



REPUBLIC OF KENYA



**In re FJK & FPD (Adoption Cause E002 of 2024)  
[2024] KEHC 6711 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6711 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
ADOPTION CAUSE E002 OF 2024**

**M THANDE, J**

**JUNE 4, 2024**

**JUDGMENT**

1. RIY and JMG, the Applicants herein are a married couple. The female Applicant went into the marriage with 2 biological children of her own FJK and FPD. The biological fathers of the children are unknown and has never been part of their lives. The children were under the sole care of the female Applicant until she commenced cohabitation with the male Applicant. Since then both Applicants have been caring for the children. The Applicants now seek to adopt the children and have filed an Originating Summons dated 24.2.24.
2. The Applicants were taken through the adoption process and implications, by Change Trust, a registered adoption society. Following their assessment, the society's case committee sitting on 30.8.23 found the Applicants to have met the requirements for adopting the children and granted their approval. On the same day, the society declared the children FPD and FJK free for adoption vide certificates nos. 00613 and 00614 respectively.
3. On 25.4.24, this Court did appoint Swalhah Ibrahim Yusuf as the guardian ad litem for the child pending the hearing and determination of the adoption application, in accordance with Section 188 of the *Children Act*. The guardian ad litem filed her report dated 8.5.24. A report dated 17.5.24 was filed by Njeri Mwangi for the Mombasa County Children Coordinator. On its part, Change Trust Kenya also filed its report dated 30.8.23. All these reports are favourable and recommend the proposed adoption.
4. The children herein are 17 years and 15 years old respectively. There is on record the written consent of the children dated 7.8.23, in line with Section 186(8)(c) of the *Act* which provides:

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—

- (f) in the case of a child who has attained the age of ten years, the child himself or herself.



5. The law recognises 3 kinds of adoptions, namely kinship, local and foreign. Section 183(3) of the *Act* provides that In this Act, adoption means local, kinship and foreign adoption.
6. Section 2 of the Act defines "kinship adoption" as the adoption of a child by a person who is a relative of the child. The adoption herein is a kinship adoption as the female Applicant is a biological mother of the child. Section 193(1) provides that a kinship adoption order may only be made in favour of a relative of the child. Section 2 provides that for the purposes of adoption, a relative means for the purpose of adoption, a mother, father, brother or half brother, sister or half-sister, maternal or paternal uncle or aunt or grandparent or step-parent of a child. Having married the children's mother, the male Applicant is their step-father. As such, his adoption of the children amounts to a kinship adoption.
7. Section 183(4)(c) defines a foreign adoption as follows:

"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.
8. A foreign adoption is one where the applicant or applicants are Kenyan nationals with dual citizenship or are foreign nationals whether or not resident in Kenya. An adoption is also foreign where the applicant or applicants are not Kenyan nationals but are biologically related to the child or were once Kenyan nationals but lost their nationality upon acquiring citizenship of another country.
9. The adoption is also a foreign adoption. The female Applicant is Kenyan, while the male Applicant is a national of Sierra Leone. Applying the definition in Section 183 of the Act, to the present circumstances therefore, it is clear that this is a foreign adoption.
10. As indicated herein, Section 183 allows foreign adoptions. In an apparent contradiction to this position, Section 186(6) provides:

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—

  - (f) is a foreign applicant except where the applicant is a biological relative of the child.
11. On the one hand, Section 183(1) empowers the Court to, 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. Among the adoption orders that may be made under this provision, is one relating to an applicant or applicants who are foreign nationals whether or not resident in Kenya.
12. What orders should then be made by the Court in light of this contradiction? Article 53(2) of *the Constitution* provides that a child's best interests are of paramount importance in every matter concerning the child. The best interests of the child must of necessity include the rights provided in Article 53(1) which inter alia are the right to be protected from abuse, neglect, harmful cultural



practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour, parental care and protection, which includes equal responsibility of the mother and father to provide for the child.

13. Section 8 of the Act underpins this constitutional imperative of safeguarding the best interests of the child by providing that:
  1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
    - a. the best interests of the child shall be the primary consideration;
    - b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
  2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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; and
    - c. secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
  3. In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.
14. In making a determination in this matter, this Court shall be guided by the overriding constitutional and statutory principle of safeguarding the best interests of the children herein.
15. The reports on record indicate that the children and Applicants have lived together as a family since 2015. The Court observed them and they appeared to have bonded well. They have during this period enjoyed parental care and protection, and their welfare has been safeguarded. The children were also given an opportunity to express their opinion on the adoption and informed the Court that they were happy to be adopted by the Applicants. The Applicants have demonstrated that they have psychological and emotional capacity as well as the material resources to raise the children in a loving home environment. After a careful assessment of the reports filed herein and noting that the children have been in the custody and care of the Applicants for over 8 years, this Court has formed the opinion that it would be in the best interest of the children to be adopted by the Applicants.
16. Having taken into account the foregoing factors, this Court has formed the opinion that it would be in the best interests of the children that they be adopted by the Applicants. The Court makes the following Orders as prayed in the Originating Summons:
  - a. The Applicants RIY holder of national identity card number XXX and her husband JMG holder of Sierra Leone passport ERXXX are hereby allowed to adopt the FJK and FPD.
  - b. I direct the Registrar General to enter this order in the Adoption Register.



c. The appointment of Swalhah Ibrahim Yusuf, the guardian *ad litem* now stands expired.

**DATED, SIGNED and DELIVERED via MS Teams this 4<sup>th</sup> day of June 2024**

---

**M. THANDE**

**JUDGE**

Page 3 of 3

