



**In re LMG (Child) (Adoption Cause E184 of 2022)  
[2023] KEHC 18227 (KLR) (Family) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18227 (KLR)

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

**FAMILY**

**ADOPTION CAUSE E184 OF 2022**

**DKN MAGARE, J**

**APRIL 27, 2023**

**IN THE MATTER OF**

**RMW ..... 1<sup>ST</sup> APPLICANT  
BGC ..... 2<sup>ND</sup> APPLICANT**

**Provisions of the law barring adoption of Kenyan children by foreign nationals declared to be unconstitutional.**

Reported by John Ribia and Collins Opwora

***Children Law** – adoption – adoption by a foreign national – rights of the child – where one parent was Kenyan but could not adopt due to not meeting the age requirements – where the other parent was a foreign national who was estopped from adopting a Kenyan child by the moratorium banning the adoption of Kenyan children by foreigners – where the parents were married - whether the marriage between a Kenyan parent who did not meet the age requirements for the adoption of a child in Kenya and a foreign national who could not adopt a child due to the moratorium placing a ban on persons of foreign nationalities adopting Kenyan children, created a union capable of allowing both to adopt a Kenyan child – Constitution of Kenya, 2010, articles 2 and 53; Children Act (cap 141) sections 183, 186, and section 17 of the Seventh Schedule to the Children Act.*

***Constitutional Law** – rights of the child – best interest principle – adoption of children – constitutionality of provisions of the law barring the adoption of Kenyan children by foreign nationals - constitutionality of statutes – constitutionality of section 17 of the seventh schedule to the Children Act – constitutionality of the moratorium on intercountry adoptions and resident adoptions issued on November 26, 2014 - whether the moratorium placing a ban on persons of foreign nationalities adopting Kenyan children and section 17 of the Seventh Schedule to the Children Act that provided for that ban were unconstitutional for not justifying the limitation of the rights of the child.*

**Brief facts**

The petitioners made an application for the adoption of an abandoned baby that a bodaboda rider had found. They had been formalized as foster parents after the minor had been placed under their care with subsequent prayers for granting and confirmation as the legal guardians vide a court order. The couple comprised a local



and a foreigner who were married. They had petitioned the court for adoption orders, but the Children Act 2022 did not expressly provide for adoptive parents comprising a local and a foreigner. The court had to decide whether the adoption process would proceed under Kenyan law or international law.

### Issues

- i. Whether the moratorium placing a ban on persons of foreign nationality adopting Kenyan children and section 17 of the Seventh Schedule to the Children Act that provided for the ban were unconstitutional for not justifying the limitation of the rights of the child.
- ii. Whether the marriage between a Kenyan parent who did not meet the age requirements to be able to adopt a child in Kenya and a foreign national who could not adopt a child due to the moratorium placing a ban on persons of foreign nationalities adopting Kenyan children created a union capable of allowing both to adopt a Kenyan child.

