



**In re SK & another (Adoption Cause E004 & E003 of 2020 & E001 of 2021 (Consolidated)) [2021] KEHC 465 (KLR) (25 February 2021) (Ruling)**

*In re SK & SSM [2021] eKLR*

Neutral citation: [2021] KEHC 465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
ADOPTION CAUSE E004 & E003 OF 2020 & E001 OF 2021 (CONSOLIDATED)  
RN NYAKUNDI, J  
FEBRUARY 25, 2021  
IN THE MATTER OF THE CHILDREN ACT NO. 8 OF 2001  
AND  
THE CHILDREN (ADOPTION) REGULATIONS OF 2005 (REV. 2016)  
IN THE MATTER OF ADOPTION OF SK AND SSM**

**IN THE MATTER OF**

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

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

**AND**

**KENYA CHILDREN HOME ADOPTION SOCIETY ..... INTERESTED PARTY**

**DIRECTOR OF CHILDREN SERVICES ..... INTERESTED PARTY**

**Section 158 of the Children Act, 2001 requiring an adoptive parent to be aged 65 years or below could be defeated by the paramount interests of the child.**

Reported by John Ribia

*Family Law – children - adoption – statutory requirements for an applicant seeking an adoption order – factors to consider when making an adoption order - whether the paramount interests of a child subject of adoption application could defeat a statutory provision requiring an adoptive parent to be aged 65 years or below – Constitution of Kenya, 2010, article 53; Children Act, 2001, sections 4, 6, 153, 154, 157, 158 and 159.*

**Brief facts**

The applicants moved the court under sections 145, 158, and 160 of the Children Act seeking an adoption order to adopt SK and SSM, minors aged 11 years and 16 years old respectively. The applicant was 72 years old, far exceeding the age restriction set by the law to qualify to adopt, being 65 years.



## Issues

- i. Whether section 158 of the Children Act, 2001 requiring an adoptive parent to be aged 65 years or below could be defeated by the paramount interests of the child.
- ii. What were the factors to consider when making an adoption order?

## Relevant provisions of the Law

### Constitution of Kenya, 2010

#### Article 53 - Children

*(1) Every child has the right—*

*(a) to a name and nationality from birth;*

*(b) to free and compulsory basic education;*

*(c) to basic nutrition, shelter and health care;*

*(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;*

*(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and*

*(f) not to be detained, except as a measure of last resort, and when detained, to be held—*

*(i) for the shortest appropriate period of time; and*

*(ii) separate from adults and in conditions that take account of the child's sex and age.*

*(2) A child's best interests are of paramount importance in every matter concerning the child.*

### Children Act, 2001

#### Section 4 - Survival and best interests of the child

*(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act 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;*

*(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.*

## Held

1. Section 154 of the Children Act gave the High Court the statutory power donated by the Act to entertain an application for an adoption order. On the other hand, section 157 of that Act set the criteria as to who could qualify for adoption. That section provided that any child resident in Kenya whether or not he or she was born in Kenya qualified for adoption.
2. Adoption applicants had to meet the set threshold under section 158 of the Children Act. An applicant ought to have attained the age of twenty-five years and was at least twenty-one years older than the child but had not attained the age of sixty-five years. Further, before making an adoption order, a court had to consider the approaches set down by the statute, the law on recognition of the existence and the role of biological parents to the minors' demands and obtaining of the necessary consents. One of the salient features of section 159 of the Children Act was the power of the court to dispense with the consent under the doctrine of necessity and for the best interest and welfare of the child.
3. The applicants revealed and emphasized on factors related to the continuity of the social relationship with the children who only knew and moved within the custodial home. The evidence from the applicants supported the pattern that the minor SK had continuously lived with the family from year six (6) to year eleven (11). Whereas SSM, aged sixteen (16) had been in their custody since she was nine (9) months old. In addition, the reports by Kenya Children's Homes and that of the County Director



