



**In re JLJ & PJ (Adoption Cause E007 of 2023)
[2024] KEHC 7446 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
ADOPTION CAUSE E007 OF 2023
JRA WANANDA, J
JUNE 21, 2024**

IN THE MATTER OF

RMK APPLICANT

JUDGMENT

1. The Application before the Court is the Originating Summons dated 29/8/2023 by the Applicant, R.M.K. seeking to adopt the two minors aforesaid, J.L.J. and P.J.
2. In her Affidavit in support of the Application and in her Statement, the Applicant has deposed that she is a Kenyan citizen residing in the United States of America (USA) and works as a nurse at the New York City Department of Health within the medical room of Public School 177. From the records before the Court, she was born on 17/08/1983 which means she is aged 41 years at present.
3. The Applicant has made the Application as the maternal aunt to the 2 minors who are siblings. J.L.J. (a girl) was born on 22/04/2007 and is now therefore aged 17 years. P.J. (a boy) was born on 19/11/2012 and is therefore at present aged 12 years. The mother of the minors, K.M.K. is said to be the Applicant's twin sister. The Applicant has exhibited the Affidavit sworn on 30/05/2023 by the minors' biological mother giving her express consent to the adoption of the minors by her twin sister, the Applicant.
4. The Adoption applied for herein is therefore what is referred to as a "kinship adoption" because the Applicant is an aunt to the children and therefore the adoption is within the extended family.
5. The Applicant concedes that she does not live with the minors in Kenya but asserts that since the minors were born, she has been taking care of their needs and expenses since their biological mother has no financial means of taking care of them and their father's whereabouts are unknown as he is alleged to have "disappeared" without a trace. She deposes that the minors live with their maternal grandparents, that the Applicant has 2 other children of her own with whom she lives in the USA, and that the Applicant leads a stable lifestyle and has all the abilities to take utmost good care of the minors.



6. In support of the Application, the Children's Office under the Directorate of Children's Services has supplied to the Court a copy of its Report dated 25/01/2024. The Court has also been supplied with the Report dated 7/02/2024 from the Kenya Children's Homes Adoption Society. The Reports give the particulars of the Applicant as the prospective adoptive parent and also particulars of the biological mother. They both state that interviews with the Children's office were conducted with the biological mother, the Applicant, the two minors, their grandmother who is living with them, and the Applicant's biological children. The Reports also stated that the relevant officers visited and inspected the Applicant's parents' home setting in Eldoret before approving the adoption of the minors. The Reports also give background information about the Applicant and also give further information and relevant particulars concerning the entire prospective adoption herein. In the end, both Reports recommend that the Application for adoption be allowed.
7. In further support of the Application, the Court has also been supplied with Affidavits and/or consents sworn by the minors' biological mother, and by their maternal grandmother and grandmother. The Court has also been supplied with, inter alia, copies of the minors' Birth Registration documents and also Birth Certificates, Certificates of Declaring a Child Free for Adoption, Identity Cards for the Applicant, the Applicant's mother (Guardian ad Litem), and the Applicant's brother (L.B.K., the prospective Legal Guardian), Applicant's Medical Report, Motor Vehicle Ownership Record, Bank Account and Employment Records. A written consent to the adoption from J.L.J was also supplied.
8. The Applicant has also produced a Certificate of Good Conduct issued by the city of New York Police Department. The same indicates that there is no record of the Applicant having previously been charged with or convicted of any criminal offence or any other offence.
9. On 31/10/2023, the Applicant's mother who is therefore the minors' maternal grandmother and also the prospective Guardian ad Litem, testified in support of the prayer for her appointment as such Guardian ad Litem. She confirmed the matters stated hereinabove including the fact that she is the one living with the minors and their mother and claimed that she does not know the minors' father. She then stated that although the Applicant lives in the USA, she has been travelling to Kenya and has in the process, bonded well with the minors. She therefore supported the Application.
10. By the orders made on the same 31/10/2023, this Court appointed the Applicant's mother, and thus the minors' maternal grandmother, to be the Guardian ad Litem pending hearing and determination of this Cause.
11. The Applicant also nominated or proposed her brother, LBK, who is the Applicant's maternal uncle for appointment as the Legal Guardian of the minors in the event of the Applicant's death or incapacity.
12. On 7/02/2024, I took the oral evidence of the sub-County Children's Officer, Soy sub-County, Uasin Gishu, one Ms Diana Komen Chelimo (PW1) who confirmed the matters stated in the Children's Office Report referred to earlier. She stated that the minors' mother has never been married and is a casual labourer and that it is the Applicant who comes in to assist financially. She supported the Application.
13. On the same 7/02/2024, I also took the evidence of the Applicant (PW2). She too, reiterated the matters stated hereinabove. She stated that she has been the sole provider for the minors since they were born and that she has a very good relationship with them. She stated that although she has not lived with the minors in Kenya, she visits regularly, that she has the means to take care of the minors as she has a stable income, and that her own 2 children have consented to the adoption.



