



**In re EM (Minor) (Adoption Cause E001 of 2023)  
[2024] KEHC 5355 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5355 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
ADOPTION CAUSE E001 OF 2023  
GL NZIOKA, J  
MAY 2, 2024**

**IN THE MATTER OF**

**PKM ..... 1<sup>ST</sup> APPLICANT  
ANM ..... 2<sup>ND</sup> APPLICANT**

**JUDGMENT**

1. By an ex-parte originating summons dated 11<sup>th</sup> May, 2023, brought under the provisions of Article 14 (4) and 53 (2) of the *Constitution of Kenya*, section 4, 154, 156(1), 157, 158, 159, 162, 163, and 170 of the *Children Act* (Act No 8 of 2001), and all other enabling provisions of the law and supported by the grounds thereto, the supporting affidavit, and statement in support of the application both of the even date and sworn by the applicants, they seeks for the following orders:
  - a. That the consent of the biological parents of the minor herein be dispensed with since the child was found abandoned and efforts to trace the parents have since proved futile.
  - b. That the applicants herein be authorized to adopt the said child and the child be henceforth called Earnest Mushindi.
  - c. That the child be presumed to be a Kenyan citizen having been found in Kenya at the time of the birth.
  - d. That the Registrar-General do make the appropriate entries in the adopted children’s register in respect to the minor and further the Registrar of Birth and Death do issue a birth certificate in respect thereof.
  - e. That the guardian ad-Litem Gabriel Karaya Murage be discharged and Richard Macharia Mwangi be appointed as the legal guardian of the minor herein in the event that the applicants herein are in any way incapacitated or in anyway unable to discharge their parental obligations.



- f. The court does issue such orders as may be necessary in the best interest of the child.
2. The 1<sup>st</sup> applicant avers that, he is fifty-one (51) years old having been born in 1972, while the 2<sup>nd</sup> applicant avers that, she is forty-eight (48) years old having been born in the year 1947. Both applicants are Kenyan citizens and residents of Naivasha within Nakuru County. That, the applicants got have been married for about twenty-six (26) years and their motivation for adopting a child stems from the fact that, they have not been blessed with a child in their marriage. Further, both applicants are Christians and worship at Repentance and Holiness Ministry and that the 1<sup>st</sup> applicant is an assistant pastor.
  3. The 1<sup>st</sup> applicant is an assistant manager in a flower company with a monthly net salary of Kshs. 86,000 and produced the bank statement for the months between 22<sup>nd</sup> August, 2020 and 20<sup>th</sup> November 2020, payslip for the month of October, 2020 and title deeds in respect to Naivasha/Mwichiringiri Block 4/6335 and Nyandarua/Kipipiri/3035.
  4. Further, the 2<sup>nd</sup> applicant is a business lady whose sells cereals and makes a profit of about Kshs. 17,000 and produced a Mpesa statement from 29<sup>th</sup> May 2020, to 19<sup>th</sup> November, 2020.
  5. That as regards the child, he is a Kenyan national of sub-Saharan race. That, he was presumably born on 23<sup>rd</sup> November 2019 and abandoned along the street at Karega village, Kiriko sub-location in Gatundu North on 28<sup>th</sup> May, 2010. The matter was reported at Kamwangi Police Station vide OB No. 05/28/05/2019 and was referred to Igengenia Level IV Hospital for treatment. On 29<sup>th</sup> May 2019, the child was transferred to New Life Home Trust.
  6. On 29<sup>th</sup> May 2019, the child was committed into the Home vide Children’s Court at Gatundu in Protection and Care Case No. 3 of 2019 for five (5) months and was subsequently extended on 1<sup>st</sup> July, 2020 where the court allowed the child to be placed for adoption. Further, the police investigated the matter and nobody has come up to claim the child as per the letter dated 13<sup>th</sup> July 2019 from the officer in charge of Kamwangi Police Station. Furthermore, efforts by the Adoption Society to trace the relatives of the child have not borne any fruits. Consequently, the child was declared free for adoption by the case committee of the Buckner Kenya Adoption Services on 20<sup>th</sup> May, 2022 as per Certificate of declaring a child free for Adoption serial No 0551.
  7. The officials of the Adoption Society have taken the applicants through “Explanatory Memorandum for Adopters” which they signed a for of certificate of acknowledgment on 27<sup>th</sup> November 2020. Furthermore a social inquiry was carried out on their suitability to adopt the child as evidenced by the form of inquiry on Prospective Adopters. That all data gathered by the society is collated and compiled in a comprehensive Declaration Report, detailing the applicants’ background, motivation to adopt and recommendations of the society. The applicants were approved to adopt the child and on 17<sup>th</sup> June 2020 the child was placed under her care and control as per the Foster Agreement between New Life Home and the applicants.
  8. It suffices to note that, the applicants filed an ex-parte chamber summons alongside the ex-parte originating summons. The application of the even date is brought under Article 14 (4) and 53 (2) of



the *Constitution of Kenya*, section 157 and 160 of the *Children's Act* (No 8 of 2001), and all other enabling provisions of the law and the applicant seeks for orders that:

