



**In re AK (Child) (Adoption Cause E020 of 2021)
[2023] KEHC 21380 (KLR) (Family) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
ADOPTION CAUSE E020 OF 2021
MA ODERO, J
AUGUST 4, 2023**

IN THE MATTER OF

JWN APPLICANT

JUDGMENT

1. Before this court for determination is the *ex parte* chamber summons dated March 15, 2023 by which the applicant JWN sought the following orders:-
 1. That the court be pleased to review the Judgement entered on the 1st day of October, 2021.
 2. That this court be pleased to order that the name of KNM (deceased) be included on the adoption order as the father of the child.
 3. That the costs be provided for.”
2. The Application was premised upon Order 45 Rule 1 of the *Civil Procedure Rules* 2010 and Section 3A of the *Civil Procedure Act* was supported by the affidavit of even date sworn by the applicant.

Background

3. The Applicant and her late husband KNM had filed in the High Court an Originating summons dated March 5, 2021 seeking to adopt the subject child Baby AKI. Unfortunately, the Applicant’s husband passed away during the pendency of the hearing of the adoption cause. The applicant opted to proceed with the application to adopt the child.
4. Vide a judgement delivered on October 1, 2021 the court allowed the application for adoption and made the following orders:-
 - a) The Applicant JWN holder of National identity card number xxxx is hereby allowed to adopt Baby AK who shall henceforth be known as AKNN.



- b) I direct the Registrar General to enter this order in the Adoption Register.
 - c) JFNM and NGWN are hereby appointed legal guardians of the child, in the event of the Applicant dying or becoming incapacitated before the child is of full age.
 - d) CWK, the guardian ad litem is hereby discharged.
5. The Applicant now prays that the judgement of October 1, 2021 be reviewed so as to include the name of her Deceased husband as the Father of the child in her Birth Certificate.
6. The applicant submits that the subject child joined their family in October, 2017 and lived as a child of the family from that time to date. That her late husband treated the child as his own and the child also bonded with the entire family and treated the Deceased as her father.
7. The applicant further submits that it will cause the child unnecessary distress to discover that the name of the man she viewed as her Father is not included in her Birth Certificate and that the inclusion of the name of the Deceased in the Birth Certificate posthumously will allow the child to be recognized and considered as a child of the Deceased for purposes of succession.
8. As stated earlier this was an ex parte application and was therefore not opposed. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated May 2, 2023.

Analysis and Determination

9. I have carefully considered this application the supporting Affidavit, the submissions filed by counsel and the relevant law.
10. Section 80 of the [Civil Procedure Act](#) provides as follows:-
- “ Any person who considers himself aggrieved-
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may or make such order thereon as it thinks fit.
11. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 provides as follows:-
- “ Any person considering himself aggrieved-
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made order without unreasonable delay.”



12. In the case of *Republic v Advocates Disciplinary Tribunal Ex-Parte Apollo Mboya* (2019) eKLR, Mativo J. held that:-

“A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds-

- a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. on account of some mistake or error apparent on the face of the record, or
 - c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
13. The first ground upon which a judgement /ruling may be reviewed is the discovery of new and important evidence. The applicant has not alleged that she has discovered new or important evidence which was not within her knowledge at the time when the application for adoption was being canvassed.
14. The second ground for review is an error apparent on the face of the record. Such an error must be obvious from the face of the record. It must not be matter of argument, conjective, allegation or implied.
15. The applicant has not alleged or has there been shown to be an error on the face of the record.
16. The only remaining ground which the applicant has rely on to have the decree reviewed is “any other sufficient reason”.
17. The applicant has stated that the subject child joined the family in October, 2017. That the child bonded with all the family members including the Applicant’s late husband who the child knew and identified as her own father.
18. This application for adoption of the child was filed by both the applicant and her late husband in March 2021. This was four (4) years after the child had joined the family.
19. The Deceased provided all the relevant documentation to the Adoption Agency. He availed himself and was interviewed both by the Adoption Agency as well as the Director Children’s Services. It is only death that prevented the Deceased from fulfilling his stated desire to adopt this child. It is manifest that the Deceased fully intended to adopt the subject child.
20. Unfortunately, the Deceased died during the pendency of the Adoption proceedings. A copy of the Death Certificate Serial Number xxxx indicates that he passed away on July 19, 2021. The Applicant opted to proceed with the application for adoption.
21. The court is mindful that this is matter which concerns a child. In that regard the court is obliged to give priority to the “best interests” of the child.
22. The *Constitution* of Kenya 2010 provides at article 53 (2) as follows:
- (2) A child’s best interest are of paramount importance in every matter concerning the child.”



23. Likewise section 8 (1) of the *Children Act* 2022 provides as follows:-

“(8). (1) 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;” [own emphasis]

24. I am guided by the court’s decision in the Adoption Cause No. 241 of 2011 where the court allowed for an adoption hearing to proceed notwithstanding the demise of the male applicant.

25. I do agree that the subject-child is entitled to have on her Birth Certificate the name of the man whom she knew as a father and who had already prior to his demise filed an application seeking to adopt her.

26. The court sought the views of the two (2) adult sons of the Deceased, MMN and LWN. They both confirmed to the court that the Applicant and the Deceased are their parents. They confirm that they are aware of and have no objection to this present application. The two (2) also confirmed that their late Father commenced the application to adopt the child during this lifetime.

27. Likewise the Director Children’s Services represented by Mr. Ezekiel Kimani informed the court that they were in support of this application as the same was in the best interest of the child.

28. I find that the review of the orders will serve to give the child her full identity and a sense of belonging and will be in the best interests of the child.

29. Accordingly, I do find merit in this application. The same is allowed and I do direct that the orders made on October 1, 2021 be reviewed to include the name of KNM (Deceased) as the father of the child. It is so ordered.

DATED IN NAIROBI THIS 4TH DAY OF AUGUST, 2023.

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MAUREEN A. ODERO

JUDGE

