



**In re DA (Child) (Adoption Cause 2 of 2022)  
[2023] KEHC 19241 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19241 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
ADOPTION CAUSE 2 OF 2022  
G MUTAI & BK MATATA, JJ  
JUNE 22, 2023  
IN THE MATTER OF THE CHILDREN ACT 2001  
AND  
IN THE MATTER OF BABY DA-A CHILD  
AND  
IN THE MATTER OF AN APPLICATION FOR ORDERS OF ADOPTION  
OF BABY DA–A CHILD BY CMM AND MM - THE JOINT APPLICANTS**

**BETWEEN**

**CMM ..... APPLICANT**

**AND**

**LITTLE ANGELS NETWORK ..... RESPONDENT**

**JUDGMENT**

1. The Applicant herein moved this honourable court by way of Originating Summons dated 14<sup>th</sup> February 2022 seeking the following orders: -
  - a. Pursuant to Article 14(4) of the *Constitution of Kenya* 2010 and section 11 of the *Children Act*, 2001, this honourable court be pleased to declare the child baby DA as a Kenyan citizen by birth;
  - b. Pursuant to the provisions of section 159 of the Children Act, 2001 this honourable court be pleased to dispense with the requirements of the consent to the adoption as required by the provisions of section 158 of the Children Act, 2001;
  - c. The joint applicants CMM and MM be authorized to adopt baby DA , a child;
  - d. Upon the making of the adoption order, the child be known as AM ;



- e. Upon making the adoption order, PKM be appointed a guardian of the child as provided for by the provisions of section 164 of the Children Act, 2001;
  - f. Upon the making of the adoption order, the Registrar General do make an entry recording the adoption and the estimated date of birth of the child as 12<sup>th</sup> March, 2018 in the Adopted Children Register as provided for by section 170 of the Children Act, 2001; and
  - g. The cost of this application be costs in the cause.
2. The application is supported by the averments in the statement in support thereof sworn on 3<sup>rd</sup> February 2022. The applicant is adult male Kenyan citizen born in 1968. He got married to one MM (the adoptive mother) in 1999 and were blessed with one biological child namely DB born on 28<sup>th</sup> September, 2000. The applicant and his wife moved this court for the adoption of the subject child. Sadly, before the finalization of the adoption proceedings MM, the joint applicant, died on 28<sup>th</sup> November 2022 leaving the applicant a widower. The applicant's motivation to adopt the baby has been ignited by the desire to have a son and give the daughter a sibling. Regarding his occupation, the applicant is a driver and a farmer.
  3. The child herein is estimated to be born on 12<sup>th</sup> March, 2018 to Ms. MWN who gave him up for adoption since she had no emotional attachment with the child and she did not see the possibility of taking care of the child due to financial instability. MWN willingly surrendered the child for placement and gave her final consent on 5<sup>th</sup> June 2019. The child was committed into the legal custody of baby Life Rescue Centre, for care and protection, vide Protection and Care Case No.31 of 2020 at Tononoka Children's Court.
  4. In a meeting held on 15<sup>th</sup> November 2017 the case committee of Little Angels Network declared the child free for adoption and a Certificate S/No.002xxxx was issued.
  5. The child was placed in the custody of the Joint Applicants on 14<sup>th</sup> June 2021 and has been under the care and custody of the Applicant since then. From the reports the Court has seen they have formed a great bond.
  6. This Court appointed Mutua Ndumbuthi the guardian-ad-litem on 31<sup>st</sup> March 2022. The Director of the Children Services through the Children Department Mombasa County and the guardian ad litem were directed to file their respective social inquiry reports within 30 days.
  7. Preceding the hearing, the County Coordinator for Children Services Mombasa County filed social inquiry report dated 27<sup>th</sup> April 2022 recommending the adoption. Equally the guardian-ad-litem filed his report on 28<sup>th</sup> June 2022 recommending the adoption. The reports were filed before the demise of the adoptive mother. Little Angels Network the adoption society filed a supplementary report dated 21<sup>st</sup> March 2023 after the demise of the adoptive mother recommending the adoption.
  8. During the hearing the applicant urged the court to allow the application to enable him adopt the baby and stated that she understood the consequences of adoption and that it is permanent.
  9. After the demise of the proposed adoptive mother the Applicant herein filed a Further Affidavit, sworn on 15<sup>th</sup> February 2023, in support of his intention to proceed with the adoption as the sole applicant.
  10. The Applicant through his advocate Messrs. Njoroge & Katsiya Advocates filed written submissions dated 9<sup>th</sup> May 2023. Counsel submitted that the applicant had met all requirements and it was in the best interest of the child that the adoption is allowed.



