



**In re Adoption of Baby ET alias BMM (BTON) (Adoption Cause E009 of 2024) [2024] KEHC 12211 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12211 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
ADOPTION CAUSE E009 OF 2024**

**G MUTAI, J**

**SEPTEMBER 27, 2024**

**IN THE MATTER OF AN APPLICATION FOR ORDERS  
OF ADOPTION OF BABY ET ALIAS BMM (BTO’N)**

**BETWEEN**

**CO’N ..... 1<sup>ST</sup> APPLICANT**

**JSH ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CHANGE TRUST ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. CON and JSH are married. They got married on 16<sup>th</sup> April 2016 in Nyali, Mombasa. I shall hereafter refer to them as the “Joint Applicants”. The Joint applicants do not have biological children of their own. They previously adopted EMN, who passed away on 21<sup>st</sup> October 2020 and NASN.
2. The Joint Applicants are both Christian missionaries working for [particulars withheld] Church, Mombasa, and [particulars withheld] River Christian Church, respectively.
3. They are desirous of adopting the child Baby ET alias BMM (BTO’N).

**The Child**

4. According to the information provided to the Joint Applicants by Mahali Pa Maisha and the Change Trust, the child, BMW, was taken to the Athi River Children office on 16th November 2023 by his biological mother, VMK, and offered for adoption. Her reason for doing so was the inability to provide for the child. The incident was reported at Athi River Police Station vide OB No. XXXX/2023. The child was admitted to Mahali Pa Maisha on 17<sup>th</sup> November 2023.



5. On 29<sup>th</sup> November 2023 the Children Court at Mavoko issued a committal order in Care & Protection Cause No E059 of 2023 *vide* which custody of the child was placed with Mahali Pa Maisha.
6. On 22<sup>nd</sup> December 2023, the Change Trust declared the child free for adoption. On the same day, the child was placed in the custody of the Joint Applicants, where she is to date.

#### **The Originating Summons dated 9th May 2024**

7. Vide the said Summons, the Joint Applicants seek the following orders:-
  1. That CON and JSH be authorized to adopt Baby ET alias BMM (BTN (the minor child));
  2. That the child Baby ET alias BMM (BTN (the minor child) is a Kenya citizen;
  3. That the Registrar General be directed to enter the name of the child in the Adopted Children Register in the prescribed form and to issue a certificate to that effect;
  4. That KOO and NLO be appointed as Legal Guardians;
  5. That the honourable court be pleased to make any other orders it deems fit and appropriate; and
  6. That cost of the Summons be provided for.
8. The Originating Summons was supported by statements in support and annexures attached thereto.

#### **Appointment of the guardians ad litem**

9. The Joint Applicants filed, together with the Originating Summons, the Chamber Summons of even dated *vide* which they sought to have Mr DM and Ms SWM appointed as the guardians ad litem in respect of these proceedings.
10. I heard the said Summons in open Court on 4<sup>th</sup> July 2024. Being satisfied as to their suitability I appointed Mr DM and Ms SWM as the joint guardians ad litem in respect of these proceedings. I directed that they file the requisite report within 30 days of the said date. The hearing of the main Originating Summons was slated for 6<sup>th</sup> August 2024.

#### **Evidence of the Witnesses**

11. The Originating Summons was heard on 6<sup>th</sup> August 2024. Five Witnesses testified. I will set out their testimonies below.
12. The first Witness was Ephraim Mutero Njama of the Change Trust, an adoption society. He testified that he is the managing trustee of the said adoption society. It was his testimony that the child was declared free for adoption on 22<sup>nd</sup> December 2023. Change Trust also assessed the Joint Applicants and found them to be suitable. Mr. Njama recommended the adoption.
13. Ms Njeri Mwangi was the second witness. She works for the Children's Department of the Mombasa County Government. She testified that her office conducted a social inquiry by visiting the home of the Joint Applicants on 29<sup>th</sup> July 2024 and compiled the report dated 30<sup>th</sup> July 2024. It was her evidence that she observed that the Joint Applicant had bonded well with the child. She also observed that the Joint Applicants have another adoptive child. Although the 2<sup>nd</sup> applicant is a foreigner, she recommended the adoption of the child by the Joint Applicants as they do not intend to relocate and also because the couple already has another adoptive child.



14. Mr DM is the guardian ad litem. He lives in Nyalı and is a businessman in the construction sector. He testified that he visited the proposed adoptive parents and established that the Joint Applicants had bonded well with the child. The baby had also bonded well with Baby N. He observed that the Joint Applicants live in a large, spacious house with four bedrooms and that the children were well provided for. Mr Mugambi recommended the adoption.
15. Mr CON was the fourth Witness. He is a missionary working for Folks River Missionary Church. The second applicant is his wife. He testified that he was aware that adoption is permanent. He further testified that he would inform the child of his adoption once he came of age. They intend to bring the child up in a Christian background.
16. JSH was the last Witness. She, just like her husband, is a missionary. She stated that they intend to adopt the child. J and C do not have children of their own. She testified that they loved the child very much. J is aware that adoption is permanent. She averred that the child fitted well into their family setting and got along very well with Baby N. She, too, is ready to inform the child that he was adopted once he is old enough. Although she is an American, she is in the process of obtaining Kenyan citizenship to become a dual citizen.

