



**In re LAO (Child) (Adoption Cause E019 of 2022)
[2023] KEHC 17585 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADOPTION CAUSE E019 OF 2022
G MUTAI, J
APRIL 28, 2023
IN THE MATTER OF THE CHILDREN ACT, 2001
AND
IN THE MATTER OF LAO (CHILD)
AND
IN THE MATTER OF AN APPLICATION FOR ORDERS OF
ADOPTION OF LAO (CHILD) BY VSJJ AND LMW AKA LMW
BETWEEN

BETWEEN
VSJJ 1ST APPLICANT
LMW AKA LMW 2ND APPLICANT
AND
LITTLE ANGELS NETWORK RESPONDENT**

JUDGMENT

1. The Joint Applicants herein moved this Honourable Court vide originating summons dated 30th September 2022 seeking orders that:-
 - a. Pursuant to Article 14(4) of the Constitution of Kenya 2010 and Section 11 of the Children Act, 2001, this Honourable Court be pleased to declare LAO (child) a Kenyan citizen by birth;
 - b. Pursuant to the provisions of section 159 of the Children Act, 2001 this honourable court be pleased to dispense with the requirements of the consent to the adoption as required by the provisions of section 158 of the Children Act, 2001;



- c. The Joint Applicants VSJJ and LMW aka LMW be authorized to adopt LAO;
 - d. Upon the making of the adoption order, the child to be known as LAOVS;
 - e. Upon the making of the adoption order WOW be appointed legal guardians of the child as provided for by the provisions of section 164 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 14th November 2005 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 application is supported by the averments in the statement in support thereof sworn on 30th September, 2022. The 1st Applicant is a male adult Dutch national while the 2nd applicant is a female adult Kenyan citizen born in 1973 and 1977 respectively. The 2nd Applicant is the biological mother of the subject child herein. The couple has also adopted a one year and four months old baby boy called L who was placed with them for bonding in September, 2022 for three months as per the adoption regulations. The motivation to adopt the child is that the male applicant wishes to have the child bear his last name which will make it easier for them as they wish to secure the child's future in terms of inheritance and to facilitate her travel outside the country.
 3. Regarding their occupation, the 1st Applicant is a businessman while the 2nd Applicant is a shipping agent working with [Particulars Withheld] Mozambique. They have monthly incomes of Kes.300,000.00 and Kes. 398,474.00 respectively and have assets in Kilifi County and Mombasa County as well as shares and savings with Span Freight Sacco.
 4. The 2nd Applicant has no objection to her husband, the 1st Applicant, adopting her daughter. The child's father's present whereabouts are unknown.
 5. In its meeting held on 24th November, 2021, the case committee of the Kenya Children's Homes Adoption Society declared the child free for adoption and issued a Certificate S/No.812 to that effect.
 6. AMKK was on 26th January,2023 appointed as the guardian ad litem in respect of these proceedings. The County Director of Children Services, through the Children Department, Mombasa and guardian ad litem were directed to file their respective social inquiry reports within 30 days.
 7. Preceding the hearing, the Director Children Services through the County Children Coordinator Mombasa County filed his report dated 6th March, 2023 opposing the adoption on the grounds that the adoption is limited by the existing moratorium on foreign adoptions as the male applicant is of foreign nationality. The guardian ad litem filed her report dated 21st February, 2023 recommending the adoption.
 8. During the hearing the Joint Applicants urged the court to allow the adoption and stated that they understood the consequences of adoption and the fact that adoption order, once granted, is permanent.
 9. The Joint Applicants, through their advocate, Mercy Ngugi & Associates Advocates, filed written submissions on 10th March 2023. The said counsels reiterated the averments of the Joint Applicants, made in the Statement in support of the application, and submitted that the best interest of the child is a paramount consideration in matters of this kind and urged the court to consider the same in its judgement. The Applicants' Counsel referred the court to the following cases, [In re Adoption of J W \(Child\)](#) [2019] eKLR, [In re RW aka RWB\(Minor\)](#)[2018] eKLR and [In re ASJ\(Minor\)](#)[2021] eKLR



for the proposition that Courts have in appropriate cases permitted adoption by foreign applicants, notwithstanding the moratorium on foreign adoption, where the best interest of the child demanded that that be done.