11. I have considered the application herein, materials in support and evidence by various witnesses and the issues that emerge for determination are, whether the child is available for adoption, whether the applicant is fit to adopt the child and most importantly whether the adoption is in his best interest.
12. The subject baby is estimated to have been born on 12<sup>th</sup> March 2018 to Ms. MWN who gave him up for adoption since she had no emotional attachment with the child and she did not see the possibility of taking care of the child due to financial instability. The said biological mother willingly surrendered the child for placement and gave her final consent on 5<sup>th</sup> June 2019.
13. On the child's nationality, it is clear that the baby was born in Bombolulu, Mombasa County to one MWN a Kenyan citizen, and that he is currently staying with the Applicant at Kibwezi, Makueni County all within the Republic of Kenya. Article 14(1) of the *Constitution of Kenya*, 2010 provides that a person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen. Therefore, the subject child can only be presumed to be a Kenyan citizen by birth.
14. The child is above 6 weeks and below 18 years. He is therefore within the age bracket of children who may be adopted pursuant to section 184 of the *Children Act*, 2022. Further section 185 of the said *Act* does recognize any child who is resident in Kenya whether born in Kenya or not, to be eligible for adoption. I have no doubt that the child is fit for adoption.
15. Concerning the Applicant's suitability, he is a Kenyan citizen. This is therefore a local adoption. The Applicant herein is 55 years old which places him under the age bracket of not less than 25 years or more than 65 years for an adoptive parent in compliance with section 186 of the *Children Act*, 2022. The Applicant has been described as being financially stable. He has an income that this honourable court is convinced is sufficient to bring up the child in a safe secure environment. From the records that were presented it would appear to me that he a caring, loving, Christian man with no criminal record. Reports indicate that since the placement of the minor into his custody the child has fully bonded with him. He also understands the consequences of adoption and that it is permanent. He appreciates the role of a parent and was categorical during the hearing that he will treat the baby like his biological child.

*In re JNA* [2018] eKLR L.A. Achode, J stated that: -

“I have perused the entire record and find that the Applicants meet the social parameters that are considered relevant to their taking on parental responsibility and custody of the child in this matter, on a permanent basis as would be conferred by the adoption order sought.”

16. Section 186(4) of the *Children Act*, 2022 provides that “the Court shall not make an adoption order in favour of a sole male applicant, unless the applicant is a blood relative of the child”. The Applicant in this case is not a blood relative of the child the subject of this matter. Could the Court make an adoption order in the said circumstances? My answer is that it can. My finding is predicated on the following principles: -
  1. The *Constitution* requires Courts when considering anything involving a child to have the best interest of the child as its paramount consideration. In my view parenting is a responsibility that men and women are equally able to do;
  2. Further to the foregoing Article 53(1)(e) of the *Constitution of Kenya*, 2010 provides that every child has a right to “parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not”; and



3. Article 27(3) of the Constitution declares that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social sphere”.

Section 186(4) of the Children Act, 2022 does not appear to me to be based on any rational consideration. It discriminates against male applicants. I have not seen a provision in the said Act that justifies the clear limitation of the fundamental right to equality and freedom from discrimination of male adoption applicants, as is required by Article 24 of the Constitution. In my view, considering the best interest of the child, the Court should allow the adoption application.

17. I am guided by the persuasive authority of In re baby M (Child) [2022]KEHC 14713 (KLR) where the Court, in a matter similar to this held as follows:-

“In this case the female applicant passed away last year, the male applicant is the sole surviving applicant to the adoption application. The provision of section 186(4) of the Children Act, 2022 goes against the tenets of the constitution which forbid discrimination on any ground. That section discriminates against a sole male applicant for adoption. I highly doubt the Constitutional validity of that section in the light of Article 27(1) and (3) which provides that (1) every person is equal before the law and has the right to equal protection and equal benefits of the law...(3)women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social sphere. Section 184(4) of the Children Act 2022 fails the Constitutional test. I will therefore be guided by the principle of the best interest of the child in considering this adoption”.

18. On the question of whether the adoption is in the best interests of the baby, guidance can be drawn from article 53(2) of The Constitution and section 8 of the Children Act, 2022 which underscores the best interests of a child as the primary consideration before making any decision concerning a baby.

19. I am also guided by the decision of Nyakundi, J in the case of In Re B (Baby) [2018] eKLR where he stated 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 provision is of the best interest of that very child...

It is that family unit that the Constitution contemplates under Article 45 which also has to take responsibilities in fulfilling the obligations enjoined in Article 53 of the same Constitution.”

20. The child herein was surrendered willingly for adoption by his mother MWN . He is like any other child in need of parental care and guidance. He needs basic necessities like food, shelter, education and clothing. He has fully integrated with the Applicant. It is therefore my view that it is in the best interests of the child that this adoption application is allowed.

21. Accordingly, the application is allowed with orders that:

- a. Baby DA is declared a Kenyan citizen by birth;
- b. The consent of the biological parent is hereby dispensed with;
- c. CMM is hereby authorized to adopt baby DA who shall henceforth be known as AM ;



- d. PKM is hereby appointed the Legal Guardian of AM in the event the Applicant is deceased or otherwise becomes unavailable before the said child turns 18 years old;
- e. The Registrar General is directed to enter the Adoption Order made herein and the estimated birth date of the child as being 12<sup>th</sup> March 2018 in the Adopted Children's Register;
- f. The guardian ad litem is discharged.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>ND</sup> DAY OF JUNE 2023 VIA MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Ms. Katsya for the Applicant

Mr. Arthur – Court Assistant

