



**In re TKM (Minor) (Adoption Cause E005 of 2021)  
[2023] KEHC 27280 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27280 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
ADOPTION CAUSE E005 OF 2021  
SN MUTUKU, J  
DECEMBER 19, 2023  
IN THE MATTER OF THE CHILDRENS ACT 2022  
IN THE MATTER OF TKM MINOR**

**IN THE MATTER OF**

**SMO ..... 1<sup>ST</sup> APPLICANT**

**DTO ..... 2<sup>ND</sup> APPLICANT**

**JUDGMENT**

1. SMO and DTO are a married couple, having solemnized their marriage under the Marriage Act, 2014, at the Registrar’s Office on 30<sup>th</sup> July 2015. The 1<sup>st</sup> Applicant is a Kenyan Citizen aged 43 years as at the time of filing this Application while the 2<sup>nd</sup> Applicant is a citizen of the United Kingdom of Great Britain and Northern Ireland. They have attached a Marriage Certificate No. xxxxx as proof of their marriage.
2. The couple has one child together, OMTO, born on 25<sup>th</sup> March 2015. They have applied for the adoption of TKM, born on 28<sup>th</sup> March 2012. TKM is the biological son of the 1<sup>st</sup> Applicant and one RM as shown on TKM’s Birth Certificate No. 920638 dated 16<sup>th</sup> January 2013. The biological father of TKM, Rayner Mathews, is said to have deserted the minor since 2013 and his whereabouts are unknown. TKM has remained under the care and support of his mother, the 1<sup>st</sup> Applicant.
3. The couple got engaged in 2014 before solemnizing their marriage and have since taken care of the minor. The 1<sup>st</sup> Applicant was granted custody of the minor in Nairobi Children’s Case No. 1463 of 2012 *SMO v RRM*.
4. The couple was residing in Kitengela at the time of filing this Cause but have moved to Westlands Nairobi where they live in a five bedroomed bungalow with the two children. The minor and his brother, with other children of minors age, are homeschooled at [Particulars withheld] School, an



online school with physical presence of teachers. The school is run by the Applicants at their Westlands Residence.

5. The minor was freed for adoption by the Kenya Children’s Home Adoption Society. The 1<sup>st</sup> Applicant has given her consent to have the minor adopted by her and the 2<sup>nd</sup> Applicant. Kenya Children’s Home Adoption Society Case Committee sitting on 22<sup>nd</sup> May 2019 freed the minor for adoption and issued a certificate declaring the minor free for adoption vide Certificate No. xxxxxxxxx dated 22<sup>nd</sup> May 2019.
6. The 1<sup>st</sup> Applicant is an astronomer by profession and the 2<sup>nd</sup> Applicant is an Engineer. Both run the Travelling Telescope business. They have stated that the reasons for this adoption are that both applicants are legally married with the 1<sup>st</sup> Applicant coming into that marriage with a child from a previous relationship and that the 2<sup>nd</sup> Applicant desires to acquire legal parental responsibility of the minor to safeguard his welfare.
7. Both applicants are financially stable. Their residence stands in a spacious compound from where they run The Travelling Telescope business and [Particulars withheld] School where their two children and neighbours’ children go to school.
8. Both applicants have been declared free from criminal activity vide the Police Clearance Certificates dated 30<sup>th</sup> August 2018 and 24<sup>th</sup> August 2018 respectively.
9. This court appointed PCNG as Guardian Ad Litem on 12<sup>th</sup> May 2022 and directed her together with the Director of Childre’s Services, to file a report within 45 days of the suitability of the Applicants to adopt the minor. Both reports have been filed. The Guardian Ad Litem filed two reports, dated 12<sup>th</sup> October 2022 and a further report dated 23<sup>rd</sup> April 2023. That of the Children’s Department is dated 11<sup>th</sup> November 2022 and is signed by Mary Atati, Assistant Director, Children’s Services Nairobi. Both reports have given positive feedback on the suitability of the applicants to adopt the minor and so recommend.
10. This is a partly kinship adoption given that the 1<sup>st</sup> Applicant is the biological mother of the minor. The Applicants are aged 43 and 45 years respectively, as at the time of filing this Cause. They satisfy the requirements of section 186(1) and (2) of the *Children’s Act*, 2022 which provides that:

186.

- (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.

11. Kinship adoptions fall under section 193 of the *Children’s Act* that provides that:

193.

