



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re EMN (Minor) (Adoption Cause 243 of 2015)
[2023] KEHC 18090 (KLR) (Family) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18090 (KLR)

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

FAMILY

ADOPTION CAUSE 243 OF 2015

MA ODERO, J

MAY 19, 2023

IN THE MATTER OF CHILDREN'S ACT NO 8 OF 2001

AND

IN THE MATTER OF ADOPTION OF EMN (MINOR)

IN THE MATTER OF

LWK APPLICANT

JUDGMENT

1. Before this court are two applications for consideration as follows:-

- (1) Summons dated 25th January 2023
- (2) Originating Summons dated 30th September 2015

(1) Summons dated 25th January 2023

2. This was an application filed by Susan Waithera Kagwe an Advocate of the High Court of Kenya seeking the following orders:-

1. That the court file herein be reviewed.
2. That this matter proceeds to Ruling and be concluded in the shortest time possible.
3. That there be no orders on costs.”

3. The application was supported by the Affidavit of even date sworn by the Applicant.



4. Section 80 of the *Civil Procedure Act* provides as follows:-

“Any person who considers himself aggrieved-

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may or make such order thereon as it thinks fit.

5. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows:-

“Any person considering himself aggrieved-

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made order without unreasonable delay.”

6. In the case of *Republic v Advocates Disciplinary Tribunal Ex-Parte Apollo Mboya* (2019) eKLR, Mativo J. held that:-

“A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds-

- a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- b. on account of some mistake or error apparent on the face of the record, or
- c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

7. In the present case there has been no allegation of an error on the face of the record. Nor is there evidence of the discovery of new and important evidence.

8. However this is an Adoption matter in which the ‘best interests’ of the child are paramount. In the Ruling delivered on 11th November 2021 Hon. Justice Muchelule (as he then was) dismissed the application on grounds that the certificate Declaring the child Free For Adoption had not been filed. The Hon. Judge did not delve into the merits of the application.



9. The certificate has now been availed. The record indicates that the child has lived with the Applicant for over ten (10) years. The best interests principle dictates that the adoption application be heard and determined on its merits.
10. For the above reasons I do allow this application for review and direct that the summons dated 30th September 2015 be considered on merit.

(2) Originating Summons dated 30th September 2015

11. The second matter for consideration is the Originating summons dated 30th September 2015 filed by the Applicant LWK seeking orders:-
 1. That the Applicant be authorized to adopt EMN ., a child.
 2. That the consent of the biological mother be dispensed with.
 3. That the child be declared a Kenyan Citizen.
 4. That upon the making of the adoption orders the child be known as AWW and the Registrar-General do make the appropriate entry in the Adopted Children’s Register.”
12. The Application was supported by the statement of even date sworn by the Applicant. The matter was canvassed by way of vive voce evidence on the virtual platform.
13. The Applicant is a single woman who has never been married and who has no biological child of her own. The Applicant seeks to adopt the subject child in order to provide a needy child with a home and out of a desire to have a child to call her own.
14. The Applicant confirmed that she understands the legal implications of adoption order. She undertakes to accord to the subject child all rights due to a biological child including the right to inherit.

Analysis and Determination

15. I have considered the application for adoption, the evidence adduced in support thereof as well as the various reports filed in court.
16. The prerequisites for before an adoption order can be made are set out in section 184 (1) (a) and (b) of the Children’s Act 2022: -
 - (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.”
17. The subject child was born at the Naivasha District Hospital on 9th September 2009. A copy of her Birth Notification Serial Number xxxx is annexed to the summons. The child is now aged fourteen (14) years old and is well above the six (6) week age limit.
18. Child Welfare Society of Kenya (CWSK) have annexed to their report a copy of their certificate Serial Number xxx dated 20th May 2022 declaring the child Free For Adoption.
19. The duty of this court is to analyze the evidence on record to determine whether the Applicant is a suitable adoptive parent. The Applicant is a Kenyan citizen as evidenced by the copy of her National Identity Card which is annexed to the summons.



20. The Applicant is a single woman. She has never been married and has no child of her own. The Applicant now wishes to adopt a child arising from her desire to have a child to call her own.
21. The Applicant is a Catholic Christian and intends to raise the child in the Christian faith.
22. The Applicant is in gainful employment. She has since 2008 been employed by the Government of Kenya as a chief and is currently the chief of [Particulars withheld] Location. She has annexed to the Summons a copy of her payslip as proof of employment. I find that the Applicant is financially stable and is able to provide for the needs of the child.
23. The Applicant has annexed a copy of a clearance certificate issued to her by the Directorate of Criminal Investigations proving that she does not have a criminal record.
24. The Applicant told the court that her family are aware of and support her intention to adopt the subject child. She has appointed her sister as the legal Guardian for the child. The proposed legal guardian MGK has signed an Affidavit dated 30th September 2015 confirming her willingness to act as the legal Guardian for the child.
25. All in all I am satisfied that the Applicant is a suitable adoptive parent.
26. The subject child was born on 9th September 2009 at the Naivasha District Hospital. The child's biological mother abandoned the child in the Hospital immediately after birth. The abandonment was reported at Naivasha Police Station vide OB xxxx.
27. On 15th December 2015 the Naivasha Children's Court committed the child to Rehema PEFA Home for Care and Protection. On 11th January 2011 the child was placed into the custody of the Applicant under a Foster Care Agreement.
28. Efforts to trace the biological mother of the child have borne no fruit. To date no person has come forward to claim the child. CWSK attempted to trace the mother/relatives of the child by placing advertisements several times in the Daily Newspapers. Despite these efforts no person came forward to claim the child. A final Police letter dated 13th September 2010 is annexed to the summons.
29. Given the fact of the child's abandonment there exists no known person from whom consent for this adoption can be sought and/or obtained. Therefore I waive the requirement for consent in line with Section 187(1)(a) of the *Children Act* 2022.
30. In deciding upon any matter involving a child, courts are obliged to give priority to the best interests of the said child. Section 8 (1) of the *Children Act* 2022 provides:-

 “(8).

 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;” (own emphasis)
32. This is a child who was abandoned at birth. She faced an uncertain future living in children's homes and other similar institutions. This adoption allows the child the opportunity to be raised in a stable and loving home environment.



33. The child has lived with the Applicant since January 2011 a period of twelve (12) years. The child has bonded with the Applicant whom she refers to as “Mum”. The child knows no other family.
34. Section 186(8)(c) of the *Children Act* 2022 provides as follows:-
- (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.” [own emphasis]
35. I was able to see the child online. She was a healthy young girl. The child willingly answered questions put to her by the court. It was clear that she was very comfortable in the company of the Applicant. She stated that she was happy living with the Applicant.
36. The child has written a letter dated 27th April 2022 giving her written consent for the adoption as required by law.
37. A Home visit was conducted on 20th September 2020. The Applicant lives in her own two bed-roomed house in [Particulars withheld]. The house was found to be well furnished in a secure environment. The home was found to be safe environment for this child.
38. I have perused the reports prepared by the Adoption Agency, the Guardian Ad Litem and the Director Children’s Services. All three reports were positive and all recommend the adoption.
39. Finally I find that this adoption serves the best interest of the subject child. I therefore allow this application and make the following orders:-
1. The Applicant LWK is authorized to adopt the child known as EMN .
 2. Upon adoption the child will be known as AWW .
 3. The Registrar-General is directed to make the relevant entry in the Adopted children’s Register.
 4. MGK is appointed as the legal Guardian for the child.

DATED IN NAIROBI THIS 19TH DAY OF MAY, 2023.

.....

MAUREEN A. ODERO

JUDGE

