



**In re JM (Child) (Adoption Cause E001 of 2023)
[2023] KEHC 20133 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADOPTION CAUSE E001 OF 2023
G MUTAI, J
JULY 14, 2023
IN THE MATTER OF: THE CHILDREN'S ACT OF 2001
AND
IN THE MATTER OF BABY JM (THE CHILD)**

BETWEEN

LMW AKA LMW APPLICANT

AND

KENYA CHILDREN'S HOME ADOPTION SOCIETY RESPONDENT

JUDGMENT

1. The applicant herein moved this honourable court vide Originating Summons dated February 2, 2023 seeking for orders that: -
 - a. Pursuant to Article 14(4) of the *Constitution of Kenya, 2010* and Section 7(1) of the *Children Act, 2022* this honourable court be pleased to declare Baby JM (the child) a Kenyan citizen by birth;
 - b. Pursuant to the provisions of section 187 of the *Children Act, 2022*, this honourable court be pleased to dispense with the requirements of the consent to the adoption as required by the provisions of section 186 of the *Children Act, 2022*;
 - c. The applicant LMW aka LMW be authorized to adopt Baby JM;
 - d. Upon the making of adoption order, the child to be known as LJWvS;
 - e. Upon making of the adoption order JJVS be appointed the Legal Guardian of the child as provided for by the provisions of Section 188 of the *Children Act, 2022*;



- f. Upon the making of the adoption order, the Registrar General do make an entry recording the adoption and the date of birth of the child as November 15, 2021 in the Adopted Children Register as provided for by section 201 of the *Children Act, 2001*; and
- g. The costs of this application be costs in the cause.
2. The application is supported by the averments in the statement in support thereof sworn on February 2, 2023. The applicant is an adult Kenyan citizen born in 1977. She is married to JJVS. They got married in February 2013 under customary law. The customary marriage was converted into a statutory marriage on April 26, 2017. She is blessed with one biological child namely LA who has consented to the adoption. The motivation to adopt the baby has been ignited by the desire to give a home to a needy child and at the same time expand her family. Regarding her occupation, the applicant is an employee of [Particulars Withheld] Company in Mombasa with an income of KES 290,000/- per month.
3. The child herein is estimated to have been born on November 15, 2021 at Provincial General Hospital, Nyeri to Ms. RNT who absconded from hospital and abandoned the minor after delivery at the New Born Unit on November 15, 2021. The matter was reported the same day at Nyeri Police Station vide Occurrence Book No 78/15/11/2021. The child was committed into the legal custody of New Life Home Trust- Nyeri for care and protection vide Protection And Care Case No E0131 of 2021 at the Nyeri Children's Court.
4. In its meeting held on August 17, 2022, the case committee of Kenya Children's Homes Adoption Society declared the child free for adoption and a Certificate S/Noxxx was issued.
5. Upon instituting these proceedings, AMKK was on May 11, 2023 appointed as the *guardian-ad-litem*. The Director of Children Services through the Children Department, Kilifi County and the *guardian-ad-litem* were directed to file their respective social inquiry reports within 30 days.
6. Preceding the hearing, the County Coordinator for Children Services Kilifi County filed her report. In her evidence in court she told the court that they visited the applicant in her home in [particulars Withheld] Estate. The child had bonded well with the applicant. That the applicant qualifies for the adoption however, they are concerned about her marriage to a foreigner. That it is in the best interest of the child that the child be adopted. The guardian ad litem filed her report on June 12, 2023 recommending the adoption.
7. During the hearing the applicant urged the court to allow the application to enable her adopt the baby and stated that she understood the consequences of adoption and that it is permanent.
8. The applicant through her advocates Mercy Ngugi & Associates Advocates filed written submissions dated June 21, 2023. Counsel submitted that the Children's Officer in her report did not give a recommendation whether the adoption should be allowed or not due to the fact that the applicant is married to a foreigner. That the applicant has presented this matter as a single applicant. Counsel relied on Section 186 (8) (b) of the *Children Act, 2022* on the requirement of a consent of the other spouse in an application by one spouse and submitted that the applicant's husband gave his consent to the applicant to adopt vide spousal consent signed on May 30, 2021 and affidavit sworn on June 7, 2021.
9. Counsel further relied on Article 53 of the *Constitution* and Section 8 of the *Children Act* and submitted that the best interests of the child are paramount. Counsel relied on the case of *In re DG (Child)* [2021]eKLR.
10. I have considered the application herein, materials in support and evidence by various witnesses and the issues that emerge for determination are; whether the baby is available for adoption, whether the applicant is fit to adopt the baby and most importantly whether the adoption is in the best of the child.



