



**In re SM (Minor) (Adoption Cause E101 of 2021)
[2023] KEHC 17377 (KLR) (Family) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

ADOPTION CAUSE E101 OF 2021

MA ODERO, J

APRIL 28, 2023

**IN THE MATTER OF APPLICATION FOR ORDERS
OF ADOPTION OF SM (MINOR) BY JNM AND TCM**

**IN THE MATTER OF SECTION 154, 158 (4), 159, 160,
169 AND 170 (1) OF THE CHILDREN’S ACT, 2001**

IN THE MATTER OF SECTION 3A OF THE CIVIL PROCEDURE ACT (CAP. 21)

IN THE MATTER OF SM (MINOR)

BETWEEN

**JNM 1ST APPLICANT
TCM 2ND APPLICANT
LKM 3RD APPLICANT
JMM 4TH APPLICANT**

AND

LWN RESPONDENT

AND

LITTLE ANGELS NETWORK INTERESTED PARTY

JUDGMENT

1. Before Court is the Originating Summons dated August 16, 2021 by which the Applicants JNM and TCM seek the following orders:-



1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Spent
 6. That the consent of the Respondent who is the biological mother of the minor, the Respondent be dispensed with pursuant to Section 159 of the Children's Act.
 7. That the 1st and 2nd Applicant herein be authorized to adopt SM (a minor)
 8. That upon the making of the adoption order, the Registrar General do make an entry recording the Adoption as provided for by Section 170 of the Children Act 2001.
 9. That there be no orders as to costs".
2. The application was supported by the Affidavit of even date sworn by the Applicant.
 3. The Applicants are a married couple who reside in the USA. They have three children aged 16 years, 7 years and 5 years. They wish to adopt the subject child who is a girl child aged seventeen (17) years old.
 4. The subject child is a niece to the 1st applicant being the child of the 1st Applicant's brother. The child has all along lived with and been cared for by her paternal grandparents who are the parents of the 1st Applicant. The child grandparents were awarded legal custody of the child vide a court order dated November 30, 2011 in Children's Case No 21 of 2011.
 5. The Applicants state that the child's grandparents who are her legal guardians are now elderly and are no longer in a position to continue caring for the child. They wish to adopt the child in order to enable her continue with her education and to continue providing for the child's needs.
 6. The Applicants both confirm that they understand the legal implications of an adoption order. They undertake to accord to the subject child all rights due to a biological child.

Analysis And Determination

7. I have considered the application for adoption, the evidence adduced in support thereof as well as the various reports filed in court.
8. The prerequisites for before an adoption order can be made are set out in section 184 (1) (a) and (b) of the Children's Act 2022: -
 - (1) A person shall not commence any arrangements for the adoption of a child unless—
 - (a) the Council, in accordance with the rules, has declared the child free for adoption; and
 - (b) the child has attained the age of six weeks.”
9. The subject child was born on August 23, 2005. A copy of the child's Birth Certificate appears as Annexure SM 1 to the Originating Summons. The child is now aged seventeen and a half (17½) years old and is well above the six (6) week age limit provided for in the law.



10. Section 156 (1) of the *Children Act* 2001 requires that a Certificate declaring that a child Free for Adoption be availed to the court before any application for adoption may be considered. This matter was filed in August, 2021 when the *Children Act* 2001 was in force.
11. No Certificate declaring the child Free for Adoption has been availed in this matter by any Registered Adoption Agency. Instead the Little Angels Network wrote a letter dated August 4, 2021 citing the reasons why they felt unable to issue the required Certificate (more on this later)
12. Notwithstanding the absence of the Certificate this court would be guided by the Constitutional Provision that in all matters concerning a child the best interest of the child shall be the paramount consideration.
13. The *Constitution* of Kenya 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) provides as follows:

“(2) A child best interests are of paramount importance in every matter concerning the child”.

Section 8 of the *Children’s Act*, 29 of 2022 which provides as follows:

 - (8) 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 interests of the child shall be the primary consideration;
 - (b) The best interests of the child shall include, but shall not be limited to the consideration set out in the First Schedule. [own emphasis]”
14. The question then is whether this adoption will serve the best interests of the child.
15. The duty of this court is to analyze the evidence on record to determine whether the Applicants are suitable adoptive parents. The 1st Applicant is a Kenya Citizen whilst the 2nd Applicant who is the husband of the 1st Applicant is an American Citizen. The couple resides in the USA. They have three (3) children. However, couple have not annexed any proof of their marriage. Neither have the couple annexed any documents to indicate how they would be able to support the child in the USA. In the absence of documentation proving financial ability of the Applicants the court is unable to assess, their suitability as adoptive parents.
16. Moreover, the Applicants have not annexed any documents e.g Clearance Certificate to enable the court determine whether or not they have a Criminal Record.
17. In the premises I find it superfluous to continue to assess this application. I therefore, dismiss the application for adoption. The Applicants are at liberty to file a fresh application once the relevant documents are made available.

DATED IN NAIROBI THIS 28TH DAY OF APRIL 2023.

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MAUREEN A. ODERO

JUDGE