10. I have considered the application herein, documents in support thereof and evidence of the various witnesses who testified before me. The issues that emerge for my determination are; whether the child is available for adoption, whether the Joint Applicants are fit to adopt the child and most importantly whether the adoption is in her best interest. I must note that the application has been brought under the repealed Children's Act 2001 whereas it was filed after the commencement of the Children's Act 2022. This Honourable Court will therefore rely on the Children's Act, 2022 in its determination as this latter legislation is the one that governs these proceedings.
11. The 2nd Applicant has been in the custody of the child from the time she bore her. Since getting married to the 1st Applicant on 20th April 2017 he has played the role of a father to the child. The biological father has not communicated nor shown any interest in her. His present whereabouts are unknown. I therefore dispense with the need for the consent of the biological father as I am of the opinion that doing so in the circumstances of this case is permissible, fair and just under Section 187 of the Children Act, No.29 of 2022. 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 Act. In view of the above consideration, it is my finding that the child is available and suitable for adoption.”
12. Regarding the baby's nationality, it is clear that she was born here in Kenya to the 2nd Applicant and thus she is a Kenyan citizen by virtue of Article 14(1) of the Constitution of Kenya, 2010 which provides that “a person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen’.
13. The child is above 6 weeks and below the age of 18 years and thus falls within the age bracket of any adoptive child pursuant to Section 184 of the Children Act, 2022. Further Section 185 does recognize that any child who is resident in Kenya, whether born in Kenya or not, is eligible for adoption. I have no doubt the child is fit for adoption.
14. Concerning the Joint Applicants' suitability, the 2nd Applicant is a Kenyan citizen. The 1st and 2nd Applicants are aged 50 and 46 years respectively which places them under the age bracket of not less than 25 years or more than 65 years for adoptive parents (see Section 186(2) of the Children Act, 2022). The Joint Applicants have been described as financially stable as they are respectively a businessman and an employee of a reputable shipping company, with each earning over Kes.300,000.00 per month. They own several assets, which fact I have previously alluded to. From the record and also my observation during the hearing they are caring, loving couple with no criminal record. They also understand the consequences of adoption and that it is permanent. The 1st Applicant understands that he will have obligations to the Child that he cannot resile from once the adoption order is issued.
15. The case for allowing this adoption cause would ordinarily be overwhelming. There is however a moratorium on foreign adoptions. Given the said moratorium can this Court permit the proposed adoption? This is the question I must answer as it is determinative of this matter.
16. The 1st applicant is a Dutch national while the 2nd is a Kenyan citizen. Both are residents of Mtwapa Kenya. They got married in 2017 and have since played the role of a father and mother to the child herein. The 1st Applicant is in fact the only father the child has known. He has taken care of her as his own child since she was seven years old. I observed them during the hearing and noted the close



bond they enjoyed. The child has consented to the adoption via consent sworn 30th September 2022. I interviewed on the said consent and she was categorical that she would like to be adopted by the 1st Applicant.

17. The County Children’s Coordinator opposed the adoption on the grounds that it’s limited by the existing moratorium on foreign adoptions seeing as the male applicant is of foreign nationality. Faced with a similar issue the court in the case of *In re ASJ (Minor)* stated that: -

“This court is aware of the moratorium barring the adoption of Kenyan children by Foreign Nationals. However, in special circumstances that moratorium can be waived. This is a case where the Foreigner (2nd Applicant) is legally married to a Kenyan citizen (1st Applicant) under the Kenyan law. He is now seeking to adopt the biological child of his Kenyan spouse. The couple who are resident in Kenya have made this country their home. There is no indication that they intend to relocate in the near future. In my view as this is a kinship or Family Adoption, special circumstances exist to warrant the waiving of the moratorium.”

18. Further the court in the case of *In re CC (Child)* [2017] eKLR stated: -

“The instant case is not an international nor inter country adoption. This is a kinship adoption to which the 2nd Applicant is a biological mother to the child in question and she has been married to the 1st Applicant since 2006 and the marriage has been blessed with two biological children. The applicants are residents of Kenya and that the subject child has been staying with both applicants with the 1st Applicant being recognized as the father for all purposes and intents. The biological father who has since given consent having returned to Italy his home country.”

19. In the case of *In re KR (Baby)* [2015] eKLR where the court stated:-

“This court is of the opinion that the child’s best interests will be served by this adoption as the applicants will be able to provide a home and a family in which the child will grow and develop. The applicants shall assume all the parental rights and duties of the child’s natural parents and shall treat the child as if he was born to them. The adoption order shall be final and binding during the child’s lifetime, and the child shall have the right to inherit their property.”

20. I therefore find and hold that the proposed adoption is in the best interest of the child. The Applicants have their home in Kenya. The child is 17 years old and will soon be an adult. She needs an identity and a sense of belonging that the adoption order will provide. Since the 2nd Applicant is her mother I, in agreement with the authorities I have quoted, find that her adoption is a local adoption. That being the case there is legal no impediment to her adoption.

21. Accordingly, the application is allowed with orders that: -

- a. LAO (Child) is declared to be a Kenyan citizen by birth;
- b. The Joint Applicants are authorized to adopt LAO (Child) who shall henceforth be known as LAO VANS;
- c. WOW is hereby appointed as the Legal Guardian of the child in the event the adoptive parents are unavailable;



- d. The Registrar General is directed to make an entry recording the adoption, and the date of birth of the child as 14th November 2005, in the Adopted Children Register;
- e. The guardian ad litem is discharged.

DATED, DELIVERED AND SIGNED IN MOMBASA THIS 28TH DAY OF APRIL 2023 VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Mango holding brief for Ms Ngugi for the Joint Applicants

Winnie Migot – Court Assistant