- of Children Services demonstrated from the facts and circumstances of the case that the applicants had taken care of the children with the consent of the biological parent.
4. The biological mother of the minors had readily agreed because the offer would be good and for the best interest of the minors. The biological parent was psychologically, morally and financially not able to maintain the strongest bond with her children to meet the daily attention to the children's physical, social, psychological and basic survival rights. Further, the County Director of Children Services and the adoption agency identified factors that favored adoption orders based on the welfare and best interest doctrine. Therefore, there were compelling reasons for the minors' continued stay with the applicants.
  5. As their constitutional and statutory rights were not tenable within the confines and custody of the parent, it followed that the parent who was best suitable to take care of her children had placed their interests above her own in order to allow the other parents, the instant applicants, to be granted custody.
  6. The instant application was a joint kinship custody application defining a child's best interest under section 4 of the Children Act and article 53 of the Constitution combined taking into account different factors and circumstances characterizing the child, as well as the circumstances and capabilities of the child's potential adoptive parents. That was underpinned in order to guarantee the most fundamental objective, home or community environment and well-being that supported the child's welfare and best interest to the maximum. The applicants seeking an adoption order had to satisfy the court that the best interest of the children as a cardinal legal principle shall be applied all the time in the decision-making process. The legal criteria for one to qualify as an adoptive parent was provided within the scope of section 158 of the Children Act.
  7. The 1<sup>st</sup> applicant was aged 72 years old and his place of birth was in Belgium, where the rest of his siblings and children lived as permanent citizens. The 1<sup>st</sup> applicant moved to Kenya in 2004 and entered into a second marriage with the 2<sup>nd</sup> applicant in 2010, which marriage was legalized in 2015. The 2<sup>nd</sup> applicant was a Kenyan citizen by birth and aged 39 years. Both applicants resided in Malindi at their matrimonial home. Typically, under section 158 of the Children Act, the 1<sup>st</sup> applicant would be disqualified for reason of age to bind him to the instant joint custody application with the 2<sup>nd</sup> applicant. However, the 1<sup>st</sup> applicant was legally married to the 2<sup>nd</sup> applicant.
  8. In assessing and determining the best interest of the children in an application for adoption under section 154 of the Children Act, the principle remained that the court should examine the relevant circumstance in each case and apply the different elements to exercise discretion that gave effect to the needs and best interest of the child who was the subject matter of the adoption order. The content of each element would vary from child to child and from case to case, dependent on the nature of the decision to be made and the concrete circumstances before the court and the importance of each element in the overall assessment.
  9. It was imperative to note that the provisions in respect of adoption were supposed to provide safeguards for the best interest of the child. Age limits of 65 years could be held to be mandatory where the rights of the child depended on it or was of special importance when the required order on adoption factored the needs of the child, physical and emotional support and care, relationship with the parent or adoptive parent as a caregiver.
  10. The condition attached to the non-grant of adoption to an applicant aged over 65 years varied due to the existing extenuating circumstances of the application. The hallmark of the exercise of that power was permissible in view of the considerations that the 1<sup>st</sup> applicant had lived with the children as a caregiver, the importance of his marriage relationship with the 2<sup>nd</sup> applicant. For sometime jointly they had met the needs of the children in terms of physical, emotional, personal, development, education, nutrition, medicare, capacity to parent the children, experience to protect them from harm and other social ills and favourable living and upbringing conditions.



11. In adjudicating the application, the feelings and opinions of the children as well as their right to be adopted in the process of determining their best interest were also taken into account by the court. The children possessed the necessary intellectual and emotional maturity to give their consent and expression of preference toward the making of an adoption order.
12. As the instant application was a kinship adoption and nationality case, the paramount interests of the children required that the applicants systematically consider not taking decisions and actions that would affect their interests. That obligation included limiting any permanent residency of the children outside the country of birth without the consent of the court and that of the biological parent.

*Application allowed with no order as to costs.*

## **Citations**

### **Cases**

#### ***United Kingdom***

1. *J v C* [1970] AC 668 - (Followed)
2. *Weller & others v Associated Newspapers Ltd* [2015] All ER (D) 194 - (Explained)

### **Texts**

Huddard, M., Ensminger, J., (1992), *Hearing the Voice of Children* 8 Canadian Family Law Quarterly pp 95, 96.