11. The child was abandoned at birth by the birth mother. I have already set out in the preceding paragraphs the circumstances under which this happened. I will not rehash the same here. Having been abandoned at birth the need for consent of the birth parents pursuant to section 186 and 187 of the [Children Act, 2022](#) is dispensed with.
 12. On the baby's nationality, it is clear the baby was born in Nyeri Provincial General Hospital and currently staying with the applicant at [particulars Withheld] Estate, Mtwapa, in Kilifi County within the Republic of Kenya. Article 14(4) of the [Constitution of Kenya, 2010](#) recognize that a child who is less than 8 years of age, and whose nationality and parents are not known, is presumed to be a Kenyan citizen by birth. In view of this provision the child herein is presumed to be a Kenyan citizen by birth.
 13. The child is above 6 weeks and below 18 years which provision falls within the age bracket of any adoptive baby pursuant to Section 184(1) (b) 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 the child is fit for adoption.
 14. Concerning the applicant's suitability, she is a Kenyan citizen thus qualifying this to be a local adoption. The applicant herein is 46 years old which places her 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](#).
 15. On the impact of the applicant's marriage to a foreigner in this case section 186 (8) provides: -

“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.”

Further faced with a similar application the court in the case of [In re DG \(Child\)](#) [2021] eKLR stated: -

“Though she is married to a non-Kenyan the Applicant herself resides in Kenya where she is undertaking a Masters Course. She told the Court that her husband intends to relocate to Kenya. Since the Applicant herein is a Kenyan citizen who resides in Kenya I find that the Moratorium against Foreign Adoptions does not apply in this case.”
 16. The applicant has been described as financially stable as the applicant is an employee of [particulars Withheld] Company in Mombasa with an income of KES 290,000/- per month. She is caring, loving and Christian lady with no criminal record. Since the placement of the minor into her custody the child has fully bonded with her and her family. She also understands the consequences of adoption and that it is permanent. She appreciates the role of a parent and admits she will treat the baby like her 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.”
- It's my view that the applicant has met the necessary requirements to adopt the baby.



17. 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(1) and (2) of the Children Act, 2022 which underscores the best interests of a child principal as the primary consideration before making any decision concerning a baby.

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.”

18. The child herein was abandoned by his mother RN. 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 obviously in the best interests of the child that this adoption application be allowed. I am guided by the case of In re DG (Child) (*supra*) where the court held:-

“This is a child whose biological mother was unwilling and/or unable to care for her. She has now found a home with the Applicant. In my view this adoption serves the best interests of the child.”

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

- a. The child is declared a Kenyan citizen by birth;
- b. The consent of biological parents or guardians is dispensed with;
- c. The applicant is authorized to adopt Baby JM who shall henceforth be known as LJWVS;
- d. JJVS is appointed as the Legal Guardian of Baby JM in the event the applicant is deceased or otherwise becomes unavailable or unable to take care of Baby JM before he attains majority;
- e. The Registrar General is directed to enter the adoption order and estimated date of birth of the child as November 15, 2021 in the Adopted Children’s Register; and
- f. The *guardian-ad-litem* is discharged.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF JULY 2023 VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Mercy Ngugi for the Applicant;

Arthur Ranyundo – Court Assistant

