



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ADOPTION CAUSE NUMBER 2 OF 2017

IN THE MATTER OF BABY M a.k.a. M M J.....THE INFANT

AND

J O N.....1ST APPLICANT

C M K.....2ND APPLICANT

RULING

1. In its judgment dated 31/7/2018, the Court made a finding that as per the report of the County Children Coordinator filed herein, an appropriate legal guardian needed to be appointed from a person who is not a blood relative of the applicants.
2. The County Children’s Coordinator Nakuru in his report dated 29/6/2018 stated;

“..... An adoption would therefore be in his best interest for he has lived with the prospective adoptive parents since October, 2016. Except, there are unresolved issues;

· The issue of appointment of Guardian ad litem and legal guardian as it is the same person E O N who is a brother and brother in law to the joint applicants respectively not done as per Section 160 of 164 of The Children Act, 2001. There will be no objectivity in acting as a friend of the child in the court process.

The Director Children’s Services opinion is that the person appointed for the two (guardian ad litem and legal guardian) cannot serve as a friend of the child successfully as there will be conflict of interest as a blood relationship exist with the applicants. A request be put that the honourable court requests that the issue to be properly addressed as per the law and then the Director Children’s Services will recommend for the adoption that J O N and C M K, joint applicants be allowed to adopt Baby Maxwell, a male child whom they propose to name him M M J. It is however to the discretion of High Court my Lordship/Ladyship to make the final decision.”

3. Mrs. Wanderi, counsel for the applicants submitted that the Children Coordinator relies on **Sections 160 and 164** of the **Children Act**. She asserts that she fails to see what prejudice arises to have guardian *ad litem* appointed a legal guardian. The report is in favour of the applicant. She asserts that the issue of “guardian *ad litem*” is now spent.
4. The provisions of **Section 160 and 164** of the **Children Act** do not expressly bar a guardian *ad litem* from being appointed a legal guardian at the conclusion of the adoption process.
5. One needs, however, to put into account the duties of a *guardian ad litem* as set out under **Section 160 (2), (a), (b), (c), (d) and (e)**. I reproduce the Section here;

“S. 160. Guardian ad litem for the child

(2) It shall be the duty of the guardian *ad litem* to—

(a) safeguard the interests of the child pending the determination of the adoption proceedings;

(b) investigate and apprise the court as to the circumstances pertinent to the adoption of the child in the prescribed manner;

(c) make recommendations as to the propriety of making any interim orders or an adoption order in respect of the child;

(d) intervene on behalf of the child and arrange for the care of the child in the event of the withdrawal of any consent prescribed by this Act;

(e) undertake such duties as the court may from time to time direct or as may be prescribed by the rules made under this Part.”

6. In a nutshell, those duties are geared towards protecting the interests of the minor during the adoption process.

7. There is therefore need to have appointed to this role, a person who would be objective and not inclined to be swayed by the wishes of the prospective adoptive parents. That is not to say that a blood relative of the prospective adoptive parents cannot suffice. It cannot be gainsaid, however, that a neutral person unrelated to the applicants would more probably than not exhibit more objectivity and be insulated from any bias that may favour the applicants against the best interests of the minor.

8. The children coordinator's view on the objectivity of the guardian *ad litem* who is a close blood relative with the applicants is not completely without merit.

9. Again, much as there is no legal provision barring a guardian *ad litem* being appointed a legal guardian at the tail end of the adoption process, in my view it would be a prudent measure to separate the two (2) roles. These two (2) roles are distinct and separate and each have distinct roles where one is to protect the interests of the child as the adoption process goes on while the other is to take care of the child in the event the adoptive parents die or are unable to take care of the child.

10. So which way this matter? Noting the far this matter has gone and alive to the fact that all reports including the report of the Children County Coordinator are in favour of the adoption herein, and noting that requiring the appointment of a new guardian *ad litem* or a legal guardian would result to a hearing de novo, and further noting that the legal guardian herein has consented to the appointment and emboldened by **Article 53(2)** of the **Constitution** which places the best interests of a child as paramount in every matter concerning a child, I proceed to review the judgment of Court dated 31/7/2018 and allow the originating summons dated 24/2/2017 in terms of prayers 5, 6, 7 and 8.

Dated and Signed at Nakuru this 11th day of October, 2018.

A. K. NDUNG'U

JUDGE