### **Analysis and Determination**

17. I have considered the application herein, the documents supporting it, and the evidence of the various witnesses. The issues that emerge for determination are whether the child is available for adoption, whether the Applicant is fit to adopt the baby, and, most importantly, whether the adoption is in the child's best interest.
18. I have already set out the circumstances under which the child was found. The child, BMM, was taken to the Athi River Children's Office on 16th November 2023 by his biological mother, VMK, and offered for adoption. Her reason for doing so was the inability to provide for the child. No one knows who the father of the child is. He never played a role in the child's upbringing. The mother, on the other hand, consented to the adoption. In the circumstances, therefore, the need for the father's consent pursuant to sections 186(8) and 187 of the *Children Act* 2022 is dispensed with. I am guided by the case of In *re HN (Baby)* [2020] eKLR, where the court stated:-

“As there is nobody laying claim over the baby, the requirement for consent is hereby dispensed with pursuant to Section 159(1) of the *Children's Act*. In view of the above consideration, it is my finding that the child is available and suitable for adoption.”
19. Regarding the baby's nationality, the evidence adduced shows that his biological mother offered him up for adoption shortly after birth. The biological mother is a Kenyan citizen holding identification card number 37XXXX221. Article 14(1) of the *Constitution* of Kenya, 2010 states that a child whose father or mother is a Kenyan at the time of the child's birth is a Kenyan citizen. Given this provision, the child herein is a Kenyan citizen by birth.
20. Regarding age, the child is above six weeks and below 18 years, which provision falls within the age bracket of any adoptive baby under Section 184 (b) of the Children Act, 2022. Further, Section 185(1) of the said Act states that any child who is a resident of Kenya, whether born in Kenya or not, is eligible for adoption. I have no doubt the child is fit for adoption.
21. Concerning the Joint Applicants' suitability, the 1<sup>st</sup> Applicant is a Kenyan citizen by birth, aged 43. The second applicant is an American citizen currently in the process of obtaining Kenyan citizenship. She is 37 years old at the time of this judgment, which ages places them within the age bracket of not



less than 25 years nor more than 65 years for an adoptive parent in compliance with Section 186(2) of the Children Act, 2022. Although there is a moratorium on foreign adoptions, and despite the second applicant not being a Kenyan citizen, it is my view that an adoption order ought to be issued as it would be in the child's best interest to do so. Firstly, the couple intends to remain residents of Kenya. Secondly, since they have another adoptive child, Baby T will benefit from the love and affection of a sibling while growing up. From the records that I have seen, the Joint Applicants have the means to take care of the child. They have no criminal records. Since the placement of the child into their custody, the child has fully bonded with them. They understand the consequences of adoption and know that once an adoption order is made, it is permanent.

22. Consequently, I do not doubt that they meet the requirements to adopt the baby. I am guided by the case of *In re B (Baby)* [2018] eKLR, where the court stated:-

“I am of the considered view that weighing all factors and the evidence placed before me, the applicants are of sufficient ability to bring up the child and to furnish her with appropriate support and maintenance within their resource base available to them.”

23. On the question of whether the adoption is in the best interests of the baby, I am guided by Article 53(2) of the Constitution of Kenya, 2010 and Section 8(1) and (2) of the Children Act, 2022 which underscores the best interests of a child as the primary consideration before making any decision concerning a baby.

24. Further, the court in the case of *In re MA (Baby)* [2021] eKLR stated:-

“This court, in the case of *In re B (Baby)* [2018] eKLR, held that the purpose of Kenya’s Constitution and Children’s Act is to protect and promote the welfare of Children by providing them with stable family units. The fundamental concern, therefore, in every adoption cause is the best interest of that very child.”

25. The mother of the child gave him up for adoption. She, therefore, needs basic necessities like food, shelter, education and clothing. She has fully integrated with the Joint Applicants. It is obviously in the child's best interests that this adoption application is allowed. I am guided by the case of *In re IK (Child)* [2020] eKLR, where the court stated:-

“She needs parental care to grow up as a normal child with emotional and physical protection, which the applicants have stepped in to offer. In that regard, the applicants meet the legal requirements for adoption. Further, all reports recommended adoption for the benefit and well-being of the child. As the Constitution and the law state, in all matters concerning a child, the child's best interests are paramount.”

## **Disposition**

26. In my view, the Originating Summons has merit. Consequently, I issue the following orders:-

1. I declare the child Baby ET alias BMM, a Kenyan citizen by birth;
2. I dispense with the consent of the biological father to the adoption as Baby ET alias BMM was given up for adoption by the birth mother shortly after birth. The whereabouts of the biological father are unknown;
3. I authorize CON and JSH to adopt Baby ET alias BMM;
4. I declare that Baby ET alias BMM shall henceforth be known as BTO’N;



5. I appoint KOO and NLO as the legal guardians of BTO’N and entrust them with his care in the event the Joint Applicants become deceased or are otherwise permanently unable to take care of him before he attains the age of majority; and
  6. I direct the Registrar General to make an entry recording the adoption order made herein and the date of birth of BTO’N as being 9<sup>th</sup> November 2023 in the Adopted Children Registrar as provided for by section 201 of the Children Act, 2022;
  7. The guardians ad litem, DM and SWM, are hereby discharged.
27. I make no orders regarding costs as this is a non-contentious adoption cause.
28. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms Mwashushe, for the Joint Applicants; and

Arthur - Court Assistant.

