



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ADOPTION CAUSE NO. 28 OF 2013**

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

AND

IN THE MATTER OF: APPLICATION FOR ORDERS OF  
ADOPTION OF BABY M ALIAS L R BY N H N & O S

BETWEEN

N H N

O S.....JOINT APPLICANTS

AND

LITTLE ANGELS

NETWORK.....RESPONDENTS

**JUDGMENT**

By way of an originating summons dated 19<sup>th</sup> November, 2013 the two applicants namely N H N (hereinafter referred to as the 1<sup>st</sup> Applicant) and O S (hereinafter referred to as the 2<sup>nd</sup> Applicant) seek inter alia the following prayers:

“(a) **THAT N H N and O S be authorized to adopt BABY L M alias L R the minor child.**

(d) **THAT the name of BABY L M alias L R to change to L N.**

On 3<sup>rd</sup> December, 2013 the court approved the appointment of MS. J A M as ‘Guardian ad Litem’ in the matter. The application was heard by way of vive voce evidence on 10<sup>th</sup> December, 2013. The applicants are a couple of Norwegian citizenship who got married on 27<sup>th</sup> June, 2009. They live in a town known as Tomso in Norway and both are in paid employment. The couple have no biological child of their own due to the inability of the 2<sup>nd</sup> applicant to conceive a child. They therefore decided to pursue the option of adoption and have come to Kenya for that purpose.

The subject child is a boy aged about 3 ½ years. The child was born on 17<sup>th</sup> May, 2010 in Nyeri to a single mother. The child was later abandoned at Kenyatta National Hospital in November, 2010. Efforts

to trace the biological mother did not immediately bear fruit and after a report being made the child was eventually committed to the New Life Home Trust on 6<sup>th</sup> July, 2011. It is at this home that the applicants met the child and commenced the adoption process.

This being an adoption application made by foreign nationals it qualifies as an International Adoption. As such it will be determined with reference to the Children Act 2001 of Kenya as well as The Hague Convention on the Protection of Children and Co-operation in respect of inter country Adoption ('the Hague Adoption Convention'). Section 156(1) of the Children Act, 2001 provides:

**“156(1) No arrangement shall be commenced for the adoption of a child unless the child is at least six weeks old and has been declared free for adoption by a registered adoption society in accordance with the rules prescribed in that behalf.”**

The subject child having been born in May, 2010 is now about 3 ½ years old. He is well above the six week age limit imposed by the law. I have also seen the certificate serial No. [Particulars withheld] dated 20<sup>th</sup> February, 2013 issued by the Little Angles Network (which is a registered adoption society) declaring the child free for adoption (I will discuss more on this later) also seen the approval certificate dated 23<sup>rd</sup> January, 2013 issued by the National Adoption Committee of Kenya which fulfils the requirements of section 162(c) of the Children Act. Therefore it would appear that all the local legal prerequisites for adoption have been met.

Before approving any adoption the court must conduct an enquiry in order to satisfy itself with respect to the suitability of the applicants as adoptive parents. As stated earlier this is a couple who got married in the Church of Norway on 27th June, 2009. I have carefully perused all the reports annexed to this application. I have carefully read the investigative social report prepared by the Child Welfare office in Norway. It indicates that the applicants are both adults of sound mind and have no criminal tendencies. All relevant background information including the early childhood and family history of each applicant is also included. The 1<sup>st</sup> applicant was born and raised in Norway. The 2<sup>nd</sup> applicant though born and raised in Murmansk, Russia, moved and settled in Norway in 2003. She has acquired Norwegian citizenship and is fluent in the language. Both applicants maintain close ties with their parents/siblings. Both applicants are in stable paid employment. The 1<sup>st</sup> applicant works as a ships mate whilst the 2<sup>nd</sup> applicant works as a nurse. Attached bank statements indicate that they have sufficient funds to enable them care for the child. They have assured the court that upon adoption the child will be entitled to Norwegian citizenship and will be entitled like all other children in Norway to education and medical care.

It is clear that this is a couple who are in a stable, loving marital union but due to inability to bear a biological child, have opted to adopt a child in order to complete their family. Their commitment to this process is evidenced by the fact that the two have taken time off their jobs and have been in Kenya for several months in order to pursue the adoption. The social report indicates that the couple did attend an induction course for adoptive parents in their home country, thus they are well prepared and have a realistic view of what the process would entail. Last but not least I find that the fact that the 2<sup>nd</sup> applicant is a trained nurse is advantageous for the physical well-being of any child they may adopt. In their sworn testimony before me both the 1<sup>st</sup> and 2<sup>nd</sup> applicant confirmed that they fully understood and appreciated the legal consequences of an adoption order. They assured the court that if their application is allowed they propose to go back to Norway with the child and that they will accord him all the rights and privileges due to a biological child. I was able to observe the demeanour of both applicants as they appeared before me. They struck me as a mature couple in a stable marriage and I am convinced that both were genuine in their desire to take this child as their own and provide him with a home.

