



**In re Baby NMM (Adoption Cause E084 of 2020)
[2023] KEHC 3053 (KLR) (Family) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 3053 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

ADOPTION CAUSE E084 OF 2020

EKO OGOLA, J

FEBRUARY 2, 2023

IN THE MATTER OF THE CHILDREN’S ACT, 2001

AND

IN THE MATTER OF ADOPTION OF BABY NMM

BETWEEN

LCB 1ST APPLICANT

SMM 2ND APPLICANT

AND

KKPI ADOPTION SOCIETY 1ST RESPONDENT

DIRECTOR OF CHILDREN’S SERVICES 2ND RESPONDENT

JUDGMENT

1. Before this court is the Amended Originating Summons dated October 21, 2022 by which the applicants LCB AND SMM seek the following orders: -
 1. That this honorable court be pleased to appoint JNM of post office number 56196-00200 Nairobi as Guardian ad litem for the above named infant; namely baby NMM during the hearing of this Adoption Cause
 2. That the Director of Children Services do investigate the suitability or otherwise of the joint applicants to adopt the infant NMM herein and file/submit a requisite report to this honorable court on its findings



3. That the applicants LCB AND SMM be authorized to adopt baby NMM and the said infant and/or child be known as NMM upon the making of an adoption order by this Honorable Court
 4. That JNM be appointed as Legal guardian to baby NMM in the event the Applicants being the adopters herein jointly die or become permanently incapacitated before the infant attains full age
 5. That the consent of the surrogate mother of the infant EKS be dispensed with.
 6. That the Registrar General makes the appropriate entries into the adoption Children's Register in respect of baby NMM
 7. That this honorable court do issue such other orders as may deem necessary in the best interests of the infant herein
 8. The costs of this Adoption Process and proceedings be in the cause
2. The Summons was supported by the statement of even date sworn by the applicants, and an Affidavit in support. The matter was canvassed by way of viva voce evidence in open court.
 3. PW1 was JNM . She testified that she has been appointed a legal guardian for the child. She filed an Affidavit dated October 15, 2020 and a consent and adopted the same
 4. PW2 was Caroline Otilo. She testified that she was the secretary of Child Services. She presented a report for files 083 and 084 of 2020. She testified that the babies referred to in both files are twins. That after assessment of the applicants, the children department has no reservations at all about the adoption and that they recommended the adoption.
 5. PW3 was LCB . She testified that she works for Child Fund International as a business development advisor living at Villa Franca Estate Embakasi; She is married to Samuel Mutiso Mackenzie. PW3 testified that the subject children were born on December 24, 2018 out of a surrogacy process where there was a surrogate agreement. PW3 understands that she will take over the support of the children fully.
 6. PW4 was SMM, who testified that he is married to PW3 LCB ; he lives in [Particulars withheld] Estate Embakasi. He testified that the subject twin children were born on December 24, 2018 out of a surrogacy process where there was a surrogate agreement. PW4 testified that he has no relationship with the surrogate mother. PW4 is ready to take up all responsibility for the children.
 7. PW5 was EKS . She testified that she is the surrogate mother; she is not married and she has a ten-year-old daughter. PW5 testified that she knows the applicants; she entered into a surrogacy agreement with them. PW5 testified that she complied with the agreement; she has no claim whatsoever from the applicants. She testified that she was chosen by the IVF Centre to be a surrogate mother. Her contract amount was Kshs. 350,000/- but the applicants paid her more.
 8. PW5 further testified that the birth notifications for both children indicate her name as the birth mother; she gave her consent to have the applicants adopt the children. PW5 relinquished all claims of responsibility and visitation of the children
 9. PW6 was Jackline Wambui Mwangi from KKPI Adoption society. She testified that the applicants approached the Society with the desire to get adoption processed. The applicants informed the Society about the surrogacy arrangement. PW6 met with the surrogate mother and took her through the process. The Society later declared the children free for adoption and issued two certificates.



10. The applicants filed written submissions dated January 16, 2023.
11. The applicants are a married couple having gotten married on April 5, 2008. They are Kenya citizens living in Embakasi. They do not have a child of their own. The subject child was born out of a surrogacy agreement between the applicants and the surrogate mother herein EKS. The applicants are the genetic parents of the subject child.
12. The child was born on December 24, 2018 and was released to the applicants on December 27, 2018. The Child has been under the foster care of the Applicants since then.
13. The applicants aver that they have sufficient family income and assets to enable them take care of the child.; that they are of good health and no criminal records exist against them. The applicants understand the effect of Adoption Orders and are ready and willing to abide by them.
14. The applicants together with their Application filed an affidavit of consent to the adoption of the child. The consent is by EKS (hereinafter “Esther”) who is the surrogate mother of the child. The consent is dated August 5, 2019.
15. Esther states that she entered into a surrogacy agreement with the applicants on February 10, 2018. The Agreement was entered with the intention of having embryos created from the gametes of the applicants being implanted in Esther’s uterus via In Vitro fertilization (IVF), with the purpose of carrying the embryos to term for the applicants. The procedure was successful and Esther was pregnant with twins.
16. Esther delivered the twins at the Aga Khan University Hospital. She acknowledges that she is not the genetic mother of the children therefore she is not liable to cater for their maintenance, upbringing and welfare.