### Held

1. Section 215(c) of the Children Act provided for the Cabinet Secretary to make regulations safeguarding and regulating international adoption. Section 17 of Schedule 7 to the Children Act provided that the terms of the moratorium on intercountry adoptions and resident adoptions issued on November 26, 2014, shall apply to matters relating to intercountry adoptions under the Children Act. That meant that resident adoptions remained under the Children Act.
2. Section 183 of the Children Act, in defining foreign adoptions, left out a scenario where one parent was a Kenyan national and another was a foreign national. The adoption was not intercountry. By operation of section 186(e), the Kenyan national could not apply for adoption as a sole male applicant. By dint of section 186(6), the female applicant, being a foreign national, could not apply as a sole applicant. However, the joint application qualified them because the defects in the sole male applicant's status were cured by the marriage. On the other hand, the marriage to a Kenyan national stabilized the adoption as a local adoption in spite of the female applicant being a foreign national.
3. The government issued a moratorium in 2014 as a transitional measure, providing that children who were to wait for 9 years could not be adopted by foreign applicants. That flew against the provisions of article 53(2) of the Constitution, which provided that a child's best interest was of paramount importance in every matter concerning the child.
4. The moratorium was meant to last until the review of the Children Act and other related laws, including measures meant to counter trafficking in persons. The Children Act had been enacted with several safeguards. Section 17 of the Seventh Schedule to the Children Act, which imposed the same provisions of the moratorium, was unconstitutional. An Act of Parliament could not import ministerial directions as law.
5. In a country where adoption was almost taboo, it was foolhardy to insist that children found in Kenya ought to be adopted by Kenyans who were not willing to adopt and who still antagonized adoption. Article 21 of the Convention on the Rights of the Child recognized intercountry adoption as an alternative means of child care.
6. To the extent that the moratorium had not been legislated to specifically state that it was limiting rights under article 53(2) of the Constitution, as required by article 24, it did not form part of the law of Kenya. The moratorium dated November 24, 2014, did not state that it was a limitation on article 53(2) of the Constitution. It was not expressly justified in the Children Act as a limitation contemplated under article 24. The moratorium against intercountry adoption was unreasonable and unjustifiable in an open and democratic society based on human dignity, equality, and freedom. That was because it did not provide alternatives for the placement of children who were viable for adoption but could not find suitable parents. Further, it could not be justified based on article 24(1) of the Constitution.
7. It was the duty of the State to find and put in place proper safeguards for intercountry adoptions. The moratorium was anathema to good conscience and an unnecessary bottleneck to adoptions. To that extent, the moratorium was null and void.



8. The child was available for adoption. The child, having been abandoned, and the mother and the father not being found, the court dispensed with the consent of the biological parents.

*Adoption application allowed.*

### **Orders**

- i. *Declaration issued that the moratorium issued on November 26, 2014 and section 17 of the Seventh Schedule to the Children Act were unconstitutional, null and void.*
- ii. *The applicants were authorized to adopt baby L to be known as LMG.*
- iii. *The child was presumed to be Kenyan by birth.*
- iv. *The Registrar General was directed to enter the adoption in the Adopted Children Register.*
- v. *The Director of Immigration was authorized to issue the child with a passport. However, the child could not leave the country in the next five years. Should a need arise for the child to leave the country, the applicants would have to get written authorization in the hand of the Secretary for Children Services.*
- vi. *The registrar of Births and Deaths was authorized to issue the child with a birth certificate.*
- vii. *The child was declared to have been born on January 24, 2018 in Nairobi.*
- viii. *The guardian ad litem was discharged.*
- ix. *RMG and PNW were appointed as legal guardians.*

### **Citations**

#### **Cases**

##### **Kenya**

*In re PM (Baby)* Adoption Cause 137 of 2016; [2017] eKLR - (Explained)

#### **Statutes**

##### **Kenya**

1. Children Act (cap 141) sections 7-17, 183, 186(e); 186(6); Schedule 7- (Interpreted)
2. Children Act (cap 141) section 17- (Unconstitutional)
3. Constitution of Kenya articles 53(2); 24(2) - (Interpreted)

#### **Instruments**

Convention on the Rights of the Child (CRC), 1989 article 21

#### **Advocates**

*Miss Ndindi* for the applicant

## **JUDGMENT**

1. This matter gave me a little discomfort in reaching the final verdict. This is a classic case for a movie series judging the judges. The series is fictional and not upcoming any time soon. The court has to decide the same nevertheless.
2. What started off as a simple adoption application by the 29 years old RM and his sweet heart, a 36-year-old BGC, a Spaniad on October 14, 2022 has sprawled into a whole gamut of legal questions, whose answers can lead to tragedies of cataclysmic proportions.
3. The question raised in this matter are not idle. I don't think the legislature in passing the [Children Act 2022](#), had these issues in mind. Unfortunately, the fact that the task of discerning the legislative intent falls on yours truly. The case herein is not a story of the applicants or their love. It is a story of baby L.
4. Baby L, a name that has for generations been associated with greatness survived the horror of abandonment, when found by a boda boda rider at Kawangware. He was a good boda boda rider. The applicants accompanied the child and were taking care of the child. The minor was placed under