The subject child had been abandoned at Kenyatta National Hospital at the age of about six (6) months in the year 2010. The report from the police and from the Adoption Agency indicates that attempts to trace the birth mother who had been admitted with the child at the hospital proved futile. Eventually the matter was reported to the authorities and by way of a court order dated 6<sup>th</sup> July, 2011 the child was committed to the New Life Home Trust. He remained in the care of the Home until February, 2012 when he was

declared free for adoption. The applicants met the child in the home and formed the desire to adopt him. As a general rule adoption into a stable home environment is far more desirable than an uncertain future in childrens home which is institutional in nature. However, certain developments have arisen in this case which the court must put into consideration before making a final decision in the matter.

The major controversy in this case is firstly whether this child was actually free for adoption and secondly whether there has been a valid consent to his adoption by the applicants.

### **1. Was the subject child free for adoption?**

The Adoption Agency issued a certificate in February, 2013 declaring the child free for adoption. However, **MR. GITAU** the Kwale Chief Childrens Officer in this report filed in court on 20<sup>th</sup> December, 2013 raised strong reservations to the adoption and submitted that the child was **NOT** free for adoption on the basis that he had managed to trace the child's biological mother who had indicated that she was opposed to the adoption. It is important to look at the history of the child and his abandonment at the Kenyatta National Hospital.

Available documentation indicates that the child was born in May, 2010 in Nyeri to a single mother. Sometimes in November, 2010 the child fell ill and was admitted at Kenyatta National Hospital with the mother who gave her name to the hospital authorities as S W. [The lady who was traced by the childrens officer was named as L W as indicated in her identity card seen by the court]. Therefore at the time of admission the birth mother gave a false name to the hospital authorities. She later absconded and abandoned the child in the hospital. In a letter dated January, 12<sup>th</sup> 2011 from one '**Millicent Onutto**' the medical social worker at the hospital indicates that efforts by the hospital administration to trace 'S W' through the telephone contact which she gave proved futile. The said social worker writes '*I have contacted the mother severally but she has refused to come to Kenyatta to discuss the welfare of the child.*' Thus at this point the mother had no interest in the child and clearly did not want him back. She even went back home and informed all her relatives that the child had died. Clearly she wanted nothing to do with her baby at all. The matter was therefore referred to the Provincial Childrens officer at Nyayo House in Nairobi for further action. Following on this a letter was written to The Administrator – Newlife Children Home by the Ministry of Gender and Social Development. This report dated 27<sup>th</sup> October, 2011 was authored by one '*Rebecca Ndungu*' for the '*Provincial Director Childrens Services.*' This report concluded at page 2 that:

**“Since the baby was abandoned by the mother no one has come up to claim her [him]. The baby is in need of care and protection. I therefore request you to offer placement at your institution”**

All this time from the date she left the child in hospital to February 2012 the mother made no effort to reclaim her child. Even when contacted by the social worker from the hospital she reiterated that she did not want the child back. The child was admitted to New Life Children Home on 6<sup>th</sup> July 2011 about eight (8) months after he had been abandoned at the hospital. The matter had been reported to the police and efforts had been made to trace the mother. A letter from the chief of Kiru Location, Kiriaini in Mathioya District dated 14<sup>th</sup> February 2013 indicates that all his efforts to trace the child's mother/family through the elders and notices, churches and schools yielded no fruit. On 27<sup>th</sup> July 2011 the O.C.P.D. Kenyatta National Hospital Police Post issued a '*Final letter*' indicating that efforts made by all authorities to trace the child's mother had failed. Thus by a court order the child was committed to the children's home. It is clear that the birth mother having abandoned the child in the hospital had no desire to re-claim him. She went underground and even the police were unable to find her. The report from the Children's Department Kwale indicates that the mother went back to the hospital twice to reclaim her child but was threatened with arrest and so she gave up the quest. If this young lady really wanted back her child I have no doubt that she would have pursued him to the ends of the earth despite all obstacles. She did not report these alleged threats to police nor did she go to the Kenyatta National Hospital Police Post to report that she had been denied access to her child. She did not bother to follow up with the court or the children home in order to find the child. She simply abandoned the quest and continued with her life until

February 2013 when Mr. Gitau managed to contact her. Therefore from October 2010 to February 2013 the mother appears to have made no real attempt to get back her child. The court did summon **L W** the biological mother of the child to court. Upon examination she admitted that she did abandon her baby aged 6 months at Kenyatta Hospital. I had no doubt that she was indeed the child's mother because she was able to reveal that the child she bore had extra digits on both fingers and toes. This was an unusual characteristic of the child which only the mother would have known. L also admitted that upon abandoning the child she did return home and told her grand-mother who was her guardian that the child had died. She further admits that she has not seen her child since he was 6 months old. She is unable to give any logical reason for her actions. Her ambivalence coupled with the fact that she gave a false name to the hospital authorities persuades me that she had no real interest in living with or raising her child. Worse still the mother upon abandoning the child in hospital returned home to tell her relatives that the child had died. There can be no greater evidence that her intention was to cut all ties to her child. From the history I find that the subject child had been abandoned by the mother and was therefore a child in need of care and protection as provided by Section 119(1)(a) of the Children Act. The biological father has never featured at all in the whole narrative. A man who went to clear the baby's bill in the hospital declined to take the child home with him. It turned out that he was not the child's father but was merely co-habiting with the mother. I find therefore that on the basis of the abandonment for a period of close to two (2) years the child was actually free for adoption.

