity. It is one among several other units surrounded by a barbed wire and a live fence with a metallic gate locked during the night. They have other assets including a car and land in Kilifi County and in Siaya Alego Nyadhi and household belongings. They are business people as well. They have income of about Kshs 80,000 per month and have an NHIF cover for the family. Apart from the house, there is an open ground spacious enough for the children to play in. The officer was satisfied that the general environment in which the child lives was conducive for his upbringing.

10. Thus, as far as the financial status of the applicants is concerned the officer established that they have a stable income from their employment. Apart from their earnings they own a vehicle and a plot. In the officer's view, the applicants are capable of providing for the basic needs of the child including such needs as food, clothing, education and medical care.

11. The report also notes that applicants are Christians who attend Crisco Church in Siaya County and live a peaceful life free from stress.

12. He assessed them as people who have positively embraced the adoption process; they too assured him that they have the support and encouragement from their respective families and friends. Based on his findings and observations, the Children's officer recommended that the applicants be allowed to adopt the child.

13. I have heard the applicant's application, seen the applicants in court and also observed the baby who was in court and very fond of her adoptive parents. I had occasion to hear from the representatives from the offices of the Director of Children Services and read the report from the Little Angels Network the Adoptive Society and even the child herself in the course of the adoption proceedings.

14. I was left with the impression that the applicants are clear of what the process involves and are under no illusion of their responsibilities towards the child once an adoption order is made. For instance they are clear in their minds that they will have to embrace the child as they would have embraced their own biological child; that they are responsible for his parental care and at the very minimum they must ensure that he is nourished, he has a roof over his head, he is clothed and educated. More importantly, the child has inheritance rights over whatever they own.

15. I am satisfied that they can meet the child's needs that may need financial input; my appreciation of their financial capabilities arises from the findings by the Children's Officer that they hold bank accounts at Equity KCB and Cooperative Bank of Kenya. Account numbers were also given and are contained in the report by the Coordinator Children's Services Siaya County Mr. K'onnyango. Their monthly income are said to be about Kshs 80,000 and their expenditure comes to Kshs 50,000 or thereabouts.

16. The Children Officer attended court in person to confirm the position in his report and the reports from the Adoptive Society and were all in agreement that the Originating Summons ought to be allowed. The child too was not restless in the arms of the applicants and kept moving from her 'mother' to her 'father'

17. Therefore, this Originating summons has to be considered in the context of the law applicable to applications for adoption as provided for in the Children Act. Section 158 of that Act which the applicants invoked states as follows:

***"158. Adoption applicants***

***(1) An adoption order may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants—***

***(a) has attained the age of twenty-five 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.***

***(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.*

*(3) An adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them—*

*(a) is not of sound mind within the meaning of the Mental Health Act (Cap.248);*

*(b) has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule to this Act or similar offences;*

*(c) is a homosexual;*

*(d) in the case of joint applicants, if they are not married to each other;*

*(e) is a sole foreign male applicant:*

*Provided that the court may refuse to make an adoption order in respect of any person or persons if it is satisfied for any reason that it would not be in the best interests of the welfare of the child to do so.*

*(4) Subject to section 159 an adoption application shall be accompanied by the following written consents to the making of an adoption order in respect of any child—*

*(a) 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;*

*(b) in the case of a child born out of wedlock whose mother is a child, with the consent of the parents or guardian of the mother of the child;*

*(c) in the case of a child born out of wedlock whose father has acquired parental responsibility in respect of the child under the provisions of this Act, with the consent of the father;*

*(d) on the application of one of the spouses, with the consent of the other spouse;*

*(e) in the case of two spouses who are not Kenyan citizens and who are not resident in Kenya, with the consent of the court of competent jurisdiction or of a government authority situated in the country where both or one of the spouses is ordinarily resident, permitting the spouses to adopt a foreign child;*

*(f) in the case of a child who has attained the age of 14 years, with the consent of the child.”*

18. Section 158 gives a picture of a person who is eligible to apply for an adoption order; it also provides a picture of one who is not. The section also prescribes the circumstances under which an adoption order will be refused and also lays out the basic requirements in an application for an adoption order.

