



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**ADOPTION CAUSE NO. 1 OF 2018 (ORIGINATING SUMMONS)**

**IN THE MATTER OF THE CHILDREN'S ACT, 2001**

**AND**

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

**AND**

**IN THE MATTER OF BABY CO.....CHILD**

**AND**

**EAO AND LOA.....JOINT APPLICANTS**

**JUDGMENT**

1. The joint applicants herein **EAO** and **LOA** [full names withheld] lodged in this court an originating summons dated 6<sup>th</sup> August 2018 seeking for orders that: **WMO**[full name withheld] be appointed as guardian litem of **BABY CO** [full name withheld] second, that the Children's Department Office Siaya County investigates the applicants' fitness to adopt Baby **CO** third, that the applicants be authorized to adopt baby **CO** and that the Court be pleased to make any other orders it deems necessary.

2. The applicants swore a joint affidavit and statement in support of the Originating Summons. They deposed that they are Kenyan citizens but with citizenship of the United States of America and that they were born in 1969 and 1965 respectively as per copies of their identity cards annexed to the joint affidavit sworn on 4th August 2018. They also exhibited copy of their marriage certificate showing that they are in a monogamous marriage celebrated under **Cap 151 of the Laws of Kenya-African Christian Marriage and Divorce Act** [now repealed].

3. They also exhibited consents of proposed guardian ad litem, **WMAO**, **DAO** the paternal grandfather and guardian to the child and reports by the guardian *ad litem* **WMAO** on the applicants herein who are also her biological parents. They also annexed certificates of fitness of the said proposed guardian *ad litem*, affidavit by **DAO**, the biological father to the deceased father of the child thus the grandfather and guardian to the child for dispensation with consent of parents of the child owing to the fact that the said parents are since deceased and that therefore the child is a total orphan under the care of his paternal grandfather. The second applicant **LOA** is also the younger brother to the child's grandfather.

4. The applicants further annexed a placement file from a registered Adoption Society, **Kenya Children's Home Adoption Society**, declaring the child **CO** free for adoption and detailing the process that the applicants have gone through to be declared fit to adopt the child.

5. When the matter was placed before me for directions on 29/9/2018, I directed the Siaya County Children's Officer to file a comprehensive report on the applicants' suitability to adopt the child. The said report signed by Ugenya/Ugunja Sub County Children's Officer **Mr. M. Obiero** was filed in court on 26<sup>th</sup> October, 2018.

6. The applicants are Licensed a Practical Nurse and Engineer respectively. They have been married since 1995 under the African Christian Marriage and Divorce Act Cap 151[now repealed] of the Laws of Kenya and have been blessed with their own three biological children namely **BRO** born in 1996, **SDA** born in 1990 and one **WMO** born in 1992. The latter is the legal *guardian ad litem* of the child vide an order of this court made on 19<sup>th</sup> December, 2018 and that the applicants wish to adopt the child herein who is a boy and who has been in their custody for a period exceeding three months from August 2017 as confirmed by the Adoptive Society duly registered as such under the Children Act, 2001, Cap.141 Laws of Kenya.

7. The affidavit further states that the biological parents of the child, **POO** and **FDA** passed on, on 15th December 2012 and 6<sup>th</sup> October 2015 respectively. The applicants live and work in the United States of America and have dual citizenship of Kenya and the U.S.A.

8. In a report compiled by the said Adoption Society filed in court on 4<sup>th</sup> February 2019 declaring baby **CO** free for adoption, the latter is said to have been born on **10.03.2010**.

9. On 16<sup>th</sup> May 2018 the Adoption Society issued a Certificate declaring the child free for adoption following Case Committee meeting approved **vide Case No 1464** pursuant to section 158 of the Children's Act, 2001.

10. The applicants herein were interviewed by the Adoption Society on several occasions and the Children's Officer Ugenya/Ugunja Sub county where their ancestral home is and where the second applicant owns a parcel of land known as **North Ugenya/Sega/3823** measuring 0.16 Hectares, where they have constructed their own house and that the family of the biological parents of the child met and decided to give the child a chance to live with adoptive parents who would take him in as their own biological child.

11. Recommendations from the Adoption Society are that the applicants are prepared to adopt the child as they have experience in raising their own three children. That they also have sufficient means to care for their family. That they have shared their desire with immediate family members who have consented to the applicants adopting the child herein without conditions. As earlier stated, the father to the child was a paternal nephew to the second applicant herein

12. This Court had the opportunity to see, observe and talk to the child **CO** in court and the Child relates well with his prospective adoptive parents and is without any manifest medical or health concerns. He was active, healthy and very close to both prospective adoptive parents.

13. The adoptive parents have no history of any medical complications that can hinder them from giving the child whom they are related to by blood as a grandson quality upbringing. They annexed copies of medical reports for their other three children and grandchildren who are healthy.