- a. That Gabriel Karaya Murage ID No. 13397669 of P.O. Box 19586-00100 Nairobi be appointed as guardian ad litem of the minor herein during the hearing of these adoption proceedings.
  - b. That the Director of Children Services in the Ministry of Gender, Children and Social Development be directed to conduct investigations as the suitability of the applicants to adopt the minor and submit a report on the finding to the court.
9. The application is supported by the grounds thereto and the affidavit of the proposed guardian ad litem, Gabriel Karaya Murage of the even date. He averred that, he is a businessman who owns several rental houses and an elder at Imara Daima Worship Centre. That he is married and has children and is therefore experienced in parental matters. That if appointed he will take care of the minor in the absence of the parents and is ready to step in if the child is mistreated.
9. On the 24<sup>th</sup> July 2023, the court allowed the ex parte chamber summons application after herein the respective parties. On 15<sup>th</sup> December 2023, the guardian ad litem filed a confidential report dated 13<sup>th</sup> December, 2023 in court. In addition, the Agency filed a report dated 9<sup>th</sup> June 2023, on 18<sup>th</sup> July, 2023, and that of the Directorate of Children Services dated 2<sup>nd</sup> October 2023, and filed on the same date.
10. The provisions of section 183 of the *Children Act* No. 29 of 2022 Laws of Kenya empower High court upon hearing an application seeking for adoption orders to make an adoption order authorizing the applicant to adopt a child.
11. The prerequisites for adoption as stipulated under section 184 of the Act, and include *inter alia* requirement that the child has been declared free from adoption by a registered adoption society.
12. Further conditions to be satisfied before an adoption order is made are provided for under section 186 of the Act as follows:
- (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 interest 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.



13. In relation to the subject matter herein the applicants have annexed to the affidavit in support of the originating summons the following documents: -
- a. A report from Kamwangi police station of an abandoned child dated 29<sup>th</sup> May 2019 and another report of similar nature dated 12<sup>th</sup> March 2020 booked vide OB No. 10/12/2020.
  - b. A letter from the aforesaid police station dated 13<sup>th</sup> July 2020 to the effect that, there was no claimant of the child and neither is the whereabouts of the parents known.
  - c. An order of the court issued vide children cause No. 3 of 2019 issued at the Chief Magistrate's court at Gatundu committing the minor to New Life Children Home with an order for mention on 30<sup>th</sup> October 2019 to confirm if the parents would have been traced.
  - d. A further order of the court allowing New Life Home to place the minor for adoption.
  - e. The certificate of declaring a child free for adoption was issued by Buckner Kenya Adoption Services has also been availed.
14. The afore documents generally prove that, the minor herein was properly available for adoption and there has been no one claiming him.
15. The applicants have also availed the following documents:
- a. A certificate of their marriage dated 19<sup>th</sup> February 2012.
  - b. The applicant's national cards. The identity card of Paul Kariuki Murage No. 13213092 indicates that he was born on 1972 and that Ann Nyambura Mwangi No. 14438015 indicates her date of birth as 1975. Consequently each one of them is over 21 years old.
16. A report from Buckner Kenya Adoption Services pursuant to section 156(1) of the *Children Act* (repealed) has been availed. In a nutshell, it states that, by a court order referred to herein, the child was placed in their custody. That all efforts to trace the relatives has been futile. As a request the case committee of Buckner Kenya Adoption Services, pursuant to Regulation 16 of the Adoption Regulations 2005 (Legislative Supplement No. 21) deliberated on the matter and in a meeting held on 20<sup>th</sup> May 2022, the child was declared available for adoption resulting in issuance of a certificate to that effect.
17. In addition, a letter dated 29<sup>th</sup> October 2019, from the Children's Office at Gatundu North, in the form of Children's officers social inquiry report reveals that, the child was progressing well at New Life Children Home and recommended the minor to continue at the home for a further six (6) months. A further report by Buckner Kenya Adoption Services enclosing a confidential report of the referee information of prospective adopters, the medical report of the adopters, certificate of good conduct of each adopter.
18. Similarly, a statement of financial status of the adopters with supporting evidence and evidence of assets owned inform of title deeds and ownership of a motor vehicle was availed.



19. In addition, the court had the benefit of interviewing them on their suitability to adopt the minor child. The general condition of the child was observed as the child was physically availed in court.
20. Based on the documents provided the applicants have generally met the requirements in support of the application for adoption order. However, the court observed that, the parents of the child were unable to contain him when the court wanted to have a chat with the child. The child displayed a character which clearly indicated that, the parents, and in particular the mother could not contain the child. It is an issue of up bringing and possible lack of control. It is in the light thereof that I allow the application and grant the adoption order as prayed for but on condition that the children department shall continue to monitor the upbringing of the child, in terms of character and file a report after six (6) months of the order of this court. If the report will not be positive, the adoption order herein shall be vacated forthwith. If the matter will however be marked as finalized.
21. It is so ordered

**DATED, DELIVERED AND SIGNED ON THIS 2<sup>ND</sup> MAY, 2024**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:-

N/A by the applicants

Ms. Ogutu: Court Assistant

