



**In re MM & another (Adoption Cause E002 of 2023)
[2024] KEHC 8371 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
ADOPTION CAUSE E002 OF 2023
JRA WANANDA, J
JULY 10, 2024**

**IN THE MATTER OF THE CHILDREN ACT NO 29 OF 2022
IN THE MATTER OF AN APPLICATION FOR ADOPTION OF M.M. AND S.M.**

IN THE MATTER OF

IKM 1ST APPLICANT

KMA 2ND APPLICANT

JUDGMENT

1. The Application before the Court is the Originating Summons dated 14/03/2023 filed through Messrs Chemurgor Koskei & Co. Advocates. The same seeks orders as follows:
 - i. That the Applicants [I.K.M.] and [K.M.A.] be authorized to adopt [M.M] and [S.M.]
 - ii. That the Registrar General shall make an entry of the Adoption Order herein in the Adopted Children Register.
 - iii. That the Registrar of Births be pleased to issue [IKM] and [KMA] with new Birth Certificates of the minors, delete the biological mother CE alias RM name on the birth certificate and insert the Applicants' name [IKM] as biological mother of the minors.
 - iv. That the Court do issue such further orders as it may deem fit in the interest of the children.
2. In her Affidavit in support of the Application, the 1st Applicant has deponed that she is a Kenyan citizen and that she is legally married to the 2nd Applicant who is the biological father of both minors, that she wishes to adopt the minors who are currently in Form 3 and Class 8 respectively, that she has been supporting and helping her husband to raise, nurture and provide for the minors since 2017 when she moved in with him, that before she legally married the 2nd Applicant, she agreed to have the minors continue living with them and would seek permission and consent of their biological mother to have her blessings to adopt the minors as her own, that the biological mother was willing and indicated that



she would not want to disrupt their current living arrangements and that having lived their lives apart from her, she would wish that they continue with said arrangement. She further deponed that they reside at their family home in Kimumu Eldoret, but she is currently based in the United Kingdom where she works as a nurse, that over the years of having lived with the minors, she has developed a strong bond and have become attached and she has a healthy relationship with them, that she is desirous of assuming full parental responsibilities and have the minors adopted as her own for them to fully derive the benefits as her dependants, that she wishes to have them as her children so that they can fully enjoy benefits that accrue under her covers as their legal parent. She deponed further that after her application, the Little Angels Network deliberated on the matter and the sitting committee was satisfied that she be allowed to adopt the minors as it would be in the best interests of the children's that they be adopted, that the agency having been satisfied of the children's availability to be adopted issued a Certificate declaring them free for adoption, that the agency also visited their home as per requirements of determining her suitability as a prospective adoptive parent, and that she has also attended interviews and counselling sessions as required.

3. In his Affidavit, the 2nd Applicant has deponed that he is a Kenyan citizen and the biological father of the minors, that he is legally married to the 1st Applicant and that they reside in Kimumu Eldoret and he is employed as a surgeon at the Moi Teaching and Referral Hospital in Eldoret, that before he married the 1st Applicant, he was in a relationship with the minors' biological mother C.E. alias R.M. and were blessed with the two minors, that the relationship with the biological mother did not work out, they went their separate ways and each one of them is now married, that after the separation, the minors initially stayed with their biological mother up until 2010 when she left and the minors were left under their grandparents care. He deponed further that thereafter, the grandparents organized a meeting to decide on the best way forward and it was agreed that the minors will stay with the 2nd Applicant's parents as they were in a better position to provide and care for them, that the minors stayed with the 2nd Applicant's parents during their tender age years and thereafter came to live with the 2nd Applicant sometime in 2015 after he was gainfully employed, that over the years, he has lived with the minors and introduced them to his now wife (1st Applicant) while they were dating and they were have since bonded and become attached to her and view her as their own mother, that his wife, (1st Applicant) has been supporting and helping him raise, nurture and provide for the minors since 2017 when he moved in with her.
4. I also note that in the Certificate of Urgency under which the Application was filed, it was stated that the 2nd Applicant is in the process of relocating permanently to join the 1st Applicant in the United Kingdom and wishes that they go together as a whole family and resettle permanently and that the 1st Applicant wishes to include the minors in her Visa as dependents. It was stated further that the orders, if granted, will allow the processing of new birth certificates and passports to take off and hasten the reunification of the family that has been separated for a while.
5. On 24/10/2023, when the parties appeared in Court, the Court noted that no Application for appointment of a Guardian ad Litem pending determination of the matter had been filed. The Court therefore directed that such Application be filed.
6. On 8/2/2024, the Court took the oral evidence of 4 witnesses led by the Applicant's Counsel, Ms. Keter.
7. PW1 was the 1st Applicant. She basically reiterated the matters stated hereinabove and testified further that she lives in United Kingdom and works in a Hospital in Walsall as a nurse, that she knows the minors as her husband's children born of a different mother and that no one has forced her adopt them She also stated that she relocated to the United Kingdom in November, 2022 but that before



