

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ADOPTION CAUSE NO. 275 OF 2014 (OS)

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

IN THE MATTER OF ADOPTION OF J J A (Minor)

BY

M A (APPLICANT)

JUDGMENT

1. The Applicant M A, is a Kenyan citizen and a widow. She has one child, R A. She wishes to adopt the child known as R W alias J J A, a minor of the female sex through the Originating Summons dated 25th November 2014. The Applicant indicates that she is the Kenyan Representative to Canada on the *[particulars withheld]*. She resides at Kilimani Dennis Pritt Road Nairobi.
2. The child who is the subject of this adoption was abandoned by her biological mother who absconded from Thika General Hospital on 26th October 1998, just after giving birth and left the baby in the ward. The matter was reported to District Children Officer who referred the child to New Life Home Trust for care and custody. On 1st December 1998, Resident Magistrate court at Thika committed the baby to New Life Home Trust, Nairobi.
3. In the year 1999, the child was discharged from New Life Home Trust and placed in the care of the Applicant and her husband (deceased) with a view to adoption. A late report of the child's circumstances was later made at Thika Police Station on 10th May 2006 where it was recorded vide Occurrence Book No.39. Since then the child has been in continuous custody and care of the Applicant.
4. Prior to the hearing of the adoption application, Little Angels Network, an adoption society prepared and filed a report in court. They also issued a certificate dated 30th July 2014 declaring the child free for adoption. The guardian ad litem, M/s. M K. K filed a report which was favourable and recommended the adoption of the child by the Applicant, to grow up in a family setting for reasons that this would enable her to attain a full harmonious development of her personality.
5. During the hearing for the appointment of the guardian ad litem, Mr. Omari, learned counsel for the Applicant submitted that it was not in the best interest of the minor to require her to give her consent at this point. This he urged was because of the trauma it would occasion the minor who believes that the Applicant and her late husband are her biological parents. The court granted Mr. Omari time to file formal submissions and authorities, if any, on the issue of the court's discretion to waive the minor's consent. On 19th January 2015 Mr. Omari filed the written submission and authorities.
6. In the written submissions Mr. Omari dwelt on the provisions of **Article 53(2)** of the **Constitution** and **Section 4(2)** and **(3)** of the **Children's Act No. 8 of 2001** which all reiterate that in all actions concerning children, whether undertaken by the public or private social welfare institutions, courts of law, Administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration. Mr. Omari submitted that the minor has known the Applicant and her husband as her biological parents and that a disruption at this age would cause her psychological trauma and may open her up to possible psychological abuse and seclusion by her peers. Mr. Omari did not address the court on whether it had or did not have the discretion to waive the requirement for the minor's consent.

7. The Director of Children's Services also filed a report dated 22nd January 2015, following independent investigations. I note that the report indicates that the record the Applicant has partially fulfilled the legal requirements for local adoption under the **Children Act No. 8 of 2001**, this is because although the child in this matter is aged 16 years her consent has not been sought, as required under **Section 158(4)(f)** of the **Children's Act 2001** due to the fact that she is away in school in Canada. For the same reason the Director of Children Services was not able to establish whether bonding had occurred between the child and the Applicant.

8. Whereas I entertain no doubt that it is in the minor's best interest to be adopted by the Applicant who is the only mother she has known all her life, and whose home will provide her with a conducive environment to grow up, I doubt that it is in this minor's best interest to be kept in the dark in view of the fact that everyone around her except herself and including her sibling knows that she is adopted. The requirement for the minor's consent is statutory and I note that **Section 158(4)(f)** of the **Children's Act 2001** is couched in mandatory terms. It leaves no room for the exercise of discretion by the court.

9. For the foregoing reason I order that the Applicant should move with alacrity to avail counselling services for herself and the minor and that thereafter the minor's status as a child under foster care will be disclosed to her with a view to obtaining her consent to the adoption proceedings.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **6th day of February 2015.**

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L. A. ACHODE

JUDGE