



REPUBLIC OF KENYA



**In re Baby EP (Adoption Cause E007 of 2024)
[2024] KEHC 12314 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADOPTION CAUSE E007 OF 2024
G MUTAI, J
OCTOBER 11, 2024
IN THE MATTER OF THE CHILDREN ACT, 2022
AND
IN THE MATTER OF BABY EP
AND
IN THE MATTER OF AN APPLICATION FOR
ORDERS OF ADOPTION OF BABY EP BY JAA**

JUDGMENT

Introduction

1. Before me is an Originating Summons dated 30th April 2024 filed by Dr. JAA. Vide the said Summons, the applicant seeks the following orders:-
 1. That the requirements of sections 158(4) of the Children's Act be waived as provided for by section 159 of the Act;
 2. That AWA in the said Republic be appointed guardian ad litem in this case;
 3. That the applicant be authorized to adopt Baby EP and the baby, be known as AH;
 4. That AMB and MAA be appointed the legal guardians of the child;
 5. That the minor be considered a Kenya citizen by birth;
 6. That the Director of Children Services does investigate the case and file a report;
 7. That the Registrar General be directed to make an entry in the Adopted Children Register recording the adoption in accordance with the particulars set out in the schedule attached hereto.



2. The Originating Summons is supported, inter alia, by the applicant's affidavit sworn on 30th April 2024 and by the reports of various bodies.

The Applicant

3. The Applicant is JAA. A is a medical doctor employed by the Kenya Defence Forces as a gynaecologist. Her service rank is Lieutenant Colonel. She is based at the Kenya Navy, [Particulars withheld]. A was born on 20th April 1986 and has resided in Mombasa for the whole of her life. She resides in Nyali, which is in the County of Mombasa.
4. In her statement in support of the adoption application, A stated that she is a Kenyan citizen of the African race. She is of sound mind and has good physical health. The applicant is not married. There is no adverse record against her, nor has she been charged with any offence. She is a Roman Catholic and is financially stable.
5. A received the child under her care and protection on 15th December 2023, upon signing a foster care agreement with the Child Welfare Society of Kenya, and has fostered the child since then.

The Child

6. According to the Kenya Children's Homes Adoption Society, the child, Abandoned Baby Girl, aka Baby EP, was presumably born on 22nd September 2023 at Kericho. She was abandoned under a big tree in the Corner C area of Kericho town. Upon being found, the Kenya Police officers were alerted. The policemen took her to Kericho County Referral Hospital for medical examination. After being discharged from the hospital, the child was admitted to New Life Home Trust, Nakuru.
7. On 10th February 2023, Kericho Children's Court committed the child to New Life Home Trust, Nakuru, for three years in Care and Protection Case No E019 of 2023. Efforts to trace her parents turned futile.
8. The Kenya Children's Homes Adoption Society's Case Committee freed the child for adoption in its sitting on 18th October 2023. The certificate freeing the child for adoption bears serial Number 926 and was issued pursuant to section 156(1) of the Adoption Regulations.

Appointment of the Guardian ad litem

9. The Court heard the application seeking to have AWA appointed as the guardian ad litem on 18th July 2024. A is a medical doctor working with the applicant at the Kenya Defence Forces, Kenya Navy base at Mtongwe, as an obstetrician/gynaecologist. The applicant lives in Nyali. Being satisfied with his suitability, this Court appointed him as the guardian ad litem on the said date. The Court, among other things, ordered him to conduct a social inquiry and to write the requisite report under Rule 9 of the Adoption Rules, 2005.

Hearing of the Originating Summons

10. The Originating Summons was heard on 26th September 2024. A total of 5 Witnesses testified. I shall briefly set out the testimonies of the various witnesses below.
11. The first witness was the guardian ad litem, AWA. He testified that he visited the applicant on four occasions. A stated that the child was happy and lived in a good environment. He produced his report dated 15th August 2024. The report recommends the approval of the adoption application.



12. Dr. JAA was the second witness. Dr. A is the applicant. She testified that she resides at Nyali, in the [Particulars Withheld]. It was testimony that she knew the effect of an adoption order. A testified that she was aware that an adoptive child has a right to inherit her estate and that once issued, an adoption order is permanent. She undertook to provide for the child to the best of her ability. Dr. A testified that her family supported the application. She stated that her feelings for the child wouldn't change even if she got a biological child of her own.
13. The proposed joint legal guardian, AMB, was the third witness. He is A's brother-in-law and is married to her sister, MAA. A works for the County Government of Mombasa and is based at the Coast General Hospital. He lives with his wife in [Particulars Withheld] He expressed his consent to be appointed as the legal guardian. Mr B stated that he knew what effect being appointed as the legal guardian would have.
14. A's wife, MAA, was the fourth Witness. She is a public health officer stationed in Siaya. Like her husband, she knows the effect of being appointed as a legal guardian. She testified that she consented to being appointed as such.
15. Ms Pauline Kitema Mumo was the fifth Witness. Pauline works for the Kenya Children's Home Adoption Society. Her Society approved A as a suitable adoptive parent on 16th November 2022. She testified that the applicant meets all the requirements and recommended the approval of the adoption application.
16. Ms Njeri Mwangi was the final Witness. She works for the Directorate of Children Services in Mombasa. She testified that she conducted a social inquiry and found that Dr. A met all the requirements. Ms Mwangi testified that the applicant had bonded well with the child. A has a nanny and has stayed with the child for nine months. Ms Mwangi testified that the applicant met all the legal requirements and recommended the adoption.