**(2) Does there exist valid consent to the adoption?**

Upto the point when this application was filed the birth mother had not been traced and the child having been abandoned there would have been no requirement that any consent be obtained. However with the information that the birth mother had been traced the court was obliged to enquire as to whether she would consent to the adoption. In the report filed on 20<sup>th</sup> December 2013 by the Kwale Chief Children's Officer, it was indicated that upon being traced the birth mother was adamant that she wanted her child back and that she would not consent to the adoption. However when she appeared before me in court on 22<sup>nd</sup> January, 2014 the birth mother L W was singing a totally different tune. She told the court that she was aware that the applicants wished to adopt her son and she stated that she has given her unreserved consent to the adoption. L further confirmed that she had voluntarily signed the consent form on 20<sup>th</sup> January 2014 in the presence of an Advocate. For clarity I feel it is important to repeat her responses verbatim upon being asked if she has given consent L stated:

**"I have now seen my child. He is well and in good health. I am aware that the applicants who are a couple from Norway now wish to adopt my son. I have met them. I have consented to the adoption. I only request that they look after my child well .... [my own emphasis]"**

The court went on to enquire from 'L' whether she fully understood the legal repercussions of an adoption order. She responded as follows:

**"I am fully aware of the legal implications of an adoption. I am aware that if the adoption is allowed I will lose all the rights of a biological mother to a child. I am not in a position to provide for all his needs ..."**

The court did also enquire from 'L' whether she was giving her consent voluntarily and of her own free will. She responded:

**"I have not been compelled to give my consent. I have not been offered any inducement to give my consent. It is my own decision, I believe my child will have a better life. I confirm that I have signed the consent form on 20/1/2014. I have signed it voluntarily ....."**

Under examination by the Children's Office, L says:

**"I will not later reclaim the child".**

From her testimony I find that the mother 'L' fully appreciates the consequences of an adoption order. She is under no illusion of the fact that by her consent she is relinquishing all parental rights to the child. She is also aware that she cannot later re-claim the child. It would appear that despite her earlier reluctance having met the applicants and having seen how well the child has thrived with them she has decided to consent to the adoption. She indicates that she herself is not able to provide for the needs of the child. From my own examination of the mother I am satisfied that she has unequivocally given her consent to this adoption thereby fulfilling the requirements of Section 158(4)(a) of the Children Act 2011. With respect to the biological father as mentioned earlier he has not featured at all in the life of this child. L herself makes no mention of him. The man who appeared at Kenyatta National Hospital was **not** the child's father but merely a man who cohabited with L. He disappeared never to be seen again. It is clear the biological father has abandoned the child, has not been traced and has had no presence in the child's life, therefore I dispense with any need for his consent.

Finally in deciding this matter I am obliged to adhere to Section 4(2) of the Children Act 2011 which provides:

**“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration: [my emphasis]**

Therefore in deciding whether or not to allow this application for adoption I am obliged to give priority to the 'best interests' of the child. This is a child who was abandoned shortly after birth. He was placed in an institution where despite the fact that his physical needs would be fulfilled, it is unlikely that his social and emotional needs would be fully met. Whilst the ideal is that a child be raised in a home with his/her biological parents, I am not fully persuaded that this is possible here. The biological mother has vacillated once too often in this matter and appears to be unable to provide for her child. Even if the court were to decline the application the child would return to the children's home before any attempt at re-bonding with the mother could be undertaken provided of course that she would step up and take back her child. Having abandoned him once before it is not entirely unfathomable that she would disappear again and leave him in the home. I am in full agreement with the Addendum to the report filed by the Adoption Agency that this child has already been through a number of transitions (from mother, to hospital, to children's home to adoptive parents) which may negatively impact his future social development and may cause him to have attachment problems in future. Any further disruption to his young life ought to be avoided. The child has been living with the applicants for the past four (4) months in a home environment where both a mother and father figure are present in his life. He has by all reports adapted well. Indeed this was evident to me when the parties appeared before my court. The child was a happy, healthy boisterous 2 year old. He has clearly bonded with the applicants and is able to utter a few words in Norwegian. To pluck him away from this warm environment back to the children's home will only make him regress in his development. The child now requires stability in his life. I am firmly of the opinion that the best interest of this child will be served by allowing his adoption by the applicants. Based therefore on the foregoing I hereby grant this application for adoption in terms of prayers (c) and (d) of the Originating Summons dated 19<sup>th</sup> November 2013. No order on costs.

**Dated and delivered in Mombasa this 10<sup>th</sup> day of February 2014.**

**M. ODERO**

**JUDGE**