



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re M (Baby) aka JMN (Adoption Cause 49 of 2019)  
[2022] KEHC 13320 (KLR) (Family) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13320 (KLR)

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

**FAMILY**

**ADOPTION CAUSE 49 OF 2019**

**MA ODERO, J**

**SEPTEMBER 22, 2022**

**IN THE MATTER OF THE CHILDRENS ACT NO 8 OF 2001**

**IN THE MATTER OF BABY M AKA JMN**

**BY**

**FMN – APPLICANT**

**JUDGMENT**

1. Before Court is the Originating Summons dated 15<sup>th</sup> April 2019 in which the Applicant seeks the following orders:-
  - “ 1. That the Applicant herein be and is hereby authorized to adopt BABY M and the child shall be called JMN.
  2. That the court be pleased to appoint TMMHA and AMK as the legal Guardians of Baby M a.k.a JMN upon granting of the adoption order.
  3. That the Registrar General be ordered to make the appropriate entries in the Adopted Children’s Register in respect of Baby JMN.
  4. That baby JMN be considered a Kenyan Citizen.
  5. That the court be pleased to make any further orders it deems necessary in the best interests of the minor.”
2. The summons was supported by the statement of even date sworn by the Applicant. The application was canvassed in open court by way of oral evidence.
3. The Applicant FMN told the court that she is a single mother of a 2½ year old boy. She now seeks to adopt a boy-child aged three (3) years old. The Applicant told the court that she fully understands the legal implications of an adoption order. She undertakes to accord to the Subject child all the rights due



to a biological child including the right of inheritance. She confirmed that her family are aware of and support her intention to adopt the child.

### **Analysis and determination**

4. I have carefully considered this application for adoption. the various Affidavits and Reports on record as well as the relevant law. I have also considered the evidence adduced in open court. The preliminary requirements for the making of an Adoption Order are set out in Section 156(1) of the Children's Act 2001 which provides as follows:-

“ 159 (1) No arrangement shall be commenced for the adoption of a child unless the child is atleast six (6) weeks old and has been declared free for adoption by a Registered Adoption Society in accordance with the Rules prescribed in that behalf.”

5. The Subject child was born on 15<sup>th</sup> September 2015. Annexed to the summons is a copy of the child's Birth Certificate Serial No. xxxx (Annexure '11B'). Therefore the child is now aged six (6) years well above the age limit provided for in law.
6. Annexed to the Report filed by the Adoption Agency on 28<sup>th</sup> May 2019 is the original Certificate Serial Number xxxx dated 17<sup>th</sup> October 2018 declaring the child Free for Adoption. Accordingly I am satisfied that the legal prerequisite for an adoption order have been met.
7. The duty of this court is to analyze the material placed before it to determine whether the Applicant is a suitable adoptive parent. The Applicant is a Kenyan citizen as evidenced by the annexed copy of her National Identify Card (Annexure '1'). The Applicant told the court that she has never been married but is a single mother of a boy-child who is aged 2½ years old. She stated that she wishes to adopt another child out of her desire to provide a needy child with a home.
8. The Applicant is a committed Christian and intends to raise the child in the CF. Annexure 11 'a' is a letter of recommendation written by Rev Fr Francis Musyoki, the Father in charge of Mary Mother of God Catholic Church Komarock, where the Applicant is a Congregant.
9. The Applicant confirmed that her family are aware of and support her intention to adopt the child. Indeed the Applicant's younger brother TMM and his wife AMK have consented to be appointed at the legal Guardians for the child. The consent letter duly signed by the Guardians is annexed to the summons (Annexure '7').
10. The Applicant runs a Bakery in Joska where she lives. From this business she earns about Kshs 50,000 monthly which is sufficient to provide for the needs of her two children. She has annexed a copy of her business permit issued to her by the Mavoko Sub-County. The Applicant has also exhibited copies of her bank statements (Annexure '6') as well as copies of her logbook and copy of Title for a plot, which the Applicant owns in Mavoko. I am satisfied that the Applicant is financially secure and is in a position to cater for the needs of the child.
11. The Applicant was examined by a Doctor and was found to be physically and mentally healthy. She has annexed a copy of her clearance Certificate issued by the Directorate of Criminal Investigations proving that the Applicant has no criminal record. Based on the evidence availed to this court I am satisfied that the Applicant is a suitable adoptive parent.
12. The Subject-child is a boy-child who was abandoned shortly after his birth in a breakdown vehicle Registration KLV 251 near Co-operative Bank, Thika. A Good Samaritan who heard the baby crying rescued the child and reported the abandonment at Thika Police Station vide OB Number xxxx<sup>th</sup> September 2015.



13. The child was immediately taken to Thika Level 5 Hospital for medical checkup. Thereafter on 24<sup>th</sup> September 2015 the child was admitted at Thomas Barnado Home. On 8<sup>th</sup> June 2018, the Thika Children’s Court committed the child to the said Home for care and Protection. On 2<sup>nd</sup> November 2018 the child was released into the custody the Applicant under a Foster Care Agreement.
14. Following the abandonment of the child, police efforts to trace the biological mother/relatives of the child have borne no fruit. A final police letter dated 22<sup>nd</sup> March 2016 (Annexure ‘16’) confirms this fact.
15. Given that this child was abandoned by her biological mother there exists no known person from whom consent for this adoption can be sought and/or obtained. In the circumstances I dispense with the requirement for consent in line with Section 159(1)(e) of the Children’s Act.
16. Article 14 of *the Constitution* of Kenya 2010 deals with issue of Citizenship. Article 14(4) provides as follows:
 

