



**In re Baby AM (Adoption Cause E006 of 2022)
[2023] KEHC 2434 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADOPTION CAUSE E006 OF 2022**

G MUTAI, J

MARCH 24, 2023

**IN THE MATTER OF AN APPLICATION FOR ORDERS
OF ADOPTION OF BABY AM ALIAS CM ALIAS CM
BY JOO AND SKM – THE JOINT APPLICANTS**

BETWEEN

JOO 1ST APPLICANT

SKM 2ND APPLICANT

AND

LITTLES ANGELS NETWORK RESPONDENT

JUDGMENT

1. The applicants JOO and SKM filed the Originating Summons dated April 6, 2022. The said Originating Summon is expressed to be brought under Sections 11, 154, 156, 157, 158, 159, 160, 161, 163, 164 and 170 of the Children Act, 2001 and Article 14 (4) of the Constitution of Kenya, 2010. The applicants seek the orders I set out verbatim below.
 - a. Pursuant to Article 14 (4) of the Constitution of Kenya, 2010 and section 11 of the Children Act, 2001, the honourable court be pleased to declare the baby AM alias CM alias CM a Kenya citizen by birth;
 - b. Pursuant to the provisions of sections 159 of the Children Act, 2001 this honourable court be pleased to dispense with the requirement of the consent to the adoption as required by section 158 of the Children Act, 2001;
 - c. The applicants JOO and SKM be authorized to adopt baby AM alias CM alias CM;
 - d. Upon the making of the adoption order the child be known as JGO;



- e. Upon the making of the adoption order JOO be appointed legal guardian of the child as provided by the provision of section 104 of the *Children Act*, 2001;
 - f. Upon the making of the adoption order the Registrar General do make an entry recording the adoption and the estimated date of birth of the child as August 3, 2015 in the Adopted Children Register as provided for by Section 170 of the *Children Act*, 2001; and
 - g. The costs of this application be costs in the cause.
2. The applicants annexed to their application supporting affidavits and reports which the court has had the benefit of looking at in detail. I shall refer to the said documents in the succeeding paragraphs of this judgement
 3. The Applicants also filed a Chamber Summons application dated April 6, 2022 *vide* which they sought to have ENW of Jomvu-Aldina, Mombasa appointed as the guardian-ad-litem in respect of this adoption cause and upon her appointment for her to prepare statutory report in terms of Rule 9 of the *Adoption Rules*, and to submit the same within 30 days.
 4. The Chamber Summons application aforesaid also sought an order compelling the County Director of Children Services, through the Children Department, Mombasa to make a home visit and to prepare the relevant social enquiry in respect of this adoption and to submit the same to the Deputy Registrar within 30 days.
 5. The said application came up for hearing on May 18, 2022. The proposed guardian-ad-litem testified before the court and affirmed that she would be the eye of the court and protect the interest of the child during the adoption process. Being satisfied that she was suitable the court issued an order appointing ENW as the guardian-ad-litem and directed her to prepare a social enquiry report within 30 days. The Director of Children Services was also ordered to file his within a similar period. Hearing was fixed for July 20, 2022.

Factual Background

6. The applicants JOO was born in Siaya on December 5, 1952. His wife, the second applicant, SKM was born on February 14, 1975 in Machakos. The two got married on April 17, 2010 at ACK Makande Hall. They are clergymen, , being Bishop and Pastor receptively of [Particulars Withheld], Church Shimanzi, Mombasa. They do not have children of their own. Although the second applicant got pregnant thrice she was not able to carry each of the pregnancies to term and miscarried on each occasion. They take care of their departed niece's children and look after them as if they were their own and wish to adopt the child so as to expand their family.
7. In support of the application they produced their personal identification documents, certificates of good conduct and evidence of their ability to take care of AM alias CM alias CM.
8. Regarding the child AM alias CM alias CM documents filed in this court show that he was born on August 3, 2015 at the [Particulars Withheld] Hospital Mombasa. The mother abandoned him at birth, by absconding from the ward, and not returning to claim him. The Department of Children Services was notified. On 1st October, a place was found for him at Baby Life Rescue Centre, Mombasa.
9. On December 10, 2015 the Tononoka Children Court committed the child to Baby's Life Rescue Centre, Mombasa for a period of 3 years.
10. The adoption agency in this mater declared the child free for adoption *vide* a certificate issued on December 16, 2016 (serial No 001840).



11. The child was placed with the applicants in 2018. The applicants and the child bonded well. After 6 days of daily visitations the applicants were allowed to take him home on August 30, 2018 after signing Foster Care Agreement. The child has been with the applicants since. From the photographs which were provided it appears clearly that the child is very happy and enjoys being with the applicants.
12. I have seen the reports of the County Children Coordinator dated August 8, 2022 and filed in court on September 6, 2022 and that of the guardian-ad-litem dated June 17, 2022. The two reports are unanimous that the adoption of the child by applicants would be in the best interest of the child and recommended it.
13. The main Originating Summons was heard on July 20, 2022 when Grace Ekubi of Little Angels Network testified. The applicants also testified. The forth witness was the guardian-ad-litem, ENW.
14. The first witness presented her report which gave the history of this case. It was her testimony that the child was happy with the applicants and that the adoption would be to his best interest.
15. The applicants testified that they both understood the effect of the issuance of the adoption order. They confirmed that they know that it is of permanent nature and thus irreversible even if the child being adopted becomes difficult later in his life. They affirmed their readiness to take care of him to the best of their ability and to raise him up in a loving way in a Christian home.
16. The guardian-ad-litem produced her report dated June 13, 2022. She testified that the child has been enrolled in school. The adoptive parents, she observed, were financially stable and lived in a secure and child friendly environment which is conducive for bringing up morally and spiritually upright children.
17. The applicants last witness was a children officer from Mvita Sub County, EKT. EKT testified that a home visit was made to the home of the applicants. The report he produced shows that the applicants and the child have bonded well. Although it was observed that the 1st Applicant was over the age limit adoption by both Applicants was recommended for two main reasons, firstly that the adoption process begun before the 1st Applicant exceeded the 65 years age threshold and secondly it would be in the best of the child.