19. Section 154(1) of the Children Act gives this court power to make an adoption order and it states:

***“Subject to this Act, the High Court may upon an application made to it in the prescribed form make an order (in this Act referred to as “adoption order”) authorizing an applicant to adopt a child.”***

20. Under Subsection (2) of the same section the proceedings in respect of an application for adoption shall be heard and determined in chambers and that the identity of the child and the applicants shall always remain confidential.

21. One of the pre-requisites for such an adoption order is that before any arrangements for adoption are commenced for adoption the child must be at least six weeks old and has been declared free for adoption by a registered adoption society (See **section 156(1)** of the Children Act).

22. From the evidence available on record, there is no doubt that this provision has been complied with and when applicants took custody of the child with the intention of adopting her, she was about nine months old. Again a certificate declaring the child free for adoption was duly issued on 31/5/2018.

23. It is also apparent that before the commencement of the adoption process the child was available for adoption. Section 157(1) of the Act is to the effect that any child who is resident within Kenya may be adopted irrespective of whether the child is a Kenyan citizen or was not

born in Kenya. The available evidence points to the fact that baby JS.WM. was born in Kenya and she was a resident of this country at the material time.

24. There is a proviso to section 157(1) which has to be taken into account; it states as follows:

***“...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.”***

25. The applicants' Originating Summons was filed in court 2/4/2019 by which time the applicants had been in continuous care and control of the child for close to 11 months. It has also been noted that both the child and the applicants have been assessed by a duly registered adoption society and the office of the Director of Children Services; they have, in their reports, recommended that the child be adopted. They have also established that the child bonds well with the applicants. It follows that the applicant's application satisfies the proviso to section 157(1) as well.

26. Section 165(2) (c) of the Children Act sets 65 as the maximum age beyond which a person cannot make an application for adoption. The applicants have demonstrated that they were way below this age at the time the application was made; as noted, they were aged 45 and 45 respectively. Accordingly, the applicants are eligible adoptive parents as long as the requirement as to age is concerned.

27. Besides the age factor, section 158(4) requires an application for adoption to be accompanied by a written consent of the parent, guardian or a person who is liable by virtue of any order or agreement to contribute to the maintenance of the child or parents or guardians of the mother of the child or the court. If the child has attained the age of 14 years, his or her consent is required.

28. However, under section 159(1) the court has power to dispense with the consent if it is satisfied that the parents or guardian of the child has abandoned, neglected, persistently failed to maintain or ill-treated the child.

29. There are two consents duly signed by the biological parents of the baby and **Baby SWM** who are minors but witnessed by their own biological parents who consider the child a bad omen as it was born in an incestuous relationship where their parents are siblings.

30. Finally, section 159(3) (b) of the Act provides that no adoption order shall be made if the applicants or an applicant has been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule to this Act or similar offences. The applicants swore an affidavit on 5<sup>th</sup> July 2019 stating that they have never been convicted of any offence or charged before a court of law and have never received or paid money for the child in issue for purposes of these proceedings. They have also not adopted any other child.

31. The applicants have satisfied this court neither of them has fallen short of the requirements of this section in the sense that they have not been charged and convicted of any of the specified offences. In this regard

32. In the circumstances, I conclude that the applicants have not only complied with the legal requirements necessary for making of an adoption order but they also understand the consequences of making that order; they are not mistaken as to their responsibilities. I am also persuaded that they not only have the will to adopt the child as their own biological child, but they have also demonstrated that they have the means to provide her with shelter, clothing, food, education and, most importantly, the parental care and protection that he needs and deserves.

33. I am therefore inclined to conclude that as much as the applicants intend to adopt the child as one of their own and to whom they can bequeath their inheritance, it is also in the best interest and the welfare of the child that the adoption order is made in their favour.

34. For the foregoing reasons, the applicant's originating summons dated 31/3/2019 is allowed in the following terms:

***a. OKO and GOA are hereby appointed as guardians ad litem of baby SWM.***

***b. The applicants are authorized to adopt Baby SWM who shall henceforth be named as EPA with full name to be withheld in the publication of this Judgment;***

***c. The Registrar General is hereby ordered to make the appropriate entries in the Adopted Children Register accordingly to reflect the child's legal identity.***

**Signed, dated and delivered in chambers this 6<sup>th</sup> Day of November, 2019**

**R.E ABURILI**

**JUDGE**

**In the presence of:**

Mr. Oduol Adv. for the applicants

Mr. K'onyango Coordinator Children's Services Siaya

CA: Modestar and Winnie