### **Statutes**

#### ***Kenya***

1. Children Act, 2001 (Repealed) (Act No 8 of 2001) sections 4(2)(3); 6; 145; 153; 154; 157; 158; 160 - (Interpreted)
2. Constitution of Kenya article 53(2) - (Interpreted)

### **Instruments**

Geneva Declaration of the Rights of the Child, 1924  
article 2

### **Advocates**

*Ms. Carolene Kituku* for the applicant

## **RULING**

### **Background**

1. (PCH) and (CKK) hereinafter referred as the applicants referred themselves as of Belgium National and for the second applicant as a Kenyan citizen but currently a married couple residents of Malindi – Kenya.
2. The applicants moved the court by way of an originating summons expressed to be brought under section 145, 158 and 160 of the *Childrens Act* seeking an adoption order of this court to adopt (SK) and (SSM) minors aged 11 years and 16 years old respectively. The applicants deposed in their affidavits in support of the originating summons. Additional affidavits were deposed by (CK), hereinafter referred as the biological mother of both minors' subject matter of these adoption proceedings. Further one (AH) a child to the 1<sup>st</sup> applicant deposed an affidavit in support of the application for adoption of the two minors as identified in the averments by the applicants. The administrators Peter Ndotono and Collins Oywera being Kenya Childrens Homes an adoption agency also prepared an adoption report dated December 16, 2020. Mr George Isoe Migosi, the county coordinator children services also added his voice to the application for adoption as captured in the context of his report dated February 2, 2021.



3. The court interacted with the parties to the application and Ms Kituku counsel for the applicants made brief oral submissions in support of the originating summons. In consideration of the matter, the affidavits by the applicants, the guardian Ad Litem, the consents by (H), the reports by the Kenya Childrens Homes and the County Director of Children Services together with the petition and annexures shall form the basis of my decision in this matter.

## Determination

### The Law

4. According to the article 53 of the *Constitution*,
  - (1) .....
    - (a) Every child has the right to a name and nationality from birth.
    - (b) To free and compulsory basic education.
    - (c) To basic nutrition, shelter and a health care.
    - (d) To be prevented from abuse, neglect, harmful cultural practices, forms of violence, inhuman treatment and punishment and hazardous or explosive labour.
    - (e) To parental care and protection, which includes equal responsibilities of the mother and the father to provide for the child, whether they are married to each other or not.
  - (2) A child's best interest are of paramount importance in every matter concerning the child.
5. According to section 6 of the *Childrens Act* No 8 of 2001,
  - (1) A child shall have a right to live with and to be cared for by his or her parents.
  - (2) Subject to sub-section (1) where the court or the Director determines in accordance with the Law, that it is in the best interests of the child to separate him or her from the parents, the best alternative care available shall be provided for the child.

It is also provided for in section 4(3) of the Act that

“in all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this act 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.
- (c) Secure for the child such guidance and correction as a necessity for the welfare of the child and in the public interest.



6. By virtue of section 154, the High Court has the statutory power donated by the Act to entertain an application for an adoption order. On the other hand, section 157 of the Act sets the criteria as to who may quantify for adoption as:

“Any child who is resident within Kenya whether or not is a Kenyan citizen or was or was not born in Kenya.”

7. Secondly, the adoption applicants must meet the set threshold under section 158 of the Act which provides that:

“For purposes of adoption, the court, may make an order upon an application by a sole-applicant or by two spouses where the applicant or at least one of the joint applicants:

- (a) has attained the age of twenty-five years and is at least twenty one years older than the child but has not attained the age of sixty five years or
- (b) is a relative of the child
- (c) or is the mother or father of the child in this legal formulation any applicant who is above sixty five (65) years is disqualified from being an adoptive parent.

The other scope catered for the Act an exclusion criterion is where its certified that the applicants is or are of unsound mind, he/she or both have been convicted by a court of law for offences in the third schedule or the applicant or applicants are homosexuals.”

8. Further, adept analysis of the approaches set down by the statute, the Law on recognition of existence and the role of biological parents to the minors’ demands obtaining of the necessary consents before the court makes the adoption order. One of the salient features of section 159 of the Act is the power of the court to dispense with the consent under the doctrine of necessity and for the best interest and welfare of the child.

