



REPUBLIC OF KENYA



KENYA LAW
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**In re JNG (Minor) (Adoption Cause E002 of 2023)
[2023] KEHC 22835 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
ADOPTION CAUSE E002 OF 2023
RE ABURILI, J
SEPTEMBER 26, 2023
IN THE MATTER OF THE CHILDREN'S ACT, 2022
AND
IN THE MATTER OF AN APPLICATION FOR AN ADOPTION
ORDER IN RESPECT OF JNG (MINOR) BY JAK-THE APPLICANT**

RULING

1. This Judgment determines proceedings which were conducted in camera.
2. They are kinship adoption proceedings and it is important to first state the law as it is and whether the applicant has met the legal requirements for adoption of a child.
3. The following are the relevant provisions of the law on adoption in Kenya:
 183. Power to make adoption orders.
 - (1) Subject to this Act, the High Court may, on an application made in the prescribed form, make an order, in this Act referred to as "adoption order", authorising an applicant to adopt a child.
 - (2) All proceedings under this Part shall be heard and determined in chambers, and the identity of the child and the applicants shall be kept confidential.
 - (3) In this Act, adoption means local, kinship and foreign adoption.
 - (4) For the purposes of this Part—
 - (a) "kinship adoption" has the meaning assigned to it in section 2;
 - (b) "local adoption" means an adoption in relation to which—
 - (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.

184. Pre-requisites for Adoption.

- (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.
- (2) A person, including a parent, guardian or adoption society, shall not, prior to the making of an adoption order, entrust a child to the care, possession or control of any person not qualified to adopt a child in accordance with this Act.
- (3) An applicant shall not preselect a prospective adoptive child except—
 - (a) in the case of kinship adoption;
 - (b) Where the applicant is a foster parent seeking to adopt a fostered child under the applicant's care.
- (4) The Secretary shall monitor and submit reports to the courts on the wellbeing of a child who is subject to adoption proceedings.
- (5) Any person who contravenes subsections (1) or (2) of this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding one million shillings, or to both.

185. Children who may be adopted.

- (1) Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was born in Kenya.
- (2) Without prejudice to the generality of subsection (1), no Court may entertain an application for an adoption order in respect of a child unless—
 - (a) the child concerned has been in the continuous care and control of the applicant within Kenya for a period of three consecutive months preceding the filing of the application; and



- (b) the application for an adoption order is supported by a report made by a duly registered adoption society recommending that an adoption order be made.
- (3) The report referred to in subsection (2)(b) shall contain the society's findings and recommendations in respect of the child and the applicant or applicants, as the case may be.
- (4) The following children shall be eligible for adoption—
 - (a) a child who is an orphan and has no guardian or caregiver able and willing to take care of the child;
 - (b) a child who has been abandoned or whose parents' or guardian's whereabouts cannot be traced within a period of one year;
 - (c) children who are willingly offered for adoption by their biological parents in accordance with regulations made under this Part.

186. Who may apply to adopt a child.

- (1) The Court may make an adoption order on application by—
 - (a) a sole applicant; or
 - (b) two spouses jointly.
- (2) The Court shall not make an adoption order in any case unless—
 - (a) the applicant has attained the age of twenty-five years, but is not above the age of sixty-five years; and
 - (b) the applicant, or both of the applicants in a joint application, is more than twenty-one years older than the child.
- (3) The restrictions in subsection (2) shall not apply in any case where a sole applicant or one of the joint applicants is the mother, father or relative of the child.
- (4) The Court shall not make an adoption order in favour of a sole male applicant, unless the applicant is a blood relative of the child.
- (5) The Court shall not make an adoption order in favour of the following persons unless the Court is satisfied on reasons to be stated on the record that there are special circumstances that warrant the making of the adoption order an applicant or joint applicants who has, or both have, attained the age of sixty-five years.
- (6) The Court shall not make an adoption order in favour of an applicant or joint applicants if the applicant or joint applicants, or any of them—
 - (a) is of unsound mind within the meaning of the *Mental Health Act* (Cap. 248);
 - (b) is incapable of exercising proper care and guardianship of a child;
 - (c) has been convicted by a Court of competent jurisdiction for any of the offences specified in the Third Schedule or similar offences;
 - (d) in the case of joint applicants, if the applicants are not married to each other;



- (e) is a sole male applicant except where the applicant is a biological relative of the child; or
 - (f) is a foreign applicant except where the applicant is a biological relative of the child.
- (7) Notwithstanding anything contained in this section the Court may at its sole discretion decline to make an adoption order in favour of any person or persons if the Court is of the view that it is not in the best interests of the child to make the order.
- (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.
- (9) If the child referred to in subsection (8)(c) has a disability which restricts or impairs the child’s ability to independently give his or her consent, the child shall be accorded such assistance, including the assistance of an intermediary, to facilitate his or her written consent.
4. JAK, the applicant by an Originating Summons dated 26th April, 2023 seeks *inter alia* an order to adopt the child A- HM now aged 17 years old. The applicant is the maternal uncle to the Child who is an orphan following the demise of her mother in 2012 as shown by the death Certificate annexed to the affidavit sworn by the applicant who was the deceased’s younger brother.
5. From the affidavit in support and death certificate annexed, the minor’s mother died aged 35 years old and it is deposed that she did not disclose to the family who the father to her child AHM was. She was a single parent who lived at her maternal home with her mother who is now aged 74 years and siblings among them, the applicant herein.
6. The child is an orphan having lost his biological mother through natural causes as per the annexed death certificate and her biological father is unknown. He is not even named in the child’s birth certificate annexed. The Child has a sister who is aged 13 years old and who lives with her and her maternal grandmother supported by the applicant herein who secured a green card and employment in the USA where he now ordinarily resides and works for gain but has very close links with the minor and his family back in Kenya, Vihiga County. His father is also deceased. hence his mother who was living with the two minors is widowed. The applicant is aged 33 years old as per the annexed national identity card. He is a Male Kenyan Citizen and single but now engaged to one, VWG and both are residing in the United States of America. He is adjudged to be mentally and medically sound. The applicant began to provide and support the child upon the death of her mother in 2012.
7. He has no biological child of his own and neither is his fiancée who has consented to the applicant adopting the child while acknowledging that the applicant has been providing for the child for all the period that she has known him and that they are now planning to get married on 30/9/2023.
8. The applicant’s elder brother and his wife who live in Kenya were granted guardianship orders of the minor by this court and the court interviewed them at the hearing of this Cause. The court also perused



