



**In re SJ (Baby) (Adoption Cause E018 of 2022)
[2023] KEHC 4044 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 4044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
ADOPTION CAUSE E018 OF 2022
MW MUIGAI, J
APRIL 28, 2023
IN THE MATTER OF CHILDREN ACT 2001
AND
IN THE MATTER OF BABY SJ**

IN THE MATTER OF

**DLB 1ST APPLICANT
JSB 2ND APPLICANT**

JUDGMENT

1. The applicants herein,DLB – Republic Of Kenya Foreigner Certificate No. xxx - Tel No. 0719xxxx And JSB - Republic Of Kenya Foreigner Certificate No.xxxx – Tel No. 0734xxxx both American Citizens but residents of the Republic of Kenya (“the Applicants”) sought by their application granted orders by this Court to adopt Baby SJ (hereafter “the child”).
2. Vide Originating Summons application dated 18th day of October, 2022 the applicants sought the following orders, that the requirements of section 186 (8) (a) of the *Children’s Act* 2022 be waived as provided for under section 187 (1) of the Act; that EGO be appointedEN as Guardian *Ad Litem* in this case; that the Applicants be authorized to adopt baby SJ and the baby be known as SJB ; that EN be appointed the Legal Guardian of the child; that the Director of Children’s Department to investigate the case and file a report; that the Registrar General be ordered to make in the adopted Children’s register and entry recording the adoption in accordance with the particulars set out in the schedule attached hereto.
3. EGO was appointed by this court as Guardian ad Litem on 9/02/2023.
4. The applicants herein are American Citizens but Residents in Kenya since the year 2007. They are husband and wife and were married on June 19, 1982in the state of Indiana USA as per attached copy of Marriage Certificate. The applicants are currently residents of Kitengela Area within Kajiado



- County. The applicants are both Directors of [Particulars withheld]. The Applicants annexed the following documents in support of their application; Letter from Kilimani Police Station to Thomas Barnado Children’s Home and hospital documents Committal order from Kajiado Children’s Court Medical reports/certificates for both the 1st and 2nd applicants, Copies of foreign certificates for both applicants Certificate of declaring a child free for adoption Serial No. xxxx. Guardian’s letter of consent Copy of Birth certificates for their two previously adopted children Guardianship Order from CM’s Court Machakos Children’s Court Case No. E012 of 2021 Copies of ID Card for both the Guardian Ad item and Legal Guardian respectively.
5. The child (SJ) who is the subject of the present adoption proceedings was born on June 11, 2016 at Frepals Nursing Home – Kibera by Pauline Wendi. The said Pauline Wendi after delivery abandoned/ left the infant under the care of the nurse on duty to seek Mpesa services but did not return. The report of abandonment was reported at the Kilimani Police Station by a Nurse namely Freda F. Chesatik Otieno Ename vide OB No. 19/22/2016.
 6. The minor was admitted at Mahali pa Maisha Infant Rescue Centre on June 22, 2016. He was 11 days old and was given the name SJ . The minor was committed to the care of the home through the Children’s Court at Kajiado vide Committal Case and Protection Case No.15/2016. A final Police letter from Kilimani Police Station dated January 11, 2017 indicated that nobody had claimed the child since he was abandoned and that the search for his kin has been fruitless. Mahali Pa Maisha also reported that during his stay in the institution, no relative had ever turned up to claim the child. The minor was freed for adoption by the Buckner Kenya Adoption Society Services in a meeting held on February 22, 2017 vide a Certificate declaring a child free for adoption Serial No. 0179.
 7. The following documents were availed from Mahali Pa Maisha for baby SJ ;
 1. Initial police letter from Kilimani Police station OB No.19/22/2016
 2. Pathology Lab Reports indicating HIV status as Negative.
 3. Admission form to the Home
 4. General progressive report from the home
 5. Social enquiry report form Sub-County Children’s Officer, Langata
 6. Committal order to the home care No. 15 of 2016
 7. Final police letter from Kilimani Police Station dated 11/01/2017
 8. Growth record sheet for the baby from the home.
 9. Copies of the child’s clinic
 8. Pursuant to section 185 (2) (b) of the *Children Act*, 2022, the Kenya Children’s Home Adoption Society, the relevant Adoption Society, prepared and filed in court a favorable report in respect of the proposed adoption of the child by the applicants. Another report in respect of the proposed adoption of the child by the applicants was prepared by the Director of Children’s Services, and this report was similarly in favor of the proposed adoption. The Guardian *Ad Litem*, EGO also filed the statutory report in which he noted that the proposed adoption of the child by the Applicants would be in the best interests of the child.
 9. The Change Trust Adoption Society filed their Social Inquiry and Home Study Report dated October 5, 2022. Mr. Muteru Njama, a Managing Trustee of the Change Trust Adoption Society appeared incourt on 21/03/2023 in respect of this Adoption. He told the court that the Society assessed the