- then, she had lived with the children for about 4 years. She stated further that she does not know where the minors' biological mother is currently but that that she gave her written consent, that she (1st Applicant) was interviewed by the Children's Officer, and that she (1st Applicant) has one daughter of her own aged 3 years old.
8. PW2 was the 2nd Applicant. He too reiterated the matters already stated hereinabove and testified further that they contacted the biological mother and explained everything to her, that she then came to Eldoret and met the Children's Officers who interviewed her and she then voluntarily gave her consent. He added that since he (2nd Applicant) took the children in the year 2017, the biological mother has never been in touch with them.
 9. PW3 was one Diana Jelimo Komen. She testified that she works in the Sub-County Children's Office, Soy Sub-County, Uasin Gishu and that she visited the home of the Applicants on 19/3/2023 and prepared a Report, that she interviewed the 1st Applicant and the children and later interviewed the 2nd Applicant virtually, that she interviewed the biological mother face to face and later also on phone 5 months apart and who she gave her consent to this adoption, that the adoption agency also interviewed the biological mother and that at no time did she change her mind. She produced then the Report dated 24/4/2023 which recommended that the adoption be allowed.
 10. PW4 was one of the two minors [M.M.]. She stated that she is 16 years old and understood that she was in Court in connection with an Application for her adoption. She stated that she does not know her biological mother properly and that she only stayed with her when she was a baby. She added that she has stayed with her father (2nd Applicant) since she was about 6-7 years old but that before then, she used to live with her grandparents in Kitale and that the 1st Applicant has been like a mother to her. She insisted that she wants the 1st Applicant to adopt her and stated that she understands that when one adopts a child, the person adopting becomes the child's full parent. She also insisted that no one had forced or coerced to agree to be adopted.
 11. After hearing the 4 witnesses, the Court adjourned and directed that the biological mother be located and be brought to Court to testify. The Court directed the Children's Office to assist in tracing the biological mother. The Court further directed that the 2nd minor, S.M. also be brought to Court to testify.
 12. Further, pursuant to the Applicant filed as directed, the Court, on 4/03/2024, took the testimony of the one N.O.G., the 2nd Applicant's brother (PW5), and thus the minors' paternal uncle, whom the Applicants had nominated to be appointed to be the Guardian ad Litem pending hearing and determination of this Cause. He testified as PW5 and the Court, having heard and examined him, on the same date, appointed him as such Guardian ad Litem.
 13. On the same 5/12/2023, the Court also took the evidence of PW6, the biological mother of the minors [R.M.] who had been traced and agreed to come to Court to testify. She stated that she is also known as [C.E] which was her maiden name. She further that she lives in Elgeyo Marakwet County and is jobless. She confirmed that the minors are her children and that she lived with them until 15 years ago. She told the Court that currently she has another family and is now married elsewhere with other children. She then confirmed her agreement that her name as the minors' mother be removed and also confirmed her agreement to give the 2 children up for adoption.
 14. On the said 5/12/2023, the Court also took evidence of the second minor [S.M.] who had also been brought to Court to testify, pursuant to the Court's directions. She stated that she is 14 years old and goes to [M..... Academy] in Vihiga and that she is in Form 1. She confirmed her knowledge of these proceedings and that she understood the same to be in respect to an Application for her adoption by



the Applicants. She physically identified her biological mother seated in Court and stated that she lived with her when she was still young. She then reiterated that she wants the adoption to be allowed.

15. After hearing all the witnesses, I directed the Applicants' Counsel to file brief written Submissions. The same was done but I thereafter directed Counsel to file Further Submissions in respect to prayer 3 above since I had reservations about it. I also directed Counsel to supply the Court with a copy of the minors' biological mother's National Identity Card which had not been so supplied. These Counsel also did but being dissatisfied with the Submissions, I again summoned her to Court together with the Children's Officer who testified as PW3, Diana Jelimo Komen, and directed Counsel to file Supplementary Submissions on prayer 3 but limited to only identifying the statutory provisions and legal authorities, if any, that would support prayer 3. I also sought PW3's comments on the arguability of prayer 3. In her response, she took the view that the prayer was valid and was indeed awardable as an order of the Court.
16. Counsel complied and filed the Supplementary Submissions but in a twist of events, in the Submissions, she opted to abandon the prayer. In explaining the decision to abandon the prayer, Counsel cited Section 200 of the *Children Act*, 2022 which deals with the "Adopted Children Register" and specifically sub-section (3). She submitted that once prayer 1 and 2 are granted, prayer 3 would no longer be necessary as it would only amount to a duplication.

