



**In re EW (Child) (Adoption Cause E076 of 2022)  
[2023] KEHC 17595 (KLR) (Family) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17595 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
ADOPTION CAUSE E076 OF 2022  
DKN MAGARE, J  
MAY 9, 2023  
IN THE MATTER OF ADOPTION OF EW**

**IN THE MATTER OF**

**SNT ..... 1<sup>ST</sup> APPLICANT  
EWN ..... 2<sup>ND</sup> APPLICANT**

**JUDGMENT**

1. This matter was placed before me during the first Rapid results initiatives carried out in January 2023 by newly appointed high court judges. The best interests of the child resulted in my taking extra caution to have the minor’s interest being given paramountcy. I heard this matter in two physical sittings in Nairobi and reserved the judgment to today.

**Background**

2. When writing this judgment, I had nightmares. I was tempted to release secrets committed to my soul. I interviewed three minors in these three cases, that is, Nairobi Adoption Causes Numbers E075, 076 and 077 all of 2022. One of them, committed to me a secret to keep quiet till she reached 18. I promised to do so. I weighed it and was satisfied that the minor was not in any immediate or foreseeable danger. It is some childhood fantasies and wishes.
3. However, I promised to record in the judgment the secret in a cryptic form. I also promised to be fair and to look out for the best interest of the children.
4. However, I promised to record in the judgment the secret in a cryptic form. I also undertook to be fair and to look out for the best interest of the children. One of the minors asked me, what can I do, if I was in your position, your honour? I stared blank, for the first time in my life. A powerful message



delivered in poetic language. I then remembered, in the middle of my stupor, the words of Ngugi Wa Thiongo immortalized in the River Between as doth: -

“The two ridges lay side by side. One was Kameno, the other was Makuyu. Between them was a valley. It was called the valley of life. Behind Kameno and Makuyu were many more valleys and ridges, lying without any discernible plan. They were like many sleeping lions which never woke. They just slept, the big deep sleep of their Creator. A river flowed through the valley of life. If there had been no bush and no forest trees covering the slopes, you could have seen the river when you stood on top of either Kameno or Makuyu. Now you had to come down. Even then you could not see the whole extent of the river as it gracefully, and without any apparent haste, wound its way down the valley, like a snake. The river was called Honia, which meant cure, or bring-back-to-life. Honia river never dried: it seemed to possess a strong will to live, scorning droughts and weather changes. And it went on in the same way, never hurrying, never hesitating. People saw this and were happy. Honia was the soul of Kameno and Makuyu. It joined them. And men, cattle, wild beasts and trees, were all united by this life-stream. When you stood in the valley, the two ridges ceased to be sleeping lions united by their common source of life. They became antagonists. You could tell this, not by anything tangible but by the way they faced each other, like two rivals ready to come to blows in a life and death struggle for the leadership of this isolated region.

5. These words stuck to my tongue. I was unable to proceed. It was my last day of rapid response initiative. I ordered, out of abundance of caution that the paternal grandfather be bought for be examined and the file be placed before me for judgment. I knew the courts in Nairobi will deal with the case. I went for Easter RRI. Somehow, Miss Wamukore Advocate, a very diligent one at that and whose resilience I have come to admire immensely turned up for her cases.
6. The cases were however taken to another court. I only had Adoption number E075 of 2021. I was rather surprised on 25/4/2023 to receive these files for writing judgments. I fixed for judgment writing, at the back of my mind I was reading mischief, when I did not see the evidence of the paternal grandfather.
7. This matter is not an easy one. The law we ready in law school was not helpful. It did not teach us on hard cases. I had to seek refuge in *Ronald Dworkin's "take Rights serious."* on hard cases.<sup>1</sup> His solutions were out of this world. He has never been to Africa and Africa is not his business.
8. I sought refuge, in a place I should have stated with. The Constitution of Kenya. That too will not give me guidance. It threw me to the deep end of the blue Indian ocean. From the Constitution, I am convinced and subscribe .to the tenets set out in article 159 (2) of the Constitution. It provides as follows: -

- “2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles.
  - a. justice shall be done to all, irrespective of status;
  - b. justice shall not be delayed;
  - c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

<sup>1</sup> Ronald Dworkin, “Taking Rights rightly”, hard cases, chapter 4, Havard University Press Cambridge, Massachussetts, 1977.