“(4) A child found in Kenya who is, or appears to be less than eight years of age and whose nationality and parents are not known, is presumed to be a citizen by birth.”
17. The subject child was abandoned at birth in Thika Town in the Republic of Kenya. He is presumed by law to be a citizen of Kenya by birth and I so declare.
18. In deciding upon any matter involving a child Courts are obliged to give priority to the best interests of the said child. Section 4(2) of the *Children Act* 2001 provides:-
 

“(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” (own emphasis)
19. Finally, it has not escaped the attention of this court that the Applicant who is female is seeking to adopt a male child. Section 158(2) of the *Children Act* provides as follows:-
  - (2) An adoption order shall not be made in favour of the following persons unless the court is satisfied that there are special circumstances that justify the making of an adoption order—
    - (a) A sole male applicant in respect of a female child;
    - (b) A sole female applicant in respect of a male child;
    - (c) An applicant or joint applicants who has or both have attained the age of sixty-five years;
    - (d) A sole foreign female applicant.” (own emphasis)
20. Therefore in order for an order of adoption to be made in the case of a female Applicant adopting male child, the court must be satisfied that special circumstances exist.
21. In considering a similar situation Hon Justice John Onyiego *In re adoption of baby P.B* [2016] eKLR stated as follows: -
 

“The key question is, are there special circumstances that would warrant the Court to allow the Applicant being a female to adopt the baby who is a male. Section 158(2) has donated to the Court wide discretionary powers in determining what entails special circumstances under which it can allow a female Applicant to adopt a male child. What then constitutes



special circumstances. Under Article 53(2) of *the Constitution* and Section 4(2) and (3) of the *Children Act*, the primary consideration before a Court, anybody, organization or institution makes any decision or order affecting child is the best interests of a child.

In the case of *In re adoption of baby JKM* (2017)eKLR Judge Achode allowed a female Applicant to adopt a male child who was found abandoned somewhere in some village. The Court took into consideration special circumstances as per the guidelines of the National Adoption Committee dated 13<sup>th</sup> January 2010 pursuant to Section 155 of the Children's Act for a female Applicant wishing to adopt a male child. The elements are particularized as hereunder:-

- i. When the child is a relative,
- ii. When the child has special needs and the applicant is willing and has capacity to take care of the child,
- iii. Where the applicant has adopted or has another biological child or children over whom she is willingly exercising parental responsibility,
- iv. Where the child to be adopted has a sibling who is also being adopted by the applicant,
- v. The applicant is the only person available to adopt the child, and
- vi. Where the applicant is the legal guardian of the child or children appointed by will or in adoption proceedings and the parents die or become permanently incapacitated.”

Similar position was held in the case of; *In re baby J. I (Minor)*eKLR and *In re G. W. (BABY)* (2008)eKLR-

“In the instant case, the Applicant has a biological child on whom she is willingly exercising parental responsibility. It is in the best interests of the baby herein that he gets a home, parental guidance, emotional, social and moral upbringing by a responsible parent. Further, the child is assured of basic necessities like food, shelter, clothing, medical care and education all of which the Appellant is capable of providing.

Considering that this is a local adoption and the baby having bonded very well as evidenced during their appearance and hearing in Court. I am fully persuaded that gender issue cannot be an impediment towards the realization of the best interests of the baby.” [own emphasis]

22. The Applicant herein already has a young son whom she has been raising singlehandedly and over whom she is already exercising parental responsibility. As such, I find the Applicant though female is qualified to adopt the Subject Child who is male.
23. Additionally, new guidelines have been issued by the National Adoption Committee (NAC) on 13<sup>th</sup> January 2010. The said guidelines provide that:-

“A sole female Kenyan can be allowed to adopt a male child on condition that the Applicant is the only person available to adopt the child.”

24. The Adoption Agency stated that he child had remained in the Children's Home since September 2015. At the age of three (3) years, he had overstayed in the Home and no person had come forward



to adopt him. In the circumstances, it was recommended that the child be placed with the Applicant who expressed a desire to adopt him.

25. The child has lived with the Applicant in her home since November 2018 a period of approximately three (3) years. Undoubtedly, he has bonded with the family. This is the only home and the only family the child knows. I was able to see the child online. He was a healthy happy boy. He was able to answer basic questions put to him. The child told the court that he attends school and named his friend as 'G' (his younger brother).
26. This is a child who was abandoned at birth. He faced an uncertain future living in Children's Homes and other similar institutions. This adoption allows the child the opportunity to be raised in a stable and loving home environment.
27. A Home visit was conducted by the Childrens Officer on 3<sup>rd</sup> June 2022. The Applicant lives in her own home in Joska. The home is a three bed-roomed house, which is well secured with a perimeter wall and a metal gate. The place is secured by 24 hour guards and is connected to both water and electricity. The home was found to be suitable for raising young children.
28. I have perused the reports prepared by the Adoption Agency, the Guardian Ad Litem and the Director Children's Services. All three reports were favourable and all recommended the Adoption. I am satisfied that this Adoption serves the best interest of the child. Accordingly, I do allow this application and make the following orders:-

1. The Applicant FMN is authorized to adopt the child known as baby M.
2. Upon Adoption the child will be known as JMN.
3. The child is declared to be Kenyan Citizen by birth and is entitled to all the rights and benefits in respect thereto.
4. The Registrar General is directed to make the relevant entry in the Adopted Children's Register.
5. TMM and AMK are appointed as the Legal Guardians for the child.
6. No orders on costs.

**DATED IN NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.**

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**MAUREEN A. ODERO**

**JUDGE**

