



**In re Baby VLN aka VLM (Child) (Adoption Cause 2 of 2019)
[2023] KEHC 18276 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
ADOPTION CAUSE 2 OF 2019
F GIKONYO, J
APRIL 18, 2023
IN THE MATTER OF BABY VLN AKA VLM (CHILD)**

IN THE MATTER OF

DNN APPLICANT

RULING

1. The significant orders sought in the Notice of Motion dated February 1, 2023 are;
 - i. Spent.
 - ii. That the honorable court be pleased to review the order issued on May 16, 2022 and re-open the matter for hearing and determination of this application.
 - iii. That the honourable court be pleased to allow the applicant herein to [en]join the husband, MME as a co-applicant and include his name together with the applicants in the minor birth certificate as requested in this matter.
 - iv. That the honourable court be pleased to revisit and issue directions on the issue of the certificate declaring the child free for adoption by a registered adoption society before the child is adopted and we wish the court to address the issue and either waive the requirement or allow the same to be issued post judgment given the circumstances of the matter.
 - v. That cost of this application be in the cause.
2. The motion is supported by grounds set out in the motion, and the supporting affidavit sworn by DNN, the applicant.
3. The application is based on the following grounds that; -



- i. This honourable court granted adoption orders on July 25, 2019 in favour of the applicant but the initial order extracted and reviewed and a fresh order issued on May 16, 2022 which also fell short of capturing the correct details to enable the applicant enforce and implement the order.
- ii. There was an error apparent on the face of the record that in the order captured the applicant's husband one MME as an adopter instead of the applicant's husband alone as appears on the face of the order hence the need to review the orders.
- iii. The applicant also states that the intention of the applicant from the time they gave out instructions in this matter was to have both the applicant and her husband, MME captured as joint applicants in the matter since they intended that the child record be reflected to indicate both the applicant and the husband as the adopters. This never happened and it is only at the late stages of the matter after the order was issued and rejected by the registrar of persons that it hit the applicant that their intention *ab initio* could not be achieved with the application as drafted. As a result, the applicant also wishes to have the entire order vacated to allow her husband to be enjoined in the matter before the matter can proceed further.
- iv. The applicant intends to apply for a new birth certificate for the minor and apply for an adoption certificate and the same cannot be achieved by the current order as drafted since it lacks pertinent details required by the institutions implementing the order and this cannot be done until the review of the order is settled.
- v. The honourable court be pleased to revisit and issue of the certificate declaring the child free for adoption by a registered adoption society before the child is adopted and wish the court to give directions and either waive the requirement or allow the same to be issued post judgment given the circumstances of the matter.
- vi. The urgency of the matter is necessitated so as to cause undue delay and allow execution and implementation of the amended order.
- vii. The parties affected by the order will not be prejudiced by the orders sought since this is an error apparent on the face of record and can be remedied with ease.
- viii. The orders sought are necessary in the interest of justice as the applicant stands to suffer grave prejudice should the order extracted on the May 16, 2022 not be amended to reflect the correct details.
- ix. The application has been filed without unreasonable delay given the circumstances of the matter and the directions issued by the court at the last court attendance.

Applicant's Submissions.

4. The applicant submitted that the intention of the applicant from the time they gave out instructions was to have both the applicant and her husband enjoined as co-applicants with the intention of the child's records indicating both of them as the adopters and had the intention of realizing these rights of the minor as a family unit.
5. The applicants submitted that in view of the refusal of the registrar of persons to recognize the applicants husband as a co-adopter of the minor she urges this court to allow the applicant's husband to be [en]joined in the application as a co- applicant.by virtue of his consent to the originating summons on the application for adoption, the consent of the applicant's spouse dated March 6, 2023 to this current application, he was on board and had every intention of acquiring responsibility towards the minor and to be recognized in her documents as the father. By allowing the enjoinder of the



