



**In re MMCH (Child) (Adoption Cause 105 of 2021)  
[2022] KEHC 13379 (KLR) (Family) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13379 (KLR)

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

**FAMILY**

**ADOPTION CAUSE 105 OF 2021**

**MA ODERO, J**

**SEPTEMBER 22, 2022**

**IN THE MATTER OF THE CHILDREN ACT 2001**

**MMCH.....THE CHILD**

**BY**

**C M .....1ST APPLICANT**

**S G C H.....2ND APPLICANT**

**JUDGMENT**

1. Before this court is the originating summons dated March 4, 2022 by which the applicants seek the following orders:-

- “ 1. That the child be presumed to be a Kenyan citizen by birth
2. That the director of immigration be authorized to issue the child with a Kenyan passport.
3. That the applicants CM and SGCH be authorize to adopt the child to be known as MCH.
4. That SH be appointed as the legal guardian of the child in the event of death or incapacity of the applicant before the child is of full age and fully self-reliant.
5. That the registrar general do make an entry of this adoption in the adopted children register.
6. That the registrar of births do issue a new birth certificate to the minor listing the 1<sup>st</sup> applicant CM as the mother and the 2<sup>nd</sup> applicant SGCH as the father to the minor.



7. That the court be pleased to make any further orders it deem necessary.”
2. The summons is supported by two statements both dated March 4, 2022 sworn by each applicant. The matter was canvassed by way of oral evidence on the virtual platform.
3. The applicants CM and SGCH are a couple who got married to each other in the year 2004. The couple have one biological child who was born in the year 2015 in Bangkok, Thailand. They now wish to adopt the subject child who was born by way of surrogacy using an egg donor and seed donated by the 2<sup>nd</sup> applicant. Accordingly, the 2<sup>nd</sup> applicant is the biological father of the said child.
4. Both applicants confirm to the court that they are aware of the legal implications of an adoption order. They undertake to accord the subject child all rights due to a biological child including the right to inherit.
5. The applicants told the court that their extended families support their decision to adopt the child.

### **Analysis and determination**

6. The legal prerequisites for adoption are set in section 156(1) of the *Children’s Act 2001*, which provides as follow: -

“ 156(1) no arrangement shall be commenced for the adoption of a child unless the child is at least (6) weeks old and has been declared free for adoption by a Registered Adoption Society in accordance with the rules prescribed in that behalf.”
7. The subject child was born on January 8, 2015. Annexed to the summons is the certificate of birth of a citizen occurring abroad serial number xxxxx (annexture ‘MCH-1’). The applicants have also annexed a copy of the child’s original birth certificate issued in Bangkok, Thailand. The child is therefore now aged seven (7) years old and is well above the six (6) week age limit, provided for in law.
8. KKPI Adoption Society which is a registered adoption agency have annexed to their report a certificate serial number xxx dated April 20, 2022 declaring the child free for adoption. I therefore find that all legal prerequisites for adoption have been met in this case.
9. The duty of this court is to analyze the evidence on record to determine whether the applicants are suitable adoptive parents. The 2<sup>nd</sup> applicant who is the child’s biological father is a citizen of Kenya. He has annexed to the summons a copy of his Kenyan passport number ck xxxxx issued in Nairobi, Kenya on October 7, 2019. The 1<sup>st</sup> applicant who is a wife of the 2<sup>nd</sup> applicant is a French citizen who holds a foreign certificate serial number xxxxxxxxx issued to her by the Republic of Kenya. The applicants are a couple who got married to each other in Nairobi on August 23, 2004. A copy of their marriage certificate serial number xxxxxx is annexed to the summons (annexture ‘MCH-1’). The couple have resided together in Kenya for the past eighteen (18) years. They have made this country their home and do not intend to move with the subject child out of Kenya. I therefore consider this to be a local adoption.
10. Following their marriage the applicants went through a long and agonizing journey seeking to have a child of their own. The 1<sup>st</sup> applicant underwent several IVF attempts and suffered the agony of three miscarriages before they decided to opt for surrogacy as a solution. This led to the birth of the subject child in Bangkok – Thailand. The 2<sup>nd</sup> applicant is the biological father of the child as evidenced by the annexed birth certificate as well as the results of DNA test contained in the report dated February 2, 2015 which returned a 99.99% probability that the 2<sup>nd</sup> applicant SGGH is the child’s father. (Annexture



‘MCH-‘1’). The couple now wish to adopt the subject child in order to regularize his position as a valued member of their family.

