



In re Abandoned Child aka Unknown Baby Girl aka ES (Adoption Cause E009 of 2023) [2023] KEHC 21679 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21679 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADOPTION CAUSE E009 OF 2023
G MUTAI, J
AUGUST 4, 2023
IN THE MATTER OF THE CHILDREN ACT, 2022
AND
IN THE MATTER OF ABANDONED CHILD AKA UNKNOWN BABY GIRL AKA ES
AND
IN THE MATTER OF AN APPLICATION FOR ORDER OF ADOPTION OF
ABANDONED CHILD AKA UNKNOWN BABY GIRL AKA ES BY MAM AND RDK
BETWEEN
MAM 1ST APPLICANT
RDK 2ND APPLICANT
AND
BUCKNER KENYA ADOPTION SERVICES RESPONDENT**

JUDGMENT

Introduction

1. Vide the Originating Summons dated 9th May 2023 the joint applicants sought the following orders:-
 1. Pursuant of Article 14(4) of *the Constitution* of Kenya, 2010 and section 11 of the *Children Act*, 2001, this honourable court be pleased to declare the child Abandoned Child aka Unknown Baby Girl aka ES a Kenyan citizen by birth;
 2. Pursuant to the provisions of section 187 of the *Children Act*, 2022 this honourable court be pleased to dispense with the requirement of the consent to the adoption as required by the provision of section 186 of the *Children Act*, 2022;



3. The Applicants MAM and RDK be authorized to adopt Abandoned child aka Unknown Baby Girl aka ES;
 4. Upon the making of the adoption order the child to be known as EII;
 5. Upon the making of the adoption order WJM and LWI be appointed legal guardians of the child as provided for by the provisions of section 188 of the *Children Act, 2022*;
 6. Upon the making of the adoption order the Registrar General do make an entry recording the adoption and the date of birth of the child as 25th January 2021 in the Adopted Children Registrar as provided for by section 201 of the *Children Act, 2022*; and
 7. The costs of this application be costs in the cause.
2. In their statement in support of the adoption application the 1st and 2nd applicants gave their respective dates of birth as being 24th September 1976 and 21st October 1977. The Joint Applicants got married to each other on 5th June 2004 at [Particulars Withheld] Church, Mombasa. They reside at [particulars Withheld] in Mombasa within the Republic of Kenya. They had one biological child BHM, who was born on 17th January 2006. Unfortunately, she passed on 3rd January 2008 due to heart complications. They have been unable have more children as the 2nd applicant has hormonal imbalance. The proposed adoption has the support of family and friends. The adoptive child is not related to them. The applicants propose that if the adoption application is allowed the subject child will be known as EII.
 3. According to the documents the Court has seen the subject child was born on the 25th day of January 2021. She was abandoned by the birth mother in the home of one GW, in Kariobangi Light Industries at Kariobangi North Estate. The matter was reported at Kariobangi Police Station, where it was recorded as OB No. 31/08/03/2021. The child was thereafter admitted to Happy Life Children's Home on 9th March 2021. She was committed to the said home on 15th September 2021 vide Nairobi Children Court Care and Protection Cause No. E263 of 2021 for a period of 3 years. The child was placed under the care of the joint applicants on 27th July, 2022. She has been with them since. The child was declared as being free for adoption by Buckner Kenya Adoption Services, a registered adoption society as per the certificate declaring the child free for adoption dated 18th July 2022.
 4. The joint applicants attached to the application documents in support thereof which include the following; the committal order issued by the Children Court, Nairobi, the identification documents of the applicants, their marriage certificate, the foster care agreement, the report of the adoption society, Certificate of Declaring a Child Free for Adoption, police clearance certificates and photographs of the joint applicants with the child amongst other documents. The court has had benefit of perusing through the said documents.
 5. This matter was first in Court on 28th June 2023. On the said date the proposed guardian ad litem testified. Upon being satisfied, on the basis of her testimony and the documents before Court, I appointed her as the guardian ad litem. I was satisfied that EKK was not related to the applicants and would be a fair appraiser of the suitability of the applicants to adopt the child. I, therefore, ordered her to prepare and submit the statutory report, required of a guardian ad litem under the Act, to the Deputy Registrar within 30 days. I also directed the Director of Children Services, through the County Coordinator of Children Services, Mombasa to prepare and file the social inquiry report in respect of the adoption proceedings herein within 30 days. I fixed the matter for hearing of the main application on 31st July 2023.



