



**In re SM (Minor) (Adoption Cause E101 of 2021)
[2023] KEHC 21699 (KLR) (Family) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21699 (KLR)

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

ADOPTION CAUSE E101 OF 2021

MA ODERO, J

AUGUST 4, 2023

**IN THE MATTER OF ADOPTION: APPLICATION FOR
ORDERS OF ADOPTION OF S.M (MINOR) BY J.N.M AND T.C.M**

AND

**IN THE MATTER OF SECTION 183, 186, 187, 188, 193, 195, 200
AND 201 (1) OF THE CHILDREN’S ACT NO. 29 OF 2022**

AND

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

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 this court is the Notice of Motion dated May 11, 2023 by which the Applicants JNM and TCM seeks the following orders:-
 - ' 1. Spent.
 2. That this court be and is hereby pleaded to Review the Judgement delivered on April 28, 2023 Honourable lady Justice Maureen Odero.
 3. That an Adoption order do hereby issue in respect of the minor herein in favour of the 1st and 2nd Applicant.
 4. That upon the making of the Adoption Order, the Registrar General do make an entry recording the adoption as provided by Section 201 (1) of the [Children Act](#) No 29 of 2022.
 5. That this Honourable court be and is hereby pleased to set aside the Judgement delivered on April 28, 2023 by Honourable Lady Justice Mauren Odero and the consequent Decree issued thereto.
 6. That there be no orders as to costs.'
2. The Application was premised upon Articles 50 and 159 of the [Constitution](#) of Kenya 2010, Section 1A, 1b, 3, 3A and 80 of the [Civil Procedure Act](#) Cap 21, Laws of Kenya, Order 10 Rule 11, Order 45 Rule 1, Order 51 Rule 1 of the [Civil Procedure Rules](#), Sections 183, 186, 187, 188, 193, 195, 200 and 201 (1) of the Children's Act No 29 of 2022 and all other enabling provisions of law and was supported by the Affidavit of even date sworn by the 1st Applicant.

Background

3. Vide a judgement delivered on April 28, 2023 this court dismissed the Originating Summons dated August 16, 2021 by which the same Applicants had sought to adopt the child known as SM.
4. The Applicants then filed this present application seeking to have the judgement of April 28, 2023 reviewed and seeking that the court make orders granting them authority to adopt the child known as SM.
5. The child's biological mother LWN who had initially vehemently opposed the adoption of her daughter later told the court that upon further consideration after talking to her daughter, and after a session in chambers with the court, the representative from the Director Children's Services, the mother's Pastor and Counsel representing the Applicants, she was ready to give her consent to the adoption. The said mother did not object to the review application.
6. The Director Children's Services stated that they had no objection to the application for review but only issued the rider that a certificate Declaring the child Free for Adoption be issued by Little Angels Network (the Adoption Agency).
7. The Adoption Agency did not issue the certificate declaring the child Free For Adoption.



8. 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.

9. 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.'

10. 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.'

11. In this matter the court had dismissed the earlier application for adoption on grounds that the Applicants failed to annex to their supporting Affidavit certain crucial document i.e copy of their Marriage Certificate, copies of bank records to prove their financial capacity and most importantly no report filed by Director Children Services or certificate Declaring the subject Child Free For Adoption had been filed.

12. There has been no allegation that there was any error apparent on the face of the record.



13. As stated earlier the child's biological mother who had previously opposed the application for adoption later after discussion with the court, her daughter, the Children's Officer and her Pastor later came round and indicated that she was willing to consent to the adoption.
14. That being the case this court in the best interest of the child allowed the application for review of its earlier judgement.
15. However, even then the new application presented to the court dated May 11, 2023 was still defective. Firstly, there was no report filed by Director Children's Services accompanying the application.
16. Secondly and more importantly no certificate Declaring the Child Free For Adoption was annexed to the application Section 184 (1) of the *Children Act* 2022 provides:-

- ' (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.'

17. The word used in Section 184 is 'shall' which makes this a mandatory provision. Counsel explained that the Applicants were not in a position to meet the financial requirements set by the Adoption Agency for a special sitting. My own view is that if the Applicants were truly desirous of seeing this matter through they would have found a way to meet those conditions.
18. I am mindful of the fact that in all matters concerning children the 'best interest' of the child is to be given priority. However, this cannot be used as an excuse to flout or ignore mandatory provisions of the *Children Act*.
19. The Adoption Agency were not in my view acting unreasonably. They had correctly initially declined to issue the certificate because the child's biological mother declined to give her consent to the adoption. Once the child's mother came around then it was incumbent that the conditions set by the Adoption Agency be met before the said certificate could be issued. In the circumstances I am unable to overlook and/or waive the production of this crucial document.
20. Thirdly Section 186 (8) (a) of the *Children Act* 2022 provides as follows:-

- ' (8) Subject to the provisions of this section, an application for an adoption order in respect of a child shall be accompanied by written consents of the following persons—
- (a) A parent or guardian of the child, or any person who is liable by virtue of any order or agreement to contribute to the maintenance of the child;
 - (b) On the application of one of the spouses, the consent of the other spouse; and
 - (c) In the case of a child who has attained the age of ten years, the child himself or herself.'

21. In this matter no written consent signed by the child's biological mother was annexed to the application. Once again this Section of the law uses the word 'shall' making it a mandatory provision.



Although the mother indicated that she was willing to give her consent no 'written consent' signed by the mother was availed to the court.

22. Finally, Section 195 (iv) of the *Children Act*, 2023 provides that the court 'may' at the time of making an adoption order appoint a legal Guardian for the child. The person to be appointed as legal Guardian must be one who understands the enormity of such an appointment and willingly consents to it.
23. The Applicants did not nominate any person/persons as legal guardian for the child in the event that they were unable or unavailable to care for the child.
24. It is evident that the Applicants and their Counsel did not delve deeply into the requirements for adoption. All they did was to include the documents which the court had observed to be missing in the first application but seem not to have gone further to interrogate all the requirements for an adoption order.
25. The application was presented in a *laissez Faire* manner with no attention to the critical mandatory requirements. The adoption of a child is a very serious undertaking which imposes lifelong obligations upon the adoptors. It cannot be dealt with in a casual manner. The various conditions set in the *Children Act* are meant to protect and benefit the child and as such the said provisions cannot be ignored.
26. On the basis of the above I find that this application for adoption is still defective. The same is hereby dismissed. No order on costs.

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

MAUREEN A. ODERO

JUDGE

