



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**ADOPTION CAUSE NO. 11 OF 2018 (OS)**

**AND**

**IN THE MATTER OF THE CHILDREN'S ACT (NO. 8 OF 2001)**

**AND**

**IN THE MATTER OF DK (MINOR)**

**AND**

**AN APPLICATION FOR ORDERS OF ADOPTION OF DK (MINOR)**

**BY**

**LEB also known as EB**

**JUDGEMENT**

1. The Applicant, LEB also known as EB is a British national. On 13.3.04, the Applicant got married to LN (L) at the Registrar's office in Mombasa. Thereafter, the Applicant took up permanent residency in Kenya on 12.12.04 and has been living in Mtwapa. The Applicant and L were not blessed with children of their own.
2. In 2008, a brother to L known as MK and his wife MM gifted their 4<sup>th</sup> born child known as DK, to the Applicant and L, in a traditional Masaai ceremony. Although the Applicant and her husband separated in 2010, the child, who was born on 22.3.07, has to date remained under the care of the Applicant from 22.2.08, to date. The Applicant was on 8.8.11 granted legal custody of the child in Tononoka Children's Court Miscellaneous Application No. 63 of 2011,
3. The Applicant now seeks to adopt the child who is now just shy of 13 years old. To this end she has moved this Court by way of the Originating Summons herein dated 2.7.18.
4. On 28.3.19, when the matter first appeared in Court, WSM was appointed as the guardian ad litem for the child pending the hearing and determination of the adoption application, in accordance with Rule 8 of the Adoption Rules. To facilitate this adoption, the Applicant has been assessed by Change Trust, the adoption society that arranged the adoption, the Director of Children Services, and WSM, the guardian *ad litem* and all have filed their respective reports. In compliance with Section 156 of the Children Act, Change Trust declared the child free for adoption on 15.12.17 *vide* its certificate No. [...]. The society's report was filed in Court on 24.9.19.
5. In compliance with this Court's order of 25.9.19, WSM the guardian *ad litem*, filed his report on 30.9.19 which is favourable and recommends the proposed adoption as it shall be in the best interest of the child.
6. In line with Section 158(4)(a) and (d) of the Act, MK, a brother to L and his wife MM, the biological parents of the child and L, the husband of the Applicant have all signed their consent to the adoption. MK however, died prior to the hearing of the Originating Summons. There is also on record a letter from Snr. Chief James Likampa of Otiasika location, Loitoktok, confirming that the child was traditionally gifted by his parents to the Applicant and L.
7. George Isoe Migosi, the Kilifi County Director of Children Services (the County Coordinator), for the Director of Children Services filed his report dated 28.1.20. Although the County Coordinator is satisfied that the Applicant meets all the prerequisites for adoption as prescribed in the Children Act, he declined to recommend the adoption. The reason given for this reservation is the Government moratorium on inter county and resident adoptions, which took effect on 26.11.14.

8. The Court is aware that there exists a Cabinet moratorium on inter country and resident adoption of Kenyan children. This indefinite moratorium was issued pursuant to Section 156(4) of the Children Act which provides:

***“The Cabinet Secretary may issue a moratorium on inter-country and residents adoptions where there is sufficient evidence to support the opinion that such adoptions or processes leading up to such adoptions are likely to be in contravention of the Constitution or any other law, or any international treaties or conventions to which Kenya is a party.”***

9. The *Daily Nation* of 12.9.19 reported that a special Cabinet meeting had for the second time in five years issued a high-level directive against taking Kenyan children for adoption abroad, after imposing an indefinite moratorium in 2014. It was further reported that:

***“At the time, the practice had attracted international attention with the United Nations and the American government flagging Kenya as a source and transit hub for child trafficking.***

***Fears were rife that some of the children were ending up in the hands of organ harvesting syndicates while others were sexually exploited, neglected or abandoned in family break-ups.”***

10. In her submissions, the Applicant contends that the moratorium is discriminatory. She contends that equality before the law as enshrined in Article 27 of the Constitution of Kenya, 2010, should apply to both citizens of Kenya and non-citizens alike. She further reminded the Court that it has a duty to uphold constitutional principles as required by Article 159(2)(e) of the Constitution. Reliance was placed on the case of Organization for National Empowerment v Principal Registrar of Birth and Deaths & Another [2013] eKLR where Lenaola, J. (as he then was) when considering the right of adopted children to a birth certificate stated:

***Reading Article 27 of the Constitution together with Article 2(5) and (6) thereof against the Charter aforesaid, I am convinced that whereas adopted children must indeed be registered in the adoption register, there is absolutely no reason why, a certificate of birth cannot be issued to them even if the adoption register is maintained for record purposes. To that extent therefore, I agree with the decision in Matadeen & Anor vs Pointu & Others [1998] 3 WLR 18 where Lord Hoffman in addressing differential treatment of persons stated thus;***

***“of course, persons should be uniformly treated unless there is some valid reason to treat them differently. The reasons for not treating people uniformly often involve questions of policy”***

11. The protection of Kenyan children from child trafficking for purposes that ran contrary to their best interests, is clearly what informed the Government moratorium. Indeed there have been widespread reports of children being passed off as abandoned orphans available for adoption, when in fact they had families of their own. There has therefore been sufficient evidence to support the opinion that such adoptions were in contravention of the Constitution, the law as well as international treaties and conventions to which Kenya is a party. Although the moratorium has resulted in the differential treatment of foreigners, it is evident that there is a valid reason to justify this government policy.

12. As I consider this matter, I am mindful of the provisions of Article 53(2) of the Constitution of Kenya, 2010 which enjoin this Court to place the best interests of a child above all else in all matters concerning the child as follows:

***A child’s best interests are of paramount importance in every matter concerning the child.***

13. This paramountcy principle is also embedded in Section 4 of the Children Act which provides:

***(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-***

***(a) safeguard and promote the rights and welfare of the child;***

***(b) conserve and promote the welfare of the child;***

***(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.***

14. The circumstances in the present case are that the child was given to the Applicant in 2008, openly in a time honoured tradition of the Masaai community of gifting a childless couple with a child. Since that time, the child has been in the constant care and control of the Applicant. Further, the Applicant acquired legal custