



**In re MS aka NASN (Baby) (Adoption Cause E010 of 2023)
[2023] KEHC 21690 (KLR) (7 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADOPTION CAUSE E010 OF 2023
G MUTAI, J
AUGUST 7, 2023
IN THE MATTER OF THE CHILDREN ACT, NO. 29 OF 2022
AND
IN THE MATTER OF BABY MS AKA NASN
AND
IN THE MATTER OF AN APPLICATION FOR ORDERS
OF ADOPTION OF BABY MS AKA NASN BY CON & JSH**

BETWEEN

CON 1ST APPLICANT

JSH 2ND APPLICANT

AND

CHANGE TRUST RESPONDENT

JUDGMENT

1. The applicants herein moved this honourable court vide originating summons dated May 19, 2023 seeking for orders that:-
 - a. That CON & JSH be authorized to adopt Baby MS aka NASN the minor child;
 - b. That the child Baby MS aka NASN is a Kenyan citizen;
 - c. That the name of Baby MS to change to NASN;
 - d. That the Registrar General be directed to enter the name of the child in the Adopted Children register in the prescribed form and to issue a certificate to that effect;
 - e. That KOO & NO be appointed as legal guardians;



- f. That the honourable court be pleased to make any other orders it deems fit and appropriate; and
- g. That costs of this summons be costs in the cause.
2. The application is supported by the averments in the statement in support thereof dated May 19, 2023. The 1st applicant is an adult Kenyan citizen born in 1980 while the 2nd applicant is an American citizen (and a Kenyan resident) born in 1986. They got married on January 16, 2016 at Nyali, Mombasa. They are not blessed with biological children of their own. They had previously adopted EMN in Mombasa Adoption Cause No.6 of 2020. Unfortunately, the said child died on October 21, 2020. The motivation to adopt the baby has been ignited by the desire to have a child of their own and the need to provide for an abandoned child. Regarding their occupation, the 1st applicant is a missionary and a youth Pastor at [particulars withheld] Christian Church while the 2nd applicant is a missionary and an administrator at the same church.
3. The child herein is estimated to have been born on October 22, 2021. She was found abandoned at a green grocer kiosk belonging to one FM on the night of December 25, 2021 at around 9pm. According to her she had rushed to her house which was not far from the kiosk to get some money only to come back and find an abandoned baby girl. She had left no one to watch over the kiosk. The baby was undressed but wrapped in a Maasai Shuka. She stayed at the kiosk for about one hour waiting to see if the mother of the baby would come back but she did not turn up. She took the baby home and attended to her during the night. Early in the morning she informed her neighbours who accompanied her to Athi River Police Station to report the matter. The matter was reported at Athi River Police Station vide Occurrence Book No. 19/26/12/2021. The child was committed into the legal custody of Mahali Pa Maisha for care and protection vide Protection & Care Cause No. E.020 of 2021 by the Mavoko Children Court.
4. On July 15, 2022 the case committee of Change Trust declared the child free for adoption and a Certificate S/No.0xxxx6 thereof was issued.
5. Upon instituting these proceedings, DM and SW were on May 31, 2023 appointed guardian ad litem. The Director of Children Services and the guardian ad litem were directed to file their respective social inquiry reports within 30 days.
6. Preceding the hearing, the County Coordinator for Children Services Mombasa County through Children's Officer Kennedy Kuria filed social inquiry report dated July 6, 2023. In his report he noted that the 2nd applicant is a foreign national married to a Kenyan and stated as follows before recommending the adoption;

“I have considered the fact that the female applicant is a foreign national married to a Kenyan. She has lived in the country for 7 years and has lived with the child for about 9 months with her husband. I have also considered the moratorium that was issued by the government in 2015 prohibiting foreigners from adopting Kenyan children. Given the fact that the female applicant is married to a Kenyan and has invested in the country, she cannot be regarded as a foreigner for the purposes of the moratorium.

From the social inquiry I have conducted I have not seen any evidence of intention by the applicants to move out of the country. In that case, this application may be regarded as a local adoption. In any case, the male applicant cannot be precluded from adopting the child by reason only of marrying a foreign national. I am also cognizant that the couple had been allowed to adopt in 2020.



Given the fact the child is available for adoption and the applicants have met the requirements for the same, the Director of Children Services recommends they adopt the child without reservations.”