Determination

17. I have had the opportunity to read the Report dated 26/04/2023 submitted by the Directorate of Children's Services and which gives the particulars of the Applicants as the prospective adoptive parents and also particulars of the biological mother. The Report states that interviews with the Children's office were conducted with the 1st Applicant, the 2nd Applicant, the biological mother and the two minors. The Report also states that the relevant officers visited and inspected the Applicants' home setting in Kimumu, Eldoret before approving the proposal for adoption of the minors. The Reports also gives relevant background information about the Applicants and also information and relevant particulars concerning the entire prospective adoption herein. In the end, the Report recommends that the Application for adoption be allowed.
18. There are also on record, the minors' biological mother's (PW6) signed Consents to the adoption, her sworn Affidavits and her signed Certificates of Acknowledgment confirming her understanding of what giving up of the children meant. All are dated 17/1/2023. Regarding the apparent clash in her name descriptions, the biological mother of the minors [R.M.] who was traced and agreed to come to Court to testify, she clarified that she is also known as [C.E].
19. There is also a consent from the biological mother's own mother (minors' maternal grandmother (also acceding to the adoption. There are also consents by the minors themselves on record.
20. 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"
21. The said provision is echoed in Section 8(1) of the *Children's Act*, No. 29 of 2022.



22. 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 as follows:

“ 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) 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;

.....

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.

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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.
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- (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

.....”

23. I.K.M and K.M.A, the Applicants herein are a married couple. The 2nd Applicant went into the marriage with 2 biological children of his own M.M. and S.M. The biological mother of the minors is known and has consented to their adoption. The children currently live with the Applicants and now the Applicants seek to adopt them.



24. 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 male Applicant is a biological father of the children. 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 father, the female Applicant is their step-mother. As such, her adoption of the children amounts to a kinship adoption.
25. The Reports on record indicate that the children and Applicants have lived together as a family since 2017. 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. As aforesaid, the children were given the 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 also, in my view, demonstrated that they have the psychological and emotional capacity as well as the material resources to raise the children in a loving home environment.
26. Also on record and which I have carefully perused are copies of the Applicants' National Identity Cards, Certificate of Marriage (25/08/2022), Guardian ad Litem's National Identity Card, Reports and "Certificates of Declaring the minors as Free for Adoption" from the Little Angels Network (Adoption Agency).
27. From the minors' respective Certificates of Birth on record, M.M. was born on 10/07/2007 and S.M. was born on 1/09/2009. M.M. is therefore currently 17 years of age and S.M. is currently 15 years. On the other hand, from their National Identity Cards, I.K.M (1st Applicant) was born on 14/12/1996 while K.M.A. (2nd Applicant) was born on 27/04/1988. I.K.M is therefore currently 28 years of age while K.M.A is 36 years old. As already cited above, under Section 186(2)(b) of the Children's Act, 2022, it is stipulated that the Court shall not make an adoption order "unless the Applicant has attained the age of 25 years, but is not above the age of 65 and the Applicant, or both of the Applicants in a joint application, are more than 21 years older than the child".
28. Although therefore the Applicants may not meet the above age-gap condition, sub-section (3) of Section 186 thereof which provides that "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" gives the Applicants safe refuge. In the event that I am wrong in my interpretation, I would still invoke the Court's inherent powers, "the interest of justice" principle and the "best interests of the child" principle and use these to override the said statutory limitations.
29. After a careful assessment of the Reports herein and noting that the minors have been in the custody and care of the Applicants for over 7 years, this Court has formed the opinion that it would be in the best interest of the children to allow them to be adopted by the Applicants.

Final Orders

30. In the end this Court makes the following Orders:
 - i. The Applicants, K.M.A. and I.K.M, being the minors' biological father and step-mother, respectively, are hereby allowed to adopt the minors known as M.M and S.M. in terms of Prayer 1 of the Originating Summons filed herein and dated 14/03/2023.
 - ii. The Guardian ad Litem, N.O.A is now accordingly discharged from his responsibilities.
 - iii. The Registrar General is directed to enter this Order in the Adopted Children's Register.



DELIVERED, DATED AND SIGNED AT ELDORET THIS 10TH DAY OF JULY 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Ms. Ketter for the Applicants