Determination

17. I have carefully considered this application for adoption the various affidavits and Reports on record as well as the relevant law. I have also considered the evidence adduced in open court. The preliminary requirements for the making of an Adoption Order are set out in section 156(1) of the [Children’s Act 2001](#) which provides as follows: -

“ 159 (1) No arrangement shall be commenced for the adoption of a child unless the child is at least six (6) weeks old and has been declared free for adoption by a Registered Adoption Society in accordance with the Rules prescribed in that behalf.”
18. The subject child was born on December 24, 2018 as evidenced by the birth certificate serial number 6294405 attached and marked “BS 3”. The child is now about four (4) years one (1) month old well above the six (6) week age limit provided for in law.
19. The child was declared free for adoption by KKPI Adoption Society by their certificate of November 15, 2019.
20. To facilitate this adoption, the applicants have been assessed by the KKPI Adoption society, the Director of Children Services and the guardian ad litem. The three have compiled and filed their reports in court. That of the Director of Children Services is dated October 25, 2022, while that of the Guardian ad litem is undated. The reports are favorable and all recommend the adoption of the child by the Applicants.



21. This is a surrogacy adoption where the genetics parents of the subject child are seeking to adopt the child from the surrogate mother. Generally, in the Kenyan Jurisdiction there is no law that governs surrogacy Adoption. However, surrogacy agreements are legal and valid.
22. In *AMN & 2others v AG & 5 others* [2015] eKLR, the High court concluded from the many authorities it had come across that: -
 - “it would seem that a host woman is presumed in law to be the mother of a surrogate child until other legal processes are applied to transfer legal motherhood to the commissioning woman. I say so based on the following decisions;
Re X (A child) [2014] EWHC 3135 (Fam) where Mrs Justice Fleanor King, DBE at paragraph 23 stated as follows;
“(a) The surrogate mother having carried a child following assisted reproduction ‘and no other woman’, is the child’s legal Mother-section 33(1) HFEA 2008. This remains the case unless the child is subsequently adopted or parenthood transferred through a parental order. Absent adoption or a parental order, she has and retains parental responsibility.”
23. This therefore means a surrogate mother remains the mother to a child until the parenthood is transferred through a parental order. The applicants herein are seeking the transfer of parental rights from the surrogate mother to themselves.
24. The duty of this court is to analyze the material placed before it and make a determination as to whether the applicants have met the requirements for a local adoption.
25. The applicants have provided bank statements proving their financial capabilities. they have also provided land ownership certificate and log book showing they own assets. This is proved by the annexure marked “BS 6”. The applicants have been medically examined and found to be physically and mentally fit as evidenced by the copies of medical reports attached. the applicants do not have any criminal records as evidenced by the police reports marked “BS 7”.
26. Based on the foregoing I am satisfied that the applicants are suitable adoptive parents.
27. In deciding upon any matter involving a child, courts are obliged to give priority to the best interest of the said child. Section 44(2) of the *Children Act 2001* provides: -
 - “(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”.
28. The child has lived with the applicants in their home since she was about 3 days old up to the present date. There is no doubt that the child has bonded with the applicants and considers them her parents.
29. The various reports filed in court all recommend the adoption. I am satisfied that the adoption will serve the best interests of the subject child. Accordingly, I allow this application and make the following orders: -
 1. That the applicants LCB AND SMM are hereby authorized to adopt baby NMM and the child shall henceforth be known as NMM.



2. JNM is hereby appointed as Legal guardian of the child in the event the Applicants being the adopters herein jointly die or become permanently incapacitated before the infant attains full age
3. The Registrar General is directed to make the appropriate entries into the Adopted Children's Register in respect of baby NMM
4. That the guardian ad litem is hereby discharged

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023.

E.K. OGOLA

JUDGE

Judgment read and delivered online in the presence of:

M/s Gitau for the Applicant

Ms. Gisiele Court Assistant

Page 3 of 3

E.K. OGOLA, J JUDGMENT ADOPTION E 084/2020