- (1) A kinship adoption order may only be made in favour of a relative of the child.



12. This court is alive to a moratorium barring the adoption of Kenyan children by Foreign Nationals. *In re ASJ (Minor)* [2021] eKLR, a matter filed at the Family Division, Nairobi, the circumstances were similar to the ones in this Cause. The 1<sup>st</sup> Applicant was a Kenyan Citizen and the biological mother of the minor while the 2<sup>nd</sup> Applicant, a foreign national, was her second husband after divorcing her first husband and the biological father of the minor. The court allowed the adoption and stated as follows:

“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 (2<sup>nd</sup> Applicant) is legally married to a Kenyan citizen (1<sup>st</sup> 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.”

13. The above circumstances prevail in this matter. The 1<sup>st</sup> Applicant, the biological mother of the minor, and a Kenyan Citizen, has consented to the 2<sup>nd</sup> Applicant, a Foreign National and a citizen of the United Kingdom, to adopt the minor as his adoptive father. Both applicants are married under Kenyan Law, both reside and operate businesses in Kenya, and they have made this country their home. They also have another child together. They are in a stable family union, and both have jointly cared for, and provided for the child since they got engaged and later married. Their respective families support their decision to adopt the minor. The records show that both Applicants have been examined and found to be medically fit and they are financially stable through their joint business.

14. The reports from the Guardian Ad Litem and the Children Services, prepared after home visits, give positive feedback and recommend that the two applicants be allowed to adopt the minor. I have noted from the reports that the minor is happy and thriving under the care and protection of both applicants. The biological father of the minor has not been in the life of the child and his whereabouts are unknown. The 1<sup>st</sup> Applicant has had custody of the minor from the time the biological father abandoned him.

15. The Applicants have proposed AMO, as the Legal Guardian of the minor. AMO is brother to the 1<sup>st</sup> Applicant herein and he has given his consent to be so appointed.

16. Section 187. (1) of the *Children's Act* empowers this court to dispense with the consent under section 186 (8) in certain circumstances as specified there. One of those circumstances is where the parent or guardian of the child has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child.

17. I have considered this matter with the best interest of the minor in this adoption in mind. I have considered the constitutional command under Article 53 (2) of the *Constitution* that A child's best interests are of paramount importance in every matter concerning the child. This requirement is repeated in the *Children Act*, 2022 in Section 4(3) which provides that “A judicial or administrative institution or any person making an interpretation as to conflict of any provision or laws shall have regard to the best interests of a child.”

18. Section 8 of the *Children Act* also provides what best interest of the child entails 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;
- (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

- (a) safeguard and promote the rights and welfare of the child; (b) conserve and promote the welfare of the child; and
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

19. To my mind, there is no better person, unless the contrary is proved, than a child’s parents to take care of the child’s best interest. Section 2 of the *Children Act* defines “best interest of the child” as follows:

“best interest of the child” means the principles that prime the child’s right to survival, protection, participation and development above other considerations and includes the rights contemplated under Article 53 (1) of the *Constitution* and section 8 of this Act”

20. I am satisfied that the 1<sup>st</sup> Applicant, being the biological mother of the minor, and the 2<sup>nd</sup> Applicant being her spouse who willingly took up the responsibility of the minor as a father and is willing to give the minor his name, are best suited to ensure that the minor, just like OMT0, their biological child, enjoy optimally, the right to survival, protection, participation and development above other considerations. The right to survival, to my understanding, encompasses many rights including right to shelter, food, accommodation, clothing, physical and mental well-being, education, health etc. The minor is expected to not only survive but also thrive under the care of both applicants.

21. Having satisfied myself that this Application is merited and that both applicants fit the bill of being declared adopters, I have no hesitation than to grant an adoption order to both applicants as sought in this Cause in the following terms and conditions:

- i. The SMO and DTO, are hereby authorized to adopt TKM, the minor herein.
- ii. That the minor shall henceforth be known as TKO.
- iii. That the consent of the minor’s biological father RM be dispensed with.
- iv. That the Registrar General is hereby ordered to make appropriate entries in respect of this adoption in the Adoption Register and to issue a certificate to that effect.
- v. That ATO is hereby appointed as the Legal Guardian of the minor.
- vi. That PCNG, the Guardian Ad Litem, is hereby discharged from her duties as Guardian Ad Litem.

22. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 19<sup>TH</sup> DECEMBER 2023.**

**S. N. MUTUKU**

**JUDGE**