- the care of the applicants on 21 January 2021. Subsequently, the applicants were formalized as foster parents of baby L on 22 January 2021.
5. The OCS Muthangari police station received the letter confirming that there was no claim over baby L Change Trust Adoption Society declared the minor free for adoption on 19 July 2022. The minor was placed under the care of the applicants as legal guardians, *vide* Nairobi children case No 952 of 2021 on 20 May 2022.
  6. A report by Change Trust indicates that the applicants have bonded well and meet the legal requirements for adoption. The female applicant is a Spanish national, who grew up in a typical European urban setting in Oviedo where she schooled before moving to Madrid for her Masters in Business Administration. On the other hand, the male applicant is a tour operator. They now carry on the same business in Kenya.
  7. The question in my mind is whether this is an international adoption or a local one. The answer to this question determines the case herein. To be able to answer this question, I sought refuge in the law.
  8. Section 215(c) Provides for the cabinet secretary to make regulations safeguarding and regulating international adoption. Schedule 7 to section 17 of the [Children Act](#) provides that the terms of the moratorium on intercountry adoptions and resident adoptions issued on November 26, 2014 shall apply to matters relating to intercountry adoptions under this Act. This means that resident adoptions remain under the [children Act](#). Section 183 defines foreign adoption as follows.
    - (i) the child is resident in Kenya; and
    - (ii) the adopting parent or parents are Kenyan nationals resident in Kenya; and (c) "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 or parents are foreign nationals whether or not resident 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.
  9. This leaves out a scenario we are faced with where one parent is a Kenyan national another a foreign national. The adoption is not intercountry. By operation of section 186(e) the Kenyan National cannot apply for adoption as a sole male applicant. By didn't of second 186(6) the female applicant herein being a foreign national cannot apply as sole applicant. However, the joint application qualifies them for the defects in the sole male applicant status are cured by the marriage. On the other hand, the marriage to the Kenyan national stabilizes the adoption as a local adoption in spite of the female applicant being a foreign national.
  10. The other tragedy we are faced with is that the government issued a moratorium in 2014, a period of 9 years ago as a transitional measure children who were to wait and were above 9 cannot now be adopted.
  11. This flies on the face of article 53(2) of the [Constitution](#) that provides that; -

“A child’s best interest are of paramount importance in every matter concerning the child.”



12. Reading through the moratorium, I note that they have placed extra cog to what essentially is a judicial decision. The Cabinet Secretary transitional provisions have now been made part of schedule 7 of the *Children Act*, without the moratorium being incorporated into the Act concerns the child.
13. The moratorium was meant to last till review of the *Children Act* and other related laws and counter trafficking in persons. The *children Act* as now been enacted with several safeguards. Consequently, I hold and find that section 17 of the schedule to the *children Act* that against imposes the same provisions of the moratorium my considered to the *Children Act* is unconstitutional. This is because an Act of parliament cannot import a ministerial directions as law. In the case of *Re of PM Baby* [2017] eKLR justice Farah S Amin, at paragraph 38 state as follows;-

“it is clear from those communications that the Moratorium is still in existence. The promised guidelines are not. Nevertheless, the main issue of concern is to protect children from the risk of trafficking in persons and other exploitative and abusive practices. The Letter dated February 14, 2017 states; “In order to address this problem, the Cabinet approved an indefinite Moratorium on inter country adoption of Kenya children by foreigners and also revoked any licences to conduct inter-country adoptions in Kenya.”. The Country Coordinator of Children’s Services also conscious of the difficulty presented in relation to foreign nationals who are have been resident in Kenya for a significant period, has asked this court to give direction on the matter. The terms of the Moratorium and the GNs that followed give no direction whatsoever, on how that anomaly should be resolved

14. The UN *Convention on the Right of the Child*. Under article 21 provides as follows; -

“ Article 21 states parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.