9. Thus far, I have referred to the constitutional and statutory provisions which apply to the making of an adoption order. It is clear from the *JVC* case [1970] 668 that welfare involves:

“When all relevant facts, relationships, claims and wishes are taken into account and weighed the course to be followed will be that which is most in the interest of the child.”

10. In *Weller & others v Associated Newspapers Ltd* [2015] All ER (D) 194:

“These best interest may be held in a variety of different contexts for example the balancing exercise must always be undertaken in children’s cases as in adult cases although a child’s right is not a trump card in the balancing exercise, the primacy of the best interests of a child means that, where a child interest would be adverse by affected, they must be given considerable weight.”

11. The predecessor of the present Childrens Act the *Geneva Declaration of the Rights of the Child* (1924) in article (2) provides:

“That the child shall enjoy special protection, and shall be given opportunities and facilities, by Law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and



dignity. In the enactment of Laws for this purpose the best interest of the child shall be the parent considerations.

12. Behind each of these headline statements lies a fuller evocation of the relevant principles to apply to our present circumstances. The first question to note is whether these minors are suitable candidates for an adoption order?
13. The textual frame of the originating summons and affidavits in support as deposed by the applicants, discusses issues on the minimized familial continued contact of the minors with their single parents. Furthermore, its averred that the personal circumstances of the parent has ostensibly impacted on the needs of the individual children subject matter of the adoption application.
14. The applicants also revealed and emphasized on factors related to the continuity of the social relationship with the children who only have known and moved within the custodial home. The evidence from the applicants support the pattern that the minor (SK) has continuously lived with the family since year six (6) and todate she is at year eleven (11). Whereas (SSM) currently aged sixteen (16) has been in their custody since she was nine (9) months old.
15. In addition, the reports by Kenya Children's Homes dated May 27, 2004 a licensed adoption agency and that of the County Director Children Services dated February 2, 2021 demonstrates from the facts and circumstances of the case the applicants have taken care of the children with the consent of the biological parent. She readily agreed for reason that the offer would be good and for the best interest of the minors.
16. On her part, she lives in Embu but would make every effort to visit the children at their current residence at Malindi. A more variation and flexibility to this application is the fact of the biological parent that psychologically, morally and financially not able to maintain the strongest bond with her children to meet the daily attention to the children's physical, social, psychological and basic survival rights.
17. The County Director of Children Services and the adoption agency identified factors that favor adoption orders based on the welfare and best interest doctrine.
18. I therefore find that, there are compelling reasons for the minors' continuance stay with the applicants. As their constitutional and statutory rights are not tenable within the confines and custody of the parent. It follows that the parent who is best suitable to take care of her children has placed their interests above her own in order to allow the other parents, herein the applicants to be granted custody.
19. Do the applicants qualify to be granted the reliefs under the Childrens Act as adoptive parents? This is a joint kinship custody application defining child's best interest under section 4 of the Act and article 53 of the *Constitution* combines taking into account different factors and circumstances characterizing the child, also circumstances and capabilities of the child's potential adoptive parents. This is underpinned in order to guarantee the most fundamental objective, home or community environment and well-being that supports the child's welfare and best interest to the maximum.
20. The applicants seeking an adoption order have to satisfy the court that the best interest of the children as a cardinal legal principle shall be applied all the time in the decision making process. The legal criteria for one to qualify as an adoptive parent is crystal clear within the scope of section 158 of the Childrens Act.
21. In the affidavits by the applicants, guardian Ad Litem and the reports by the County Director of Children Services and the Adoption Agency Kenya Childrens Homes. The material consists of textual data that shows the 1<sup>st</sup> applicant (PCH) is aged 72 years and his place of birth is in Belgium, where the