- d. justice shall be administered without undue regard to procedural technicalities; and
- e. the purpose and principles of this Constitution shall be protected and promoted.”

9. Nevertheless, I don't think I have any leeway in this matter, whether or not to subscribe to the Constitution. article 3 (1) of the Constitution provides as doth: -

“Every person has an obligation to respect, uphold and defend this Constitution.”

- 10. I was this interested in doing justice to all irrespective of status. These children were all minors. If I enforce each and every one of their requests then I will end up separating the children. Therefore, I called for the paternal grandfather. I hoped against hopes that he will shed light to the situation at hand.
- 11. I called him to testify. To my utter shock, dismay and consternation, I saw a person so disinterested about his grandchildren that I had doubts. The examination around his identity confirmed my worst fear. The biological father of the children was sired by him. From his testimony demeanor and postulations, I fear what the third president of Kenya could have called him.
- 12. Therefore, this judgment, will stand out in its oddity and complexity. I have to balance between the best interest of the children and the desires of the children, which are at divergence.

### **The originating summons**

- 13. The originating summons dated 23/5/2023 were filed seeking to adopt the minor herein. EW who, if the court allows the application will be known as EWN.
- 14. The applicants made an application to adopt their grandchildren. These are children of the late PWN (deceased). She died during the child birth of the last of the three children.
- 15. The children were taken over by the paternal grandparents since her death in April 2018. The father of the Children FW wrote a letter dated 24/3/2022 giving up the children for adoption.
- 16. The biological father testified in court and privately. He came across as indifferent and has disinterest in both life and the children. He gave the children up as expression of his love. The children may or may not share those sentiments.
- 17. I was minded to dismiss this petition. However, I gave the last chance to see the paternal grandparents, either both or the father in particular. The father came to court but was more disinterested in the minors. He does not know their names and does not care. It did not bother him.
- 18. Four children grew in his household. He appears to have absolutely no clue on what it takes to raise children. His interest is simply to go back to Ndia and meet fellow men in the evening palm wine dance. He does not know where all, except one of his own children are. Like Okonkwo, before him FW was determined not to be to his children, what his father was. These words in things fall apart ring true: -

“When Unoka died he had taken no title at all and he was heavily in debt. Any wonder then that his son Okonkwo was ashamed of him? Fortunately, among these people a man was judged according to his worth and not according to the worth of his father. Okonkwo was clearly cut out for great things. He was still young but he had won fame as the greatest



wrestler in the nine villages. He was a wealthy farmer and had two barns full of yams, and had just married his third wife.”