15. Essentially in a country where adoption is almost taboo it is foolhardy to insist that children found in Kenya ought to be adopted by Kenyans who are not willing to adopt and who still antagonize adoption. Article 21 of the [Convention on the Right of the Children](#) recognizes inter country inter country adoption as alternative means of child care.
16. Without saying more to the extent that the moratorium as not been legislated to specifically state as it is as limiting rights under article 53(2) as required by article 24 it does not form part of the law of Kenya. Article 24(2) of the [Constitution](#) provides as follows; -
- “(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom — (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the [Constitution of Kenya, 2010](#) intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
- (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
- (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
17. The moratorium dated 24 November 2014 does not state that it is a limitation to article 53(2) of the [Constitution](#). It also not expressly justified in the [Children Act](#) as a limitation contemplated under article 24 of the [Constitution](#).
18. The said moratorium dated 26 November 2014 against inter country adoption is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom. This is because it does not provide alternatives for placement of children who are a viable for adoption but cannot find suitable parents. Further it cannot be justified on basis of article 24(1) of the [Constitution](#), which provides as doth: -
24. Limitation of rights and fundamental freedoms (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”
19. Article 53 of the [Constitution](#) provides comprehensive rights of children. Those rights remain a mirage unless protected by the court and the state. The state is under obligation to use less restrictive means for achieving the same purpose.



20. It is not the duty of the children to find suitable parents. Article 53 provides as follows: -

- “ 53. Children (1) Every child has the right—
- (a) to a name and nationality from birth;
  - (b) to free and compulsory basic education;
  - (c) to basic nutrition, shelter and health care;
  - (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
  - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
  - (f) not to be detained, except as a measure of last resort, and when detained, to be held— (i) for the shortest appropriate period of time; and
    - (ii) separate from adults and in conditions that take account of the child’s sex and age. (2) A child’s best interests are of paramount importance in every matter concerning the child.

21. It is the duty of the state to find and put in place proper safeguards for inter country adoptions. Moratorium is anathema to good conscious and an unnecessary bottleneck to adoptions. The state should to that extent the moratorium is null and void.

22. Notwithstanding my finding above having found that this was not an inter county adoption, I now have a duty to review the evidence on the applicants.

23. The applicants testified on the capacity to adopt. The guardian ad litem produced her report; she is the kindergarten teacher of the minor herein. The legal guardian testified that they are willing to be default guardians. WI testified that they classified the adoption as national since the couple resides in Kenya. Mutheru Njama testified on behalf of the adoption agency saying that they a respect dated 16 September 2022. She says that the female applicant has been resident for more than 3 years and they are satisfied with the adoption.

24. I have perused a report dated 29 March 2023 by the Secretary of Children Service, the guardian ad litem report dated 24 November 2022, the report by Change Trust Adoption Society together with financials. I am satisfied that the child is available for adoption. The child having been abandoned and the mother and the father not being found, I dispense with the consent of the biological parents. I allow the origination summons dated 14 December 2022.

### **Determination**

a. The moratorium issued on 26 November 2014 and section 17 of the 7<sup>th</sup> Schedule of the *Children Act 2022* are unconstitutional, null and void.

b. The consent of biological parents is hereby dispensed with.



- c. The applicants be authorized to adopt baby L to be known as LMG.
- d. The child to be presumed to be Kenyan by birth.
- e. The Registrar General be directed to enter the adoption in the Adopted Children Register.
- f. The Director of immigration be authorized to issue the child with a passport. However, the child shall not leave the country in the next five years. Should a need arise for the child to leave the country the applicants should get written authorization in the hand of the Secretary for Children Services.
- g. The registrar of Births and deaths to issue the child with a birth certificate.
- h. The child be declared to have been born on 24 January 2018 in Nairobi.
- i. The guardian ad litem be discharged.
- j. RMG and PNW appointed as legal guardians.
- k. This file is sealed and closed

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27<sup>TH</sup> DAY OF APRIL, 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Miss Ndindi for the Applicant

Court Assistant - Firdaus