- applicant's husband as a co-applicant and amending the order extracted on May 16, 2022 to reflect the correct details, the applicants will be in a position to take up full responsibility that comes with parenting the child.
6. The applicant submitted that there is no ill motive on the part of the applicant herein presenting this application to court. That she has the best interest of the child at heart to be brought up within a family unit that has both parents who love and care for her. The applicant's husband consenting to be enjoined has shown his willingness to be a party to this case.
 7. The applicant submitted that there was an oversight of the above requirement from the very onset when the application for adoption was made up until the issue of the first adoption order. The judge and the advocate on record seem to have taken the report by the children's officer Narok as the requisite report and used it as a basis for granting the adoption order. In view of the mandatory requirement as communicated by the attorney general's office she urges this court to revisit the issue of the child being declared free for adoption, to consider the progress made in the present adoption cause and there being a judgement to allow the certificate be issued post judgment or in the alternative waive the requirement all together in this case. That the same will facilitate quick disposal of the matter and safe guard the interest of the minor and all parties involved therein.
 8. The applicant submitted that this being a kinship adoption the consent of the biological father and mother had been signed and is contained in the pleadings filed in court on July 10, 2019. The husband of the applicant is a relative of the biological parents. That the court had in previous decided case waived the requirement for the certificate freeing the child for adoption where the adopting party is a relative (kinship adoption).
 9. The applicant submitted that she is deserving of the orders sought. She may suffer grave prejudice if the event order extracted on May 16, 2022 is not amended to reflect the correct details and this matter is not reopened to enjoin the applicant's husband and issued with the orders sought.
 10. The applicant has relied on the following authorities;
 - i. Article 3 of the *United Nations Convention*.
 - ii. Article 53 of the *Constitution*
 - iii. Section 11(1) and (2), 184(1)(a) 186(8)(b) of the *Children's Act* No 29 of 2022
 - iv. *Re EC (Minor)* [2017] eKLR
 - v. *Re JN (Minor)* [2018] eKLR
 - vi. *In Re Adoption Of Baby EM* [2014] eKLR

Analysis and Determination

11. On July 31, 2019, this court, (Bwonwong'a J) issued an order as follows;

“That the adoption application is hereby approved.”
12. On April 21, 2022 upon an application for review of the adoption order, this court issued the following orders;

“In the upshot, the court finds that the application for review of the orders of July 25, 2019 to be merited, and is allowed;



Accordingly:-

1. The adoption order granted on July 25, 2019 is hereby reviewed as follows;
 - i. The applicant, DNN, is hereby authorized to adopt baby VLNAKAVLM who shall henceforth be known as VLM.
 - ii. LLM's date of birth shall be June 9, 2013 and her place of birth shall be Narok.
 2. As a consequence, adoption order be drawn in accordance with this review and be served upon the relevant institutions. This adoption order supersedes the earlier adoption order.
 3. The Registrar-General is hereby directed to enter this adoption in the adopted children's register.
 4. The director of civil registration is hereby authorized to issue VLM with a new Kenyan birth certificate.
 5. Costs be in the cause."
13. When the applicant presented the adoption order as reviewed, the A-G in a letter dated September 7, 2022 to the legal counsel for the applicant flagged out three major issues of concern, to wit; i) lack of certificate declaring child free for adoption; ii) inclusion of the spouse as a joint adoptive parent without an order of the court; and iii) clarity on children officer's report that the child had been committed to the custody of the husband of the applicant two years prior to the adoption.
14. It appears from the averments by the applicant that the review which was done by the court in accordance with the application by the applicant did not cure the original omission. The omission was as a result of the confusion at the onset of these proceedings. Although the report by the children officer dated July 25, 2019 stated clearly that the child had been committed to the care of the husband of the applicant for whom they sought assistance by way of formal adoption, the application for adoption was made in the name of his wife alone. The attempt by the applicant to rectify the anomaly through an application for review of the adoption order did not fill up the omission as the application failed to capture the real and exact problem. I wish to believe the failure to state the exact problem in the initial application for review was perhaps failure to understand the problem, or an inadvertent mistake on the part of the legal counsel. Now, the applicant has made an application for review of the adoption order herein to join her husband as co-applicant.
15. The applicant has relied on order 45 rule, 1, 2 (1) and 3(2) and order 51 rule 1 of the *Civil Procedure Rules*, Section 1A, 1B and 26(1) of the *Civil Procedure Act* Cap 21 and section 184(1)(a) of the *Children Act* No 29 of 2022.

Of Waiver of Certificate Child Free for Adoption

16. Before making an adoption order, the court shall inquire into and be satisfied on evidence before it that-
 - h. the Council has certified and declared the child free for adoption. (section 194(h) of the *Children Act*)
17. The applicant has applied for waiver of this requirement on the basis that this was an oversight during the initial application, yet, the court (Bwonwong'a J) issued adoption order thereto. Effectively, the child herein is duly under adoption order made by the court.



