



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

ADOPTION CAUSE NO. 17 OF 2018

IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001

AND

IN THE ADOPTION OF C K S (MINOR)

M M G.....APPLICANT

JUDGMENT

1. Pursuant to the provisions of Sections 158, 159 and 160 of the Children Act, Section 24 of the interpretation and general provisions Act Chapter 2 Laws of Kenya and Section 3A of the Civil Procedure Rules, M M G herein referred to as the applicant moved this court vide an Originating Summons dated 8th February 2018 but filed on 14th February 2018 seeking various orders as follows:

- (1) That H N K be appointed as guardian ad litem for Baby C K S.**
- (2) That the applicant M M G be authorized to adopt Baby C K S.**
- (3) That upon adoption, the child be known as C D G.**
- (4) That the Registrar General be directed to enter this adoption into the register of adoptions.**
- (5) That the child be presumed to be Kenyan citizen and be accorded all rights of immigration that accrue to Kenya citizens.**

2. Application is anchored on grounds on the face of it and a statement in support of the application together with annexures thereof.

3. The applicant herein is a Kenyan citizen born 1963 and a lawyer by profession managing her law firm. She is a single mother who has never been married but blessed with one biological child (daughter) one S who is now over 26 years old. Besides her legal work, the applicant is engaged in other assignments and responsibilities among them being Chairman [Particulars withheld] Ltd., Director [Particulars withheld] Bank Foundation, Director [Particulars withheld] Kenya Ltd, Director [Particulars withheld], Board member [Particulars withheld] Studies, Member Federation of Women Lawyers, Member [Particulars withheld] of Nairobi, Trustee [Particulars withheld] Foundation, Founder Trustee [Particulars withheld] Charitable Trust, Member [Particulars withheld]TTC and Member [Particulars withheld] Voters.

4. The motivation to adopt the baby herein is born out of the desire to share her life with others now that her only child Stephanie although on her path leaving their house needs a sibling hence the urge for the applicant to bring on board a new companion in the house.
5. The brief background surrounding the child is that the boy who is presumed to have been born on 17th December 2015 was found on 16th January 2016 having been abandoned in a coffee plantation at game rock area in the outskirts of Nyeri town. The child was rescued by good Samaritans who reported the incident to Nyeri Police Station vide OB 56/16/1/2016 and thereafter admitted at Nyeri Provincial General Hospital for medical attention. On 24th January 2016, he was discharged from hospital and then admitted at New life Home Trust after obtaining a committal order from Nyeri Children's Court vide P & C Case No. 21/2016.
6. Despite every effort by the police and Children Department in tracing the mother and or relatives, nothing positive came out of it. This is confirmed through a final letter from Nyeri Police Station dated 22nd July 2016 pursuant to Regulation 16 of the adoption Regulations 2005 (legislative supplement No. 21). Buckner Kenya Adoption Society held its case committee on 12th August 2016 and recommended the baby for adoption thus underscoring the principle of the best interests of a child. Accordingly, the baby was declared free for adoption in compliance with Section 156 (1) and a certificate S/No. XXX issued to that effect. On 31st July 2015, the baby was placed under the custody of the applicant for a continuous mandatory 3 months period after execution of a care agreement for care and control in accordance with Section 157 of the Children's Act.
7. On 5th March 2018, H Nd K was appointed guardian ad litem and the director children services ordered to file assessment and evaluation report within 45 days pursuant to a Chamber Summons application dated 8th February 2018 supported by an affidavit of fitness sworn by M/S Jane Kahenya. Prior to the hearing, the director Children Services, guardian ad litem and Buckner Kenya Adoption Services filed their assessment and evaluation reports filed on 3rd May 2018, 30th April 2018 and 15th March 2018 respectively.
8. According to the guardian ad litem and Buckner Adoption Society the applicant is fit to adopt the baby. However, the Director Children Services was non committal and left it to the court's discretion based on the observation that the baby is a male and the adoptive parent is a female thus contravening Section 158 (2) (b) of the Children's Act. That notwithstanding, both reports positively found the applicant as a dedicated Christian with no criminal record, financially stable and appreciates the consequences of the adoption.
9. I have considered the application herein. Issues for determination are: whether the baby is available for adoption; whether the applicant is suitable to adopt the baby and whether it is in the best interests of the baby to be adopted.
10. The baby herein was found having been abandoned at a coffee plantation by an unknown person. Efforts to trace the mother or any other relative have not been fruitful. This is clear from the report of the Children Department filed herein and a police final letter of 22nd July 2016 in which they confirmed that nobody has since laid claim over the baby. To that extent the requirement for consent in accordance with Section 159 (1) of the Children Act is dispensed with. Since placement into the care and control of the applicant on 31st July 2017 after being declared free for adoption on 12th August 2016, the baby has been in the custody of the applicant to date and therefore fully bonded with the adoptive family.
11. Under Article 14 (4) of the 2010 Kenyan Constitution, a child found in Kenya who is, or appears to be, less than 8 years of age, and whose nationality and parents are not known, is presumed to be a Kenyan by birth. Besides, Section 157 (1) of the Children Act provides that any child who is a resident within Kenya may be adopted whether or not the child is Kenyan citizen, or was or was not born in Kenya. The baby herein is for all purposes and intents, constitutionally and statutorily presumed to be a Kenyan citizen. Secondly, pursuant to Section 156(1), the baby who is presumed have been born on 17th

December 2015 is over six weeks the minimum age requirement for a child sought to be adopted. For the reasons herein stated, the baby is available for adoption.

12. Regarding the applicant's suitability to adopt the baby, she is a Kenyan citizen born 1963 translating to 57 years old which age properly falls within the age bracket of not less than 21 years old and not more than 65 years in compliance with Section 158(1) of the Children's Act. As stated earlier, the applicant is a lawyer earning a monthly income of 500,000/= and owns 1.9 hectares of land in Kwale. She has a clean criminal record as reflected in the certificate of good conduct; she is medically, physically, mentally and emotionally fit. Besides, her only daughter S A W has approved the adoption and offered to be the legal guardian.

13. With the above stated positive social, economic, moral and emotional standing attributed and or associated with the applicant, it is my finding that the applicant has met the necessary requirements save for the gender element in which she is a female and the baby is a male.

14. Regarding the hurdle of gender, Section 158 (2) of the Children's Act provides:

“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 order –

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

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

(c)

(d)

(e)

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 interest of the child to do so”.

15. 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 a child is the best interests of a child.

16. In the case of; **In Re Adoption of Baby JKM (2017 e KLR,** 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 applicant is willing and has special 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 being adopted has a sibling who is also adopted by the applicant.
- (v) Where 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 dies or become permanently incapacitated.

Similar position was held in the case of; In Re Baby J.I (minor) (2013) eKLR and In Re G.W (baby) (2008) eKLR.

17. 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.

18. 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.

19. Accordingly, application is allowed with orders:

- (a) That M M G be and is hereby authorized to adopt baby C K S who henceforth shall be known as C D G.
- (b) That the child's date of birth shall be 17th December 2015 and place of birth Nyeri County, Kenya.
- (c) That the Registrar General be and is hereby directed to enter this adoption into the register of adoptions.
- (d) That the consent of the biological parents who abandoned the baby be and is hereby dispensed with.
- (e) That the Director Immigration do issue a Kenyan passport to the baby.
- (f) That the guardian ad litem be and is hereby discharged.
- (g) That Stephanie A W K daughter to the applicant be and is hereby appointed as legal guardian in the event of death or incapacitation of the applicant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

Mr. Banji holding brief for Mrs. Kiguatha.....Counsel for the applicant

Edwin.....Court Assistant