11. The applicants run a restaurant business together in Karen area of Nairobi. They earn an income of approximately KShs 1.5 million monthly from said business. This is more than sufficient to enable the couple provide for the needs of the child. In addition, the couple own their own home in Karen as well as another home in Mtwapa, Kilifi county.
12. The applicants indicated to the court that the respective families have already accepted the child and recognize him as a member of the family. They are aware of the circumstances of the conception and birth of the subject child. Both families support of the intention of the applicants to adopt the child and have wholeheartedly welcomed the child into the family. The 2<sup>nd</sup> applicants parents who reside in Mtwapa, Mombasa county are delighted to welcome the subject child as their grandchild.
13. The applicants have appointed SH brother of the 2<sup>nd</sup> applicant as the legal guardian for the child. The said legal guardian has signed a consent dated March 4, 2022 indicating his willingness to act as legal guardian for the child. All in all I am satisfied that the applicants are suitable adoptive parents.
14. The applicants are both physically and mentally fit and are both well able to raise the child. They have annexed copies of clearance certificates issued to them by the directorate of criminal investigations proving that neither has a criminal record (annexture MCH ‘1’).
15. As stated earlier the subject child is the biological son of the 2<sup>nd</sup> applicants. This is proved by the inclusion of the name of the 2<sup>nd</sup> applicants in the child's birth certificates as well as the DNA test. The child was conceived scientifically through seed donated by the 2<sup>nd</sup> applicant and an egg donated by a donor. The fertilized embryo was then carried to term and delivered by a surrogate mother in Bangkok, Thailand on January 7, 2015. The woman who carried and delivered the subject child one Chantana Chatthong entered into a surrogacy agreement with the applicants in which she agreed to relinquish any claim to the child. A copy of the surrogacy agreement is annexed to the summons (annexture ‘MCH’3’). The applicants told the court that immediately upon his birth, the child was released to them and they returned to Kenya with their son. They have lived with and raised the child in this country for the past seven (7) years. At no time has the woman who delivered the child ever come to seek custody of the child. Indeed the child has had no communication at all with the surrogate.
16. Article 14 of the [Constitutions of Kenya, 2010](#) deals with the question of Citizenship. Article 14(1) provides as follows:-

“A person is a citizen by birth if on the day of the person’s birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.” (own emphasis)
17. The 2<sup>nd</sup> applicant who is the child's biological father was born in Kenya in the year 1965. The child's father was largely raised in Kenya and is a citizen of Kenya as proved by his passport. At the time of the child's birth in January 2015 the 2<sup>nd</sup> applicant was a citizen of Kenya as proved by his birth certificate serial number xxxxxx. Accordingly based on article 14(1) I declare the child to be a citizen of Kenya by birth.
18. The question would arise whether the child's biological mother has consented to this adoption. The surrogate mother agreed to relinquish the child to the applicants immediately the child was born and indeed she did honour this agreement. For the past seven (7) years the woman who bore the child in Bangkok has made no attempt to claim the child, neither has she made an effort to see the child. It is clear that the mother has abandoned all rights to the child. Accordingly, I waive the requirement for her consent in line with section 159 (1)(a) [Children Act](#) 2001.



19. 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, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”. (Own emphasis)

20. It is a fact that surrogacy agreements are relatively new and novel in the Kenyan jurisdiction. However, such arrangements are now gaining ground and the Kenyan courts must squarely face the issues which arise therefrom. In JLN & 2 others v Director of Childrens Services and 4 others [2014] eKLR Hon Justice Lenaola (as he then was) observed as follows:-

“Currently there is no law in Kenya regulating surrogacy arrangements. It is because of lack of a legal regime that the parties found themselves in such a situation. But even where there is no legal regime, the court or any persons dealing with the issues must in accordance with article 57 of the Constitution, decide the issue on the basis of the best interests of the child.....”

21. This is basically a Kinship adoption. The 2<sup>nd</sup> applicant is the biological father of the child. The 1<sup>st</sup> applicant is the legal wife of the child's father. The child has lived with the applicants from the time he was born. He is to all intents the couple's son.

22. I have perused the reports prepared by the adoption agency, the guardian *ad litem*, as well as the director childrens services. All three reports are positive and all recommend the adoption.

23. A home visit was conducted by an officer from director of children services on October 25, 2021. The applicants live in the Karen area of Nairobi County. They live in a palatial 3 bedrooomed house built on a 2.5 acre piece of land. The home is spacious with all amenities. The applicants have provided toys games and bicycles for the children as well as a swimming pool. The area is close to several amenities like schools, hospitals and shopping malls. The house is well secured by an electric fence, CCTV and 24 hour guards.

24. The court was not able to interview the child as he was unfortunately in hospital on the hearing date. Nevertheless, the applicants have annexed several photographs showing their happy and loving interaction with the subject child and his brother. I have no doubt that the child has bonded with the applicants. They are the only parents he knows and the applicants have raised and provided for the child in the same way they do for their other son.

25. In the matter Re the matter of Baby TDL [2014] eKLR a case which was on all fours with the present case Hon Justice Musyoka held as follows:-

“I have noted the ethical concerns raised by the director of children services in his report. I have taken note that he has recommended the proposed adoption save that he has misgivings about certain matters on a purely moral standpoint. Legally surrogacy arrangements are valid and have been upheld in other jurisdictions. The Kenyan state has been slow in passing legislation to deal with surrogacy arrangements, that however should not in my view affect the legality of such arrangements so long as they are entered into freely by consenting adults and are in the best interests of the child the subject of the arrangements. In my view the child in this case will not be prejudiced in any way, and the present arrangements are in his best interests.” (own emphasis)



26. All in all I am satisfied that this adoption serves the best interests of the child, Accordingly, I do allow this application and make the following orders:-

1. The applicants CM and SGCH are authorized to adopt the child known as MCH.
2. Upon adoption the child shall be known as MCH.
3. The registrar general is directed to make the relevant entry in the adopted children's register.
4. The child is a Kenyan citizen by birth and is entitled to all rights, privileges and benefits in respect thereto.
5. SH is appointed legal guardians for the child.”

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

.....

**MAUREEN A. ODERO**

**JUDGE**