The law

18. Part XIV of the [Children Act, 2022](#) makes provision regarding adoption. I shall refer to the portions of the said part which are relevant to this cause. Section 185 (4) (b) provides that “the following children shall be eligible for adoption ... (b) a child who has been abandoned or whose parents or guardian’s whereabouts cannot be traced within a period of 1 year”. Evidence which has been produced before this court confirms that the child was abandoned. I have also seen the certificate declaring the child as being free for adoption.
19. Section 186 (2) of the [Act](#) provides that “the court shall not make an adoption order in any case unless (a) the applicant has attained the age of twenty-five years but is not above the age of sixty-five years, and(b) the applicant, or both applicants in a joint application, is more than twenty-one years older than the child”.
20. The 1st Applicant is 70 years old. The second Applicant is 47 years old. Although the 1st Applicant has surpassed the age limit I note that this adoption Application was started when he was less than 65 years. The reports which have been produced before me recommend this adoption despite the handicap on the part of the 1st applicant.



21. Section 187 of the Act gives the court power to dispense with the consent of the parents of the adoptive parents in certain circumstances. One such circumstance is where the child was abandoned. I have seen the letter written by Makupa Police Station dated March 1, 2017, the documents dated August 26, 2015 from the Coast General Hospital, together with the Abandoned Child Discharge Form dated September 30, 2015, the Admission Form dated December 10, 2015 and the letter of the Sub County Children Officer dated September 28, 2015. I am satisfied that the child was abandoned. That being the case, and as the law gives me that discretion, I dispense with the requirement for parental consent.
22. I must return to the issue of qualification of the 1st applicant. He is presently 70 years old. This court is permitted by section 186 (5), for reasons to be noted, to allow an adoption by and applicant or joint applicants, one or both of whom, is 65 years and above. In this case the two applicants are spouses in a happy marriage. They are both evangelical clergyman and have fostered children who reside with them. The child the subject of this proceedings is very happy with them as shown by the reports that were produced. The second applicant is 47 years old and is in very good health. I am convinced that the proposed adoption is in the best of the child and that there are special circumstances in this matter that call for the court not to be a bar to the adoption or indeed to the happiness of the child.
23. *In Re SK & SSM* (Adoption Cause No E004 and E003 OF 2020 and E001 OF 2021) (Consolidated) [2021] KEHC 465 Nyakundi J stated in paragraph 25 as follows; -
- “In the case at hand, the condition attached to non-grant of an adoption to an applicant aged 65 years is hereby varied due to the existing extenuating circumstance of the application. The hallmark of this exercise of this power is permissible in view of the consideration that the 1st applicant has lived with the children as the care giver the importance of his marriage relationship with the 2nd applicant”
24. I am required by Article 53(2) of the *Constitution* of Kenya, 2010 to consider the best interest of the child. This constitutional requirement is buttressed by the provision of section 8(1) of the *Children Act*, 2022 which states that;
- “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies: -
- a. the best interest of the child shall be the primary consideration;
 - b. the best interest of the child shall include but shall not be limited to considerations set out in First Schedule”.
25. The child would benefit from the love and affection of the joint applicants. The applicants have the capacity to bring up the child in a loving secure environment together with other children the applicants are fostering. In the kind of environment, the applicants provide he shall grow up well. It is therefore my finding that the proposed adoption is in the best interest of the child AM alias CM alias CM.
26. To secure the child’s interest I appoint JOO as the legal guardian, should the applicants be unavailable or otherwise unable to take of the child, before he attains the age of 18 years.

Disposition

27. The upshot of the foregoing is that I find merit in the Originating Summons filed herein. Adoption of the child by the applicants would be in his best interest. Consequently, I order as follows: -



- a. Pursuant to Article 14(4) of the Constitution of Kenya, 2010 I hereby declare that the child AM alias CM alias CM as a Kenyan citizen by birth;
- b. The applicants JOO and SKM are hereby authorised to adopt baby AM alias CM alias CM;
- c. Child AM alias CM alias CM shall hence forth be known as JGO;
- d. JOO is hereby appointed as the legal guardian of the child JGO; and
- e. The Registrar General is hereby ordered to make an entry recording the adoption and the estimated date of birth of the child as August 3, 2015 in the Adopted Children Register

I make no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MARCH, 2023.

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GREGORY MUTAI

JUDGE

In the presence of: -

Winnie Migot – Court Assistant

Ms Ngugi for the Applicants