18. Further, I also consider the submission by the applicant that, this being a kinship adoption, the consent of the biological father and mother had been signed and is contained in the pleadings filed in court on July 10, 2019.
19. The person proposed who is the husband of the applicant is a relative of the biological parents. Therefore, blood relative of the child.
20. And, the child was committed by the biological parents to the custody of the person proposed to be joint adoptive parents of the child two years prior to the adoption order herein. From the material before the court, he has had the custody, care and control of the child as such relative. Nothing in law which prevents parents of a child to make temporary arrangements for a fit person to exercise parental responsibilities over a child or to have care and control of their child (section 32 of the *Children Act*)
21. These facts, explains how the child came to his custody and also persuade the court in the peculiar circumstances of this case and in the interest of the child, to waive the requirement in section 194(h) of the *Children Act*. Accordingly, I order waiver of the prerequisite in Section 194(1)(h) of the *Children Act*.

Review of Adoption Order

22. I will deal with the application before me as one which is predominantly for review of an existing adoption order to give joint custody of the child to a blood relative and the adoptive parent.
23. Review of adoption order in the manner stated above is not strange to the *Children Act*. See for instance section 190 of the *Children Act*. More specifically, the court may review an existing adoption order to give joint custody to the adoptive parent and another suitable person- the law prefers a spouse of the applicant or the biological parent or relative of the child.
24. Similarly, the Court may make an adoption order or an interim adoption order in respect of a child who has previously been the subject of an adoption order under the *children Act* or any other written law in any Commonwealth jurisdiction (section 196 of the *Children Act*)
25. I do note that the person proposed to be joint adoptive parent is the husband of the applicant and a blood relative of the child- uncle.
26. The reports by the children officer declare him fit to adopt the child herein. The custody of the child to him has also been explained.
27. But, before I close on this aspect, I should say something about kinship adoption. Latest amendment to the *Children Act*- which in common parlance qualifies to be an over hall- introduced, *inter alia*, Kinship adoption which I believe is a recognition of the familial relation in providing home and shelter for the children born within the family- which to the best of my understanding, was part of the tradition in African Societies to keep and provide within the family all children born in the family. The days of yore had such infrastructure in which even the family or clan property supported all members of the clan including the children born in the family or clan whether within or outside marriage.
28. I should think therefore, that kinship adoption perhaps is seeking to appeal to the core sense amongst relatives of the need to shelter and provide children within and family relation.
29. I should think also the requirements in section 194(1) (f) of the *Children Act* recognizes the role of relative in adoption of children born in the family by *inter alia* stating that:

"Before making an adoption order, the Court shall inquire into and be satisfied on evidence before it that-



- (f) where the applicant is not a relative of the child, reasonable steps have been taken to inform the relatives of the child of the proposed adoption, and no relative who is capable of exercising care over the child has expressed willingness to do so"

30. MME, the person being proposed to be joint adoptive parent of, is the blood uncle of the child and to whom, according to the report by the Children Officer, the custody of the child had been committed by the biological parents of the child. He has expressed willingness to continue exercising care, control and parental responsibility over the child. See consent by him to the application.
31. The applicant who is the adoptive parent of the minor herein is the wife of the said MME.
32. Based on the philosophy of kinship adoption and the encouragement by law that family relations should strive to provide home, shelter and a feeling of family to children under adoption, the application indomitably appeals to the court.
33. In the upshot, I allow the application and review the adoption order made on May 16, 2022 in the following specific terms;
- i. That the applicants, DNN, and MME are hereby authorized to adopt baby VLNAKAVLM who shall henceforth be known as VLM.
 - ii. That VLM's date of birth shall be June 9, 2013 and her place of birth shall be Narok.
 - iii. That the Registrar-general is hereby directed to enter this adoption in the adopted children's register.
 - iv. As this adoption order is made by the court in respect of a child who has previously been the subject of an adoption order made by this court under this Act, the Registrar shall cause the entry in the Register of Births to be marked with the word "re-adopted".
 - v. That the director of civil registration is hereby authorized to issue VLM with a new Kenyan Certificate of Birth and enter thereto the names of the adoptive parents in accordance with this adoption.
 - vi. Costs be in the cause.
 - vii. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, , THIS 18TH DAY OF APRIL 2023.

F. GIKONYO M

JUDGE

In the presence of:

1. Omondi for applicant

2. Court Assistant – Mr. Kasaso