Reports filed in Court

17. The guardian ad litem's report is dated 15th August 2024. In his recommendation, AWA stated that he was confident the child was in safe hands and enjoyed a favourable environment. He strongly recommended that the adoption application be allowed as it would be in the child's best interest.
18. The Directorate of Children Services' report is dated 1st August 2024. The report stated that a home visit was conducted on 30th July 2024. The office found that the applicant resides in a 3-bedroom apartment at [Particulars Withheld] in a safe, secure neighbourhood and has a nanny. It was observed that the child had bonded well with the applicant. There is family support for the adoption. The report found that the applicant meets all the requirements and recommended the adoption.

Analysis and Determination

19. I have considered the application herein, the supporting documents, and the various witnesses' evidence. The issues that emerge for determination are whether the child is available for adoption, whether the Applicant is fit to adopt the baby, and, most importantly, whether the adoption is in the child's best interest.
20. I have already set out the circumstances under which the child was found. She was abandoned under a big tree in the Corner C area of Kericho town. Upon being found, the Kenya Police officers were alerted. The policemen took her to Kericho County Referral Hospital for medical examination. After being discharged from the hospital, the child was admitted to New Life Home Trust, Nakuru. Her parents have not been traced. Given the time that has elapsed, it is highly likely that they won't be traced.



Therefore, the need for the parent's consent pursuant to sections 186(8) and 187 of the *Children Act* 2022 is dispensed with. I am guided by the case of *In re HN (Baby)* [2020] eKLR, where the court stated:-

“As there is nobody laying claim over the baby, the requirement for consent is hereby dispensed with pursuant to Section 159(1) of the Children's Act. In view of the above consideration, it is my finding that the child is available and suitable for adoption.”

21. Regarding the baby's nationality, the evidence adduced shows that he was found abandoned immediately after birth. Article 14(4) of *the Constitution* of Kenya, 2010 states that a child under eight years of age whose nationality and parents are unknown is presumed to be a Kenyan citizen by birth. Given this provision, the child herein is presumed to be a Kenyan citizen by birth.
22. Regarding age, the child is above six weeks and below 18 years, which provision falls within the age bracket of any adoptive baby under Section 184 (b) of the *Children Act*, 2022. Further, Section 185(1) of the said Act states that any child who is a resident of Kenya, whether born in Kenya or not, is eligible for adoption. I have no doubt the child is fit for adoption.
23. Concerning the applicant's suitability, she is a Kenyan citizen by birth, aged 38, which ages places her within the age bracket of not less than 25 years nor more than 65 years for an adoptive parent in compliance with Section 186(2) of the *Children Act*, 2022. She is also more than 21 years older than the child. From the records that I have seen, the applicant has the means to take care of the child. She is a qualified medical professional earning a good salary and living in a very comfortable neighbourhood. She has no criminal records and is an active member of her church. Since the placement of the child into her custody, the child has fully bonded with her. She understands the consequences of adoption and knows that once an adoption order is made, it is permanent.
24. Consequently, I do not doubt that she meets the requirements to adopt the baby. I am guided by the case of *In re B (Baby)* [2018] eKLR, where the court stated:-

“I am of the considered view that weighing all factors and the evidence placed before me, the applicant is of sufficient ability to bring up the child and to furnish her with appropriate support and maintenance within their available resource base.”
25. On the question of whether the adoption is in the best interests of the baby, I am guided by Article 53(2) of *the Constitution* of Kenya, 2010 and Section 8(1) and (2) of the *Children Act*, 2022 which underscores the best interests of a child as the primary consideration before making any decision concerning a baby.
26. Further, the court in the case of *In re MA (Baby)* [2021] eKLR stated:-

“This court, in the case of *In re B (Baby)* [2018] eKLR, held that the purpose of Kenya's Constitution and Children's Act is to protect and promote the welfare of Children by providing them with stable family units. The fundamental concern, therefore, in every adoption cause is the best interest of that very child.”
27. The child was abandoned shortly after birth. She, therefore, needs basic necessities like food, shelter, education and clothing. She has fully integrated with the applicant. It is obviously in the child's best



interests that this adoption application is allowed. I am guided by the case of In re IK (Child) [2020] eKLR, where the court stated:-

“She needs parental care to grow up as a normal child with emotional and physical protection, which the applicants have stepped in to offer. In that regard, the applicants meet the legal requirements for adoption. Further, all reports recommended adoption for the benefit and well-being of the child. As the Constitution and the law state, in all matters concerning a child, the child’s best interests are paramount.”

Orders of the Court

28. In my view, the Originating Summons has merit. I therefore issue the following orders:-

1. I declare the child Abandoned Baby Girl, aka Baby EP, a Kenya citizen by birth;
2. I dispensed with the consent of the biological parents to the adoption of Abandoned Baby Girl aka Baby EP, as she was abandoned shortly after birth and her parents have not been traced to date;
3. I authorize Dr JAA to adopt Abandoned Baby Girl aka Baby EP;
4. I declare that Abandoned Baby Girl aka Baby EP, shall henceforth be known as AH;
5. I appoint AMB and MAA as the legal guardians of AH and entrust them with her care if the applicant becomes deceased or is otherwise permanently unable to take care of the child before she attains the age of majority;
6. I direct the Registrar General to make an entry recording the adoption order made herein and the date of birth of AH as being 22nd September 2022 in the Adopted Children’s Register as provided for by sections 201 of the Children Act, 2022; and
7. I discharge AWA from his responsibilities as the guardian ad litem.

29. I make no orders as to costs as this is a non-contentious adoption matter.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF OCTOBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Philip, for the Applicant; and

Arthur, Court Assistant.