6. The guardian ad litem prepared and filed her report dated 27th July 2023. In the said report she recommended that the joint applicants be allowed to adopt the child. The County Coordinator of Children Services prepared a report which was filed on 28th July 2023. They also recommended the adoption. In the observation of the said office, the applicants meet all the requirements.
7. The joint applicants appeared before Court. Both expressed a desire to adopt the child. They wish to share their lives with the child and give her the very best in life. They are aware of the effect of adoption. They know it is permanent and thus irreversible. They undertook to bring her up in a happy Christian home and to correct her anytime she errs. I observed them during their respective testimonies and was convinced that they wish nothing but the best for the adoptive child.
8. In addition to the joint applicants other witnesses who testified were MWK, a social worker with Buckner Kenya Adoption Services, Louisa Kemuma, a Children Officer, and the guardian ad litem. All deposed that the joint applicants were fit to adopt the child and that it would be in the best interest of the child that the adoption orders do issue.
9. I have considered the application herein, the documents in support and evidence of the various witnesses and the issues that emerge for determination by me 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. I have already set out the circumstances under which the child was found. The child was abandoned by the parents at birth. Nobody has come forward to claim the child and therefore the need for consent pursuant to section 186(8) and 187 of the *Children Act*, 2022 is dispensed with. 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’s Act. In view of the above consideration, it is my finding that the child is available and suitable for adoption.”
11. Regarding the baby’s nationality, it is clear that she was found abandoned in the house of GW in Kariobangi Light Industries in Kariobangi North Estate in Nairobi within the Republic of Kenya. Article 14(4) of *the Constitution* recognizes 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 a Kenyan citizen by birth.
12. In terms of age 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 (b) of the *Children Act*, 2022. Further Section 185(1) does recognize any child who is resident in Kenya whether born in Kenya or not to be eligible for adoption. I have no doubt the child is fit for adoption.
13. Concerning the joint applicants’ suitability, they are Kenyan citizens aged 46 and 45 years 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(2) of the *Children Act*, 2022. The applicants have been described as financially stable. They have no criminal record. Since the placement of the minor into their custody the child has fully bonded with them. They also understand the consequences of adoption and are aware that once an adoption order is made it is permanent. They appreciate the role of a parent and admit they will treat the baby like their biological child.



14. Consequently, I have no doubt that they 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 considered 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 available to them.”

15. On the question of whether the adoption is in the best interests of the baby, I am guided by Article 53(2) of *the Constitution* of Kenya, 2010 and Section 8(1) and (2) of the *Children Act* 2022 which underscores the best interests of a child as the primary consideration before making any decision concerning a baby.

16. Further the court in the case of *In re MA (Baby)* [2021] eKLR stated:-

“This court in the case of *In re B (Baby)* [2018] eKLR held 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 is the best interest of that very child.”

17. The child herein was found abandoned thus 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 IK (Child)* [2020] eKLR where the court stated: -

“She needs parental care to grow up as a normal child with emotional and physical protection which the applicants have stepped in to offer. In that regard, the applicants meet the legal requirements for adoption. Further, all reports recommended adoption for the benefit and wellbeing of the child. As *the Constitution* and the law state, in all matters concerning a child, the best interests of the child are paramount.”

18. 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 MAM and RDK are authorized to adopt Abandoned Child aka Unknown Baby Girl aka ES who shall henceforth be known as EII;
- d. WJM and LWI are hereby appointed legal guardians of the child in the event of any eventuality befalling the applicants;
- e. The Registrar General is directed to enter the adoption order made herein and the estimated birth date of the child as 25th January 2021 in the Adopted Children’s Register;
- f. The guardian ad litem is discharged.

DELIVERED, DATED, AND SIGNED AT MOMBASA THIS 4TH DAY OF AUGUST 2023 VIA MICROSOFT TEAMS.

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GREGORY MUTAI
JUDGE



In the presence of:-

Ms. Ngugi for the Joint Applicants; and

Mr. Arthur Ranyundo – Court Assistant