19. Five years after the demise of his wife, FW is still morning. However, his children asked me to tell him, they love him the way he is. He is their father.
20. The children while supported the adoption, prayed for one thing, that I have to give them. Their request is odd, but they are children.
21. Edina Mogita Ondimu was appointed the legal guardian. I questioned her both privately and in the ordinary cause. She was too trusting. The directorate of children services testified and requested that I ensure the legal guardian is a proper one.
22. The minor herein, EW was born on 22/4/2018, when her mother died. She joined the grand parents in 2018 at the age of a few days. She was interviewed by the court in the presence of the guardian ad litem. Her views remain confidential as it is in her best interest to do so. Though aged five years, her mental acuity was superb.
23. The applicants are newly wedded after in a civil marriage on 26/5/2018. They were married earlier under custom in 1981. They have other 4 other children including PW (deceased), who was the mother of the minors.
24. Kenya Children’s Homes Adoption Society issued the requisite certificates recommending the kinship adoption. I have perused the report by Edina Mogita Ondimu, the guardian ad litem and it recommends the adoption. The Directorate of Children Services also recommends the adoption in a report signed by Ezekiel Kimani.
25. This is kinship adoption, otherwise the 1<sup>st</sup> applicant could not have qualified since he is 67 years old. The female applicant is 60 years old. In an ordinary adoption these are the least qualified persons to adopt. However, section 186 of the [Children’s Act](#) provides as follows: -
  - “6) The court shall not make an adoption order in favour of an applicant or joint applicants if the applicant or joint applicants, or any of them— (a) is of unsound mind within the meaning of the Mental Health Act (cap. 248); (b) is incapable of exercising proper care and guardianship of a child; (c) has been convicted by a court of competent jurisdiction for any of the offences specified in the Third Schedule or similar offences; (d) in the case of joint applicants, if the applicants are not married to each other; (e) is a sole male applicant except where the applicant is a biological relative of the child; or (f) is a foreign applicant except where the applicant is a biological relative of the child.”
26. This decision will be based on the postulations in article 53(2) of the [Constitution](#) that provides as follows; -
  - “ a child’s best interests are of paramount importance in every matter concerning the child.”
27. I am aware that there are imperatives that need to be met before the adoption is granted. The power of this court is circumscribed in section 183 of the [Children’s Act](#). The section provides as follows: -
  - 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", authorizing 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;
  - (b) "local adoption" means an adoption in relation to which—
    - (i) the child is resident in Kenya; and
    - (ii) the adopting parent or parents are Kenyan nationals resident in Kenya; and
  - (c) "foreign adoption" means an adoption in relation to which —
    - (i) the adopting parent or parents are Kenyan nationals with dual citizenship;
    - (ii) the adopting parent or parents are foreign nationals whether or not resident in Kenya;
    - (iii) the adopting parent or parents are not Kenyan nationals but are biologically related to the child; or
    - (iv) the adopting parent or parents were once Kenyan nationals but have lost their nationality by operation of the law of the host country to which the prospective parent or parents have a nationality.
28. This is a kinship adoption the prerequisites of section 184 of the [Children's Act](#) have fully been met the Applicant. The Applicant is not disqualified by dint of section 186(6) of the [Children's Act](#) from adopting. The section provides as doth: -
- The court shall not make an adoption order in favour of an applicant or joint applicants if the applicant or joint applicants, or any of them—
- a) is of unsound mind within the meaning of the Mental Health Act (cap. 248);
  - (b) is incapable of exercising proper care and guardianship of a child;
  - (c) has been convicted by a court of competent jurisdiction for any of the offences specified in the Third Schedule or similar offences;
  - (d) in the case of joint applicants, if the applicants are not married to each other;
  - (e) is a sole male Applicant except where the Applicant is a biological relative of the child; or
  - (f) is a foreign applicant except where the applicant is abiological relative of the child.”
29. In this case, though the applicant resides in the in Githunguri with the minors. I was able to talk to the minor who is 5. Whatever she was able to communicate is safe with me.
30. The Guardian Ad Litem was appointed on 1/12/2022. It appears that I also granted the same application. The second one was in error. The report by the directorate of children services and the Guardian ad Litem were supporting of the adoption. After private audience with the children, I heard the children's father. He gave consent to adoption.
31. The male applicant testified next. On being cross examined by the court the male applicant stated that his children are agreeable. The female applicant testified next.



32. Danson Kibui testified next and gave his consent. The second proposed legal guardian is the wife of the first guardian. She knew her responsibilities. The 4<sup>th</sup> witness was the guardian ad litem who produced her report.
33. The next to testify Was Peter Ndotono from the adoption agency. He produced the reports. He supported the Application. Thereafter, I directed the paternal grandparents to be availed. The file followed me till on 5/5/2023, when on routine visit to Milimani law courts to have a tête-à-tête with a friend. I was informed that this matter is listed before me.
34. Out of call of duty, I liaised with the deputy registrar who availed an open court room where I took evidence of the Last witness. His evidence can traumatize anybody. The less I say about him the better.
35. I now have to deal with several interests. The most important is the welfare of the children. I note that all witnesses referred to the biological father as a good for nothing loafer. That is not information acceptable to some of the children. I was able to read between the lines and decipher the nuances.
36. The children deserve a home and they already have one. I must disappoint some to cater for the children. The application has merit and is for allowing,. This child has been with the adoptive parents since 2018. She has bonded well with them.

### **Determination**

37. I therefore conditionally allow the originating summons dated 23/5/2022, in the following terms: -
  - [a]. SNT and EWN authorized to adopt EW who will be known as EW
  - [b]. ANW and DKN be the legal guardians of the minor.
  - [c]. The guardian ad litem be discharged.
  - [d]. The minor is a Kenyan by birth born on 22.4.2018
  - [e]. The registrar general be directed to enter this adoption in the register of Adoptions.
  - [f]. This file is sealed and closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9<sup>TH</sup> DAY OF MAY 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Miss Wamukore for the Applicant

Court Assistant - Firdaus