- rest of his siblings and children live as permanent citizens. The 1<sup>st</sup> applicant moved to Kenya in 2004 and entered into a second marriage with the 2<sup>nd</sup> applicant on September 30, 2010.
22. Further, the 1<sup>st</sup> applicant legalized his marriage with the 2<sup>nd</sup> applicant on January 31, 2015, a photocopy of the marriage certificate is annexed to prove that fact of their union. The 2<sup>nd</sup> applicant a Kenyan citizen by birth aged 39 years and third born to the (late LK) also has other siblings to that birth family. The 2<sup>nd</sup> applicant also resides in Malindi at their matrimonial home with the 1<sup>st</sup> applicant. I note that the children were placed under the care of the applicants one (SK) at the age of 6 years whereas (SSM) has been in their custody since the age of 9 months.
  23. According to the Kenya Homes report, the applicants have completed their fostering period prior to this application for adoption. There has been no report of conflict between the applicants and the children to compromise their best interest. It was the applicants' averment that they intend to reside in Kenya with no intention of permanently relocating to Belgium. Assessing the affidavits and annexed documents, the 2<sup>nd</sup> applicant is in active involvement in business she describes as S Customized Fashion Kenya. The 1<sup>st</sup> applicant a retired civil servant is entitled to a monthly pension as supported with the statement of account marked PCH – 4. The 1<sup>st</sup> applicant also contends that he has no immediate plans to return to his home country. Typically, under section 158 of the Act, the 1<sup>st</sup> applicant would be disqualified for reason of age to bind him to this joint custody application with the 2<sup>nd</sup> applicant. However, I underscore the fact that the 1<sup>st</sup> applicant is legally married to the 2<sup>nd</sup> applicant.
  24. In assessing and determining the best interest of the children to this application under section 153 of the Act, the principle remains that the court should examine the relevant circumstance in each case and application of the different elements to exercise discretion that gives effect to the needs and best interest of the child subject matter of the adoption order. I take cognizance of the fact that the content of each element will necessarily vary from child to child and from case to case, dependent on the nature of the decision to be made and the concrete circumstances before the court and the importance of each element in the overall assessment. It is imperative to note that the provisions in respect of adoption are supposed to provide safeguards for the best interest of the child. Age limits of 65 years may be held to be mandatory where the rights of the child depend on it or it's of special importance when the required order on adoption factors the needs of the child, physical and emotional support and care, relationship with the parent or adoptive parent as care giver.
  25. In the case at hand, the condition attached to non-grant of an adoption to an applicant aged over 65 years is hereby varied due to the existing extenuating circumstances of the application. The hallmark of the this exercise of this power is permissible in view of the considerations that the 1<sup>st</sup> applicant has lived with the children as care giver, the importance of his marriage relationship with the 2<sup>nd</sup> applicant, for sometime jointly they have met the needs of the children in terms of physical, emotional, personal, development, education, nutrition, medicare, capacity to parent the children, experience to protect them from harm and other social ills and favourable living and upbringing conditions. It is also quite evident that in adjudicating the application, the feelings and opinions of the children as well as their right to be adopted in the process of determining their best interest was also taken into account by the court.
  26. I was satisfied that the children possessed the necessary intellectual and emotional maturity to give their consent and expression of preference towards the making of an adoption order. The court in the case



of Huddard & Ensminger [1992] *Hearing the voice of children* At Wood 2003 45 Arizona Law Review 629 it was observed:

“The child’s statement of her views to the Judge directly will probably be the most reliable evidence for a court. The judge can observe the child and assess her competency, understanding of the situation, and possible influence, without the screen of a third party.”

27. In this context, I have listened to the applicants, the children wishes, representatives of children welfare and interests and the bodies gazette to ascertain always that all the information weighed for an adoption order is fully and freely obtained.
28. As explained above, under article 53 (2) of the *Constitution* and section 4 of the *Children’s Act* framework the children’s best interest has featured prominently and thereby permitting the court to exercise discretion to grant the orders as prayed in the Originating Summons as consolidated in E001 of 2020.
29. Given my observations that this is a kinship adoption and nationality case the paramountcy interests of the children require that the applicants systematically consider not to take decisions and actions that will affect their interest. This obligation includes to limit any permanent residency of the children outside the county of birth without the consent of the court and that of the biological parent.
30. In the result and for the reasons given, I allow the application in the precise terms and declaration with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF FEBRUARY 2021**

.....

**R. NYAKUNDI**

**JUDGE**

In the presence of:-

Ms. Carolene Kituku Advocate for the applicants