- Adoptive parents who have had the custody of the child. The said child has unique challenges and the child has proper medical care. The Agency report contains family and professional background information of the Child's Adoptive Parents. According to the report the applicants made an Adoption Application to Kenya Children's Home Adoption Society on January 25, 2022. The applicants operate a registered Organization in Kenya under the name CSI Ministries as a Trust and in 2011 they started an Infant Rescue Centre and the same was registered as a CCI where they have been directors to date. The applicants were taken through the relevant interviews, a home assessment was carried out as well as the pre-placement counselling. The applicants were found eligible. A Case Committee sitting on October 5, 2022 considered their application and approved them as adoptive parents.
10. Prior to the placement baby Jeremiah was declared free for adoption by the Society's Case Committee on October 5, 2022 where a freeing certificate Serial Number 0179 was issued in compliance to section 184 (1) (a) of the *Children's Act 2022*.
 11. The applicants have been married for 40 years and have been in full time ministry for 22 years. They have two adults biological children namely CB born in the year 1984 married with two sons and NB born in the year 1990 who is also married. The applicants in the year 2012 adopted two children previously namely EB born in the year 2010 and SB born in the year 2011. The applicants herein are adopting Baby SJ, the child subject of these proceedings who has special needs for they felt that every child needs and deserves their very own family hence needed to open their home to needy children. The applicants children, siblings and close friends are aware of the intended adoption and have been very positive and supportive.
 12. The applicants live in the [Particulars withheld] area of Kajiado near the [Particulars withheld] Farm in a four bedroomed brick bungalow situated on seven acres piece of land. The house has electricity and water (a private borehole which has ample supply of water for the house and farming) and an onsite generator that provides power in case of power blackout. They produce fresh fruits, vegetable as well and also have a tilapia pen and chicken pen. The applicants are employed by the Ministry and have a monthly coming income of Kshs.560,000/- per month. The applicants own a vehicle in the US and have mutual funds and various investments. Financial bank statements are attached as proof of their financial capability. The applicants have fulfilled all the legal requirements to adopt to wit; being married for over three years, not over 65 years of age, they have been duly registered for more than ten years, the child has an unique health condition which the applicants have the capacity to facilitate medical and cognitive development care and the applicants have adopted two other children from Kenya and have remained under the supervision of the Director of Children's services.
 13. On observation during the interview sessions and prior meetings it was observed that the Applicants and the minor have bonded well with the minor. The Adoption Society recommended Adoption.
 14. The Director of Children Services through a Report dated 20/03/2023 in respect of the proposed adoption of the child by the applicants was prepared by Emily Kimanzi Machakos Sub County Children Officer. Emily Kimanzi appeared in court on 21/03/2023 in respect of these proceedings and stated that the applicants have been in Kenya since 2006 and have applied for citizenship hence Kenya is also their home. They have 2 biological children, 2 grandchildren and 2 adopted children. They have a well-furnished 4 bedroomed house. The applicants practice farming in their 7 acre piece of land and have constructed/established a rescue center for infants. The minor has bonded well with the Applicants and also have a good relationship with the other siblings and family members. The 2 biological children of the Applicants have given their written their consents in regard to this adoption.
 15. The report contains family background information of the Child's Adoptive Parents. The applicants are desirous to assist a needy child especially the minor in this matter who has a peculiar condition.



The minor is said to have three life threatening conditions and is under specialized care all around. The applicants have begun this treatment plan abroad and have travelled with him to the USA after a lower court granted them his guardianship a male child hence their motivation towards this adoption. During the home visit it was observed that the applicants have bonded well with the minor and they live comfortably in their house and have the required amenities. The applicants have no criminal record. The applicants are socially and economically able to take care of the child. The adoption was recommended.