all the documents filed in court on the consents filed by the child's grandmother and the consents signed by the child who is over 12 years on 23rd January 2023 as required by law. The Children's Officer, Kisumu County filed a suitability report dated 5th July, 2023 on the applicant to adopt the child and the applicant has been assessed to be suitable and possessing financial capability to continue taking care of the child herein and her sister in Adoption Cause No. E003 of 2023.

9. At the hearing of this cause on 18th September, 2023, I interviewed the child and the applicant herein as well as the appointed guardians ad litem and I have perused the report and documents filed by Little Angels Network, an adoption Society in Kenya who sat and deliberated on the applicant's application and they declared the child free for adoption. They have also issued and signed the Certificate of Freeing a Child for Adoption on 1st March, 2023.
10. The applicant in my view, as supported by evidence on record, has met all the legal requirements of adoption as reproduced above. Though a sole male applicant, he meets the requirements under section 186 of the new *Children's Act*, 2022 which allows a sole male applicant to adopt a female child who is related him by blood.
11. This indeed is a kinship adoption because the applicant is a brother to the child's mother and has lived with the child since she was born as her mother never married and her father is unknown to date. The applicant desires that the child receives good education and upbringing and is free to have the child join and live with him in USA. That in my view does not contravene the moratorium issued by the Cabinet Secretary. This being a kinship adoption is indeed a domestic adoption. *In re R.N.W. (minor)* (2019) eKLR the Court held that:

“In *Adoption Cause 75/2017, J.N.A. by Zoo and C.A.N.* Achode, J held that:-

“According to the guidelines for alternative Family Care of Children in Kenya pg.153, kinship adoption is adoption by adopters who are kin or relatives within the extended family of the child. Kenyans living abroad and wishing to adopt a Kenyan child will adopt as Kenyans by way of domestic adoption. This is therefore considered to be a local adoption....”

Having considered the above, authorities, I am persuaded to find that a kinship adoption is a domestic adoption to which this court has jurisdiction. The adoption application before me being a kinship adoption, this court has jurisdiction to hear it and will proceed to hear the Originating Summons. It is so ordered.”

12. Further in *In re R.N.W. (minor)* (2019) eKLR it was held that :

“ 11. This is a Kinship Adoption as the applicant is related to the child since the child's biological mother was a cousin to the Applicant.

12. Lady Justice Achode *In re J.N.A.* [2018] eKLR held that:-

“The indefinite moratorium issued by the Kenyan cabinet on 27th November, 2014 involved inter-country and resident adoptions of Kenyan children by foreigners. It does not affect adoptions by Kenya applicants, even those living abroad. Dual citizenship in our country is anchored in Article 16 of the Kenyan Constitution.



According to the *Guidelines for Alternative Family Care of Children in Kenya* page 153,

“kinship adoption is adoption by adopters who are kin or relatives within the extended family of the child.”

Kenyans living abroad and wishing to adopt a Kenyan child will adopt as Kenyans by way of domestic adoptions. This is therefore considered to be a local adoption.”

13. I had the opportunity to interview the child in court during the hearing of these proceedings which were conducted in Camera. I found her enthusiastic to be part of her uncle and to consider him to be her father and therefore her parent. I have noted that the child’s grandmother has given her consent to this adoption. I have noted the very positive reference in support of the applicant’s adoption of the child.
14. The affidavit sworn by the applicant on 24th April, 2023 is clear that the applicant’s intentions are to protect, support, provide inheritance for and maintain the child as his own. He understands the obligations of an adoptive parent towards the child who shall also benefit from his medical insurance.
15. The applicant has no criminal record or history of criminality and he filed a Certificate of Good conduct from the Criminal Investigations Department to confirm his depositions. The inquiry report by the Children’s Officer and the Little Angels Network, a Registered Adoption Society too gives him a clean bill of health. They describe him as kind hearted and hold the view that the adoption herein sought will be in the child’s best interest.
16. In the end, I allow the Originating Summons dated 26th April, 2023 in the following terms:
 - a. The applicant JAK is hereby authorized to adopt the child currently identified as AHM.
 - b. That WMK and MUO as appointed as joint legal guardians of the child AHM in the event the applicant is incapacitated or in any way unable to discharge his parental obligations, shall remain the child’s legal guardians.
 - c. The Registrar General is hereby directed to make the appropriate entries in the adopted Children’s Register to reflect the adoption of the child AHM by JAK.
 - d. An adoption order is hereby issued and to be extracted in the prescribed form under the Children’s Act and Rules
 - e. This file is now closed

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF SEPTEMBER, 2023

R.E. ABURILI

JUDGE