14. The applicants are also said to be committed Christians and the second applicant is a Board Church member of St Stephen's Anglican Church. They promise to bring up the child in a Christian and God fearing setting. They are described by the adoption Society as good people with strong social, moral and spiritual ethics ready to continue to provide fully for the well-being of the child and family and have the best interests of the child at heart. That they are hardworking, humble and of integrity.

15. The applicants are also recommended and commended highly by the **KidsFirst Adoption Services, LLC, Indianapolis** vide letter dated 9<sup>th</sup> March, 2018 and **Kern Road Mennonite Church** for being passionate about children and highly recommending the applicants to be adoptive parents of the child.

16. The attached criminal citation search shows that the applicants have no past criminal record. They have stable income with strong parenting skills having raised their own biological children and are ready for any challenges that face every other parent. The Children's Officer was satisfied that the general environment in which the child lives was conducive for his upbringing. The Children's Officer assessed the applicants as people who have positively embraced the adoption process; that they too assured him that they have the support and encouragement from their respective families and friends. Based on the findings and observations, the

Children's officer recommended that the applicants be allowed to adopt the child.

17. I have heard the applicant's application, seen the applicants in court and also observed the child **CO** who was in court and very fond of his prospective adoptive parents. I had occasion to hear from the adoptive parents and the court appointed guardian ad litem as well as **Miss Mercy Anyango** the Children's Officer Ugenya/ Ugunja Sub County of Siaya County.

18. I visually observed how the child freely related with his prospective adoptive parents and 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 medical insurance, a roof over his head, he is clothed and educated. More importantly, the child has inheritance rights over whatever they own in equal measure as their own biological children.

19. I am satisfied that the applicants can meet the child's needs that may need financial input. My appreciation of their financial capabilities arises from the affidavits filed in court that they hold a bank account at Cooperative Bank of Kenya and in the U.S.A. Their pay slips were also exhibited. Their combined monthly income are said to be about Kshs 1. 4 million Kenya Shillings and their expenditure is about 1.05 million.

20. The Children's Officer attended court in person to confirm the position in their report and the reports from the Adoption 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 his 'mother' to his 'father'

21. 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.

22. 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.”*

23. 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.

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

*“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.”*

25. Under Subsection (2) of the said 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. These proceedings were held in utmost confidentiality. No names were called out and owing to the tiny chambers at the High Court, the public were cleared from the courtroom before proceedings were conducted in camera. Prior to clearance of the courtroom, the applicants and the child were accommodated outside the courtroom and were only called in after the court was fully cleared of other people.

26. One of the pre-requisites for such an adoption order is that before any arrangements for adoption are commenced, 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’s Act).

27. 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 him in 2017, he was about 7 years old. A Certificate declaring the child free for adoption was duly issued on 16<sup>th</sup> May, 2018.

28. 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 on record points to the fact that baby **CO** was born in Kenya and he was a resident of this country at the material time.

29. 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.”*

30. The applicants’ Originating Summons was filed in court on 3rd September 2018 by which time the applicants had been in continuous care and control of the child for close to one year from 2017.

31. It has also been noted that both the child and the applicants have been assessed by a duly registered adoption society and the office responsible for the Children’s Services in the Sub county of Ugenya/ Ugunja, within Siaya County and 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.

32. Section 165(2) (c) of the Children Act sets **65** years 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 49 and 51 respectively. Accordingly, the applicants are eligible adoptive parents as far as the requirement as to age is concerned.

33. 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.

34. 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 have abandoned, neglected, persistently failed to maintain or ill-treated the child.

35. There is a consent duly signed by the biological paternal grandfather of the baby **CO** who is a minor confirming that the child’s biological parents died as shown by the annexed death certificates.

36. 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 and annexed search results 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. They have also deposed that they have no adverse interests to those of the child. In my humble view, therefore, the applicants herein have satisfied this court that neither of them falls short of the requirements of this section in the sense that they have not been charged and convicted of any of the specified offences.

37. In the circumstances, I find and hold that the applicants **EAO** and **LOA** 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.

38. I am also persuaded that the applicants 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 him with shelter, clothing, food, education and, most importantly, the parental care and protection that he needs and deserves.

39. I am therefore inclined to conclude that besides the fact that 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 the favour of the applicants herein **EAO** and **LOA**

40. For the foregoing reasons, the applicants' originating summons dated 6<sup>th</sup> August 2018 is allowed in the following terms:

- 1. WMO be and is hereby appointed as guardian ad litem of baby CO;*
- 2. The applicants EAO and LOA are authorized to adopt Baby CO who shall henceforth be named as COO [COO] with full name to be withheld in the publication of this Judgment;*
- 3. The Registrar General is hereby ordered to make the appropriate entries in the Adopted Children Register accordingly to reflect Baby CO., the child's legal identity;*
- 4. A formal Adoption Order as required by the Children's Act do issue.*

Orders accordingly.

Signed, dated and delivered in chambers at Siaya this 20<sup>th</sup> Day of December, 2019

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Ms. Sharon Onyango Advocate h/b for Mr. Okello Advocate for the applicants

The applicants

The Child C.O.O.

CA: Modestar



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