14. On the same date, I took the testimony of the minors' biological mother (PW3). She confirmed that she is a casual labourer and that the Applicant is her twin sister. She then stated that she has no financial means of her own to take care of the minors, and that she does not see any possibility that she will change her mind in future regarding the adoption even if her fortunes change and she becomes financially independent. She confirmed that she has voluntarily consented to her sister applying for the adoption and that she has willingly supplied the documents filed in support of the Application. She also confirmed that she has been extensively interviewed by the relevant Children's Officers. Upon inquiries from the Court, she reiterated that she truthfully does not know the whereabouts of the minors' father and that the minors have never asked her about him.
15. On the same date, I again took the evidence of the Applicant's mother (Guardian ad Litem) (PW4). She basically reiterated the above matters. Upon inquiry from the Court about the absence of the Applicant's father (minors' grandfather) in Court, she stated that he is at home and did not bring him to testify because he is unable to walk properly. She however conceded that no Affidavit of Consent from the Applicant's father has been supplied to the Court.
16. At this juncture, the Applicant's Counsel, Mr. Kanyonge drew my attention to the fact that the Applicant's father was in attendance virtually as he was bed-ridden. Since I was unable to verify this fact from the screen, Counsel stated that the Applicant's father was experiencing challenges in logging-in to the session.
17. I then on 4/03/2024 took the testimony of the 2 minors. They both basically reiterated their willingness and readiness to be adopted by the Applicant, their aunt,

Determination

18. Regarding litigation concerning minors, Article 53(2) of *the Constitution* stipulates the over-arching principle which must apply whenever any decision concerning a child is to be made to be the "best interests" of the minor. It provides that:

"A child's best interests are of paramount importance in every matter concerning the child"

19. The said provision is echoed in Section 8(1) of the Children's Act, No. 29 of 2022.
20. Regarding the law of adoption in Kenya, the relevant provisions are to be found in Part XIV of the Children's Act, 2022 which provides

" 183.

- (1) Subject to this Act, the High Court may, on an application made in the prescribed form, make an order, in this Act referred to as "adoption order", authorising an applicant to adopt a child.
- (2) 2) All proceedings under this Part shall be heard and determined in chambers, and the identity of the child and the applicants shall be kept confidential.
- (3) In this Act, adoption means local, kinship and foreign adoption
- (4) For the purposes of this Part—
 - (a) "kinship adoption" has the meaning assigned to it in section 2;



- (b) “local adoption” means an adoption in relation to which—
 - (i) the child is resident in Kenya; and
 - (ii) the adopting parent or parents are Kenyan nationals resident in Kenya; and
- (c) “foreign adoption” means an adoption in relation to which —
 - (i) the adopting parent or parents are Kenyan nationals with dual citizenship;
 - (ii) the adopting parent or parents are foreign nationals whether or not resident in Kenya
 - (iii) the adopting parent or parents are not Kenyan nationals but are biologically related to the child; or
 - (iv) the adopting parent or parents were once Kenyan nationals but have lost their nationality by operation of the law of the host country to which the prospective parent or parents have a nationality Power to make adoption orders. m e a n s an adoption in

184.

- (1) A person shall not commence any arrangements for the adoption of a child unless —
 - (a) the Council, in accordance with the rules, has declared the child free for adoption; and
 - (b) the child has attained the age of six weeks.

.....

185.