7. The guardians ad litem filed their report dated June 30, 2023 recommending the adoption.
8. During the hearing the applicant urged the court to allow the application to enable them adopt the baby and stated that they understood the consequences of adoption and that it is permanent.
9. I have considered the application herein, materials in support and evidence by various witnesses and the issues that emerge for determination are whether the baby is available for adoption, whether the applicants are fit to adopt the baby and most importantly whether the adoption is in the best of the child.
10. The child was abandoned at birth. Her birth parents are unknown. I have already set out above the circumstances under which she was found. Given the circumstances of this case the need for consent pursuant to section 186 and 187 is dispensed with.
11. On the baby’s nationality, it is clear the baby was found abandoned in Athi River, Machakos County and is currently staying with the applicants at Nyali, Mombasa County all within the Republic of Kenya. *The Constitution* of Kenya, 2010, in article 14(4) thereof, recognize that a child who is less than 8 years of age, and whose nationality and parents are not known, is presumed to be a Kenyan citizen by birth. In view of this provision the child herein is presumed to be Kenyan citizen by birth.
12. The child is above 6 weeks and below 18 years which provision falls within the age bracket of any adoptive baby pursuant to section 184(1) (b) of the *Children’s Act* 2022. Further section 185 does recognize that any child who is resident in Kenya whether born in Kenya or not to be eligible for adoption. I have no doubt that the child is fit for adoption.
13. Concerning the applicants’ suitability, the 1st applicant is a Kenyan citizen while the 2nd applicant is an American citizen, and a resident of Kenya, married to the 1st applicant. The applicants are 42 and 36 years old respectively which places them under the age bracket of not less than 25 years nor more than 65 years for an adoptive parent in compliance with section 186 of the *Children Act* 2022.
14. On the issue of the 2nd applicant being a foreigner the court in the case of *In re ASJ (Minor)* [2021] eKLR where the court stated: -

“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.”
15. Further the *court in the case of In re Adoption of J W (Child)* [2019] eKLR stated:-

“The court takes cognisance of the Moratorium on Inter-Country Adoption of Kenya Children” that was declared on November 27, 2014 by the Cabinet. The Cabinet approved an indefinite moratorium on inter-country adoption of Kenya children by foreigners, and also revoked all licences to conduct adoptions in Kenya with immediate effect. Either way each case shall be determined on its merits (see the case, *In re M (Baby)* [2017]) eKLR. In the



instant case the applicants have demonstrated their ability to provide a conducive home and family environment in which the child will grow and develop. The 2nd applicant has been resident in Kenya since 2014 and together with the 1st applicant have a permanent residence in South B. They were further blessed with their biological child on 21st August 2016.

I note that the applicant is the only father the child knows and has well bonded with her. Consequently the court finds that it is in the best interest of the child to be adopted by the applicants.”

16. In this case the 2nd applicant is married to the 1st applicant who is a Kenyan citizen. She has been a resident in Kenya for the last seven years. In her evidence before court she also told the court that they were working towards getting Kenyan citizenship. That they are permanently based in Kenya and the child’s home is Kenya. There is no indication that the couple intend to relocate in the near future. Further the child has been with the applicants since her placement with them on September 27, 2022 when she was 11 months old. The applicants are the only parents that the child has known. She has bonded well with them. It is therefore my view that the moratorium does not apply in this case and that it is in the best interest of the child to be adopted by the applicants.
17. The applicant has been described as financially stable with an income of Kes.270,000/- per month and other business ventures to supplement their income. They have no criminal records. Since the placement of the minor into their custody the child has fully bonded with them. They also understand the consequences of adoption and that it is permanent. They appreciate the role of a parent and admit they will treat the baby like their biological child. Consequently, it’s my view that the applicants have met the necessary requirements to adopt the baby. I am guided by the case of *In re B (Baby)* [2018] eKLR where the court stated:-

“I am of the conceded view that weighing all factors and the evidence placed before me the applicants are of sufficient ability to bringing up the child and to furnish her with appropriate support and maintenance within their resource base availed to them.”

18. On the question of whether the adoption is in the best interests of the baby, guidance can be drawn from article 53(2) of *the Constitution* of Kenya, 2010 and section 8(1) and (2) of The *Children Act*, 2022 which underscores the best interest of a child principal as the primary consideration when making any decision concerning a baby.

Am also guided by the decision of Nyakundi, J in the case of *In re B (BABY)* (supra) where he stated that:-

“The purpose of Kenya’s Constitution and Children’s Act is to protect and promote the welfare of Children by providing them with stable family units. The fundamental concern therefore in every adoption cause provision is of the best interest of that very child...

It is that family unit that *the constitution* contemplates under article 45 which also has to take responsibilities in fulfilling the obligations enjoined in article 53 of the same constitution.”

19. The child herein was abandoned at a green grocer kiosk in Athi River. She is like any other child in need of parental care and guidance. She needs basic necessities like food, shelter, education and clothing. She has fully integrated with the applicants. It is obviously in the best interests of the child that this



adoption application be allowed. I am guided by the case of *In re DG (Child)* [2021]eKLR where the court held:-

“This is a child whose biological mother was unwilling and/or unable to care for her. She has now found a home with the Applicant. In my view this adoption serves the best interests of the child.”

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

- a. The child is declared a Kenyan citizen by birth;
- b. The consent of biological parents or guardians is dispensed with;
- c. The applicants are authorized to adopt Baby MS aka NASN who shall henceforth be known as NASN;
- d. KOO and NLO are hereby appointed legal guardians of the minor in the event of any eventuality befalling the applicant;
- e. The Registrar General is directed to enter the adoption order made herein and the estimated birth date of the child as October 22, 2021 in the Adopted Children’s Register; and
- f. The guardian ad litem is discharged.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF AUGUST 2023

GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Mwashushe for the Applicants; and

Mr. Arthur Ranyundo – Court Assistant.