16. The Guardian ad Litem, EGO filed his Report dated October 18, 2022 in support of these Adoption proceedings. He stated that he has known the applicants since the year 2017. He has visited the family and observed that the minor has interacted well with the applicants as well as the other children of the family. The applicants have support from both the immediate and extended family which have fully welcomed the minor as part of the family. The Guardian Ad litem recommended the adoption.
17. The Legal Guardian EN filed her affidavit of Legal Guardian sworn on March 22, 2023 stating that she has known the applicants for more than 12 years. She works as a social worker at Mahali Pa Maisha Infant Rescue Centre. She understands the needs and gravity of the care the minor needs and is aware of the medication he has received and continue to receive under the care and expense of the Applicants. She understands her duties as a legal guardian in case of any eventuality.

Analysis

17. Section 183 (4) (c) *Children Act* provides "foreign adoption" means an adoption in relation to which —
 - (i) the adopting parent or parents are Kenyan nationals with dual citizenship;
 - (ii) the adopting parent(s) are foreign nationals whether or not they reside in Kenya;
 - (iii) the adopting parent or parents are not Kenyan nationals but are biologically related to the child; or
 - (iv) the adopting parent or parents were once Kenyan nationals but have lost their nationality by operation of the law of the host country to which the prospective parent or parents have a nationality.
18. In High Court (Family Division) Adoption Cause No 137 of 2016 *In the matter of Baby PM* [2017] eKLR the court outlined the Letter of 26/11/2014 referenced Moratorium on Inter Country and Resident Adoption from Ministry of Labour Social Security & Services to the Director of Children Services and Adoption Agencies confirming indefinite moratorium on intercountry adoptions pending review of *Children Act* and related laws and proposals from Counter Trafficking in persons Advisory Committee. This was followed by the Gazette Notice of February 2015 that established Expert Committee with terms of reference and thereafter another Gazette Notice of 4/12/2015. It is not clear if/when/how the lifting of moratorium took place.
19. This court is alive to the jurisdiction of the High Court vide article 165 *CoK* 2010 and section 183(1) *Children Act* 2022. The court is conscious of the law; article 53 *CoK* 2010, section 8 of *Children Act* 2022 and the *UN Convention on the Rights of the Child & African Charter on the Rights & Welfare of the Child* all amplify on the best interests of the child.
20. Although, there is the amended *Children Act* 2022, sections 191-192 of the *Children Act* that list the prerequisites to qualify foreign adoption, a number of issues arise herein that impede the process and outcome of the foreign adoption herein.



21. This court considered contents in all the statutory reports that have been filed in respect of the proposed adoption of the child by the Applicants that have recommended that this court allows the adoption of the child.
22. The court finds the applicants are from documents and reports presented Christians, law abiding with no criminal record and have fostered the child. However, in light of the legal background of foreign adoptions and new/amended [Children Act](#), the court has evaluated the facts of this adoption and finds as follows;
 - a. The applicants have not presented documents of their missionary work in Kenya; any documents confirming the existence, scope of work of Christian Services International Ministries in Kenya and the appointment of the Applicants as Directors and remuneration from [Particulars withheld] .
 - b. The Applicants have not presented legal documents of registration and/or proprietorship of Mahali Pa Maisha Rescue Home as prescribed by section 63 (3) of [Children Act](#) 2022 and the extent of the Applicants involvement/running of the home.
 - c. The applicants submitted through the Adoption Agencies Change Trust & Buckner Kenya documents relating to the child and Buckner Kenya Adoption Services presented Certificate Declaring the Child Free for Adoption, they have not produced a medical report outlining the child's special needs and/or unique health condition which the Applicants have the capacity to facilitate medical and cognitive development including treatment abroad for this court to consider.
 - d. Form C5- The court Order from the Children's Court at Kajiado committing the child SJ to Mahali Pa Maisha is not the Court Order compared to CM's Court Guardianship Order attached.
 - e. Compliance with section 191 (d) of [Children Act](#) 2022 reports from their Home Country to confirm that the Applicants have been authorized and recommended as persons who are fit, including being morally fit and financially capable, to adopt a foreign child by a competent government authority or court of competent jurisdiction in the country where they intend to reside with the child immediately after the making of the adoption order.

Disposition

1. On the basis of a careful examination of the documents presented before this court at this stage, this Court has exercised judicial discretion to decline granting of adoption of the child to the Applicants at this stage under section 186(7) [Children Act](#) 2022 pending compliance with the above raised pertinent issues.
2. The Guardianship order granted to the Applicants over the child issued on 21/5/2021 remains in force as a valid and legal order of the court.

It is so ordered.

DELIVERED SIGNED & DATED IN OPEN COURT AT MACHAKOS THIS 28TH DAY OF APRIL 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:



NO APPEARANCE - FOR THE APPLICANTS
GEOFFREY - COURT ASSISTANT