- (1) Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was born in Kenya.
- (2) Without prejudice to the generality of subsection (1), no Court may entertain an application for an adoption order in respect of a child unless—



- (a) the child concerned has been in the continuous care and control of the applicant within Kenya for a period of three consecutive months preceding the filing of the application; and
 - (b) the application for an adoption order is supported by a report made by a duly registered adoption society recommending that an adoption order be made.
- (3) The report referred to in subsection (2) (b) shall contain the society's findings and recommendations in respect of the child and the applicant or applicants, as the case may be.
- (4) The following children shall be eligible for adoption —
- (a) a child who is an orphan and has no guardian or caregiver able and willing to take care of the child
 - (b) a child who has been abandoned or whose parents' or guardian's whereabouts cannot be traced within a period of one year;
 - (c) children who are willingly offered for adoption by their biological parents in accordance with regulations made under this Part.

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.



(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.

.....

(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

.....”

21. As aforesaid, the Adoption applied for herein is within the family and therefore what is referred to as a “kinship adoption”. The Applicant desires the children to join her in the USA once the process is successfully completed.

22. Regarding a moratorium that was issued regarding international adoptions, in the case of *In re R.N.W. (minor)* (2019) eKLR, the Court held as follows:

“

“ 11. This is a Kinship Adoption as the applicant is related to the child since the child’s biological mother was a cousin to the Applicant.

12. Lady Justice Achode *In re J.N.A.* [2018] eKLR held that:-

“The indefinite moratorium issued by the Kenyan cabinet on 27th November, 2014 involved inter-country and resident adoptions of Kenyan children by foreigners. It does not affect adoptions by Kenya applicants, even those living abroad. Dual citizenship in our country is anchored in Article 16 of the Kenyan Constitution.

According to the Guidelines for Alternative Family Care of Children in Kenya page 153, “kinship adoption is adoption by adopters who are kin or relatives within the extended family of the child.” Kenyans living abroad and wishing to adopt a Kenyan child will adopt as Kenyans by way of domestic adoptions. This is therefore considered to be a local adoption.”

23. This Court is satisfied that in the present case, this is a kinship adoption, and is also a local or domestic adoption. The Court is also satisfied that the Applicant is a suitable person with the demonstrated financial and social means to provide and care for the minors, and has in any event, been doing so for



a considerable period prior to making this application. During my interview of the children, I formed the view that the minors and the Applicant who is their share a close bond. They expressly confirmed to the Court their eagerness to be adopted by their aunt.

24. As aforesaid, the Applicant is now 41 years old and the children are 17 and 12, respectively. 4 years old. Insofar as the Applicant has therefore attained the age of 25 years, but is not above the age of 65 years and is more than 21 years older than the children, she has also met the threshold set under Section 186(5) of the Children's Act, 2022.
25. Having taken into account the foregoing factors, this Court is satisfied that it would be in the best interest of the minors to be adopted by the Applicant. The Court is further satisfied that all the legal requirements for a kinship adoption have been met.
26. I have however noted that although the biological mother testified and also swore an Affidavit giving her consent, a copy of her National Identity Card has not been supplied to the Court.
27. Similarly, although Section 186(8)(c) requires that "an application for an adoption order in respect of a child shall be accompanied by written consents' of various persons, including, "in the case of a child who has attained the age of 10 years, the child himself or herself", only a consent by J.L.J. has been supplied. Regarding P.J., although I interviewed both minors and they both confirmed their eagerness to be adopted by the Applicant, no consent from P.J. has been supplied.

Final Orders

28. In the end this Court makes the following Orders:
 - i. The Applicant, R.M.K. being the two minor's maternal aunt and being the twin sister of the minors' mother, is hereby allowed to adopt J.L.J. and P.J. (minors).
 - ii. L.B.K., the Applicant's brother, is hereby appointed the Legal Guardian in the event that the Applicant dies, or is incapacitated by ill health.
 - iii. The Guardian ad Litem, J.G.I., who is the Applicant's mother, appointed herein on 31/10/2023, is accordingly discharged.
 - iv. The Registrar General is directed to enter this Order in the Adopted Children's Register.
 - v. For completeness of the Court record, the Applicant is directed to supply to the Court a copy of the minors' biological mother's National Identity Card and also a written consent by P.J. to the adoption, within a period of 14 days. The formal Adoption Order or Court Decree shall therefore not be issued until this direction is complied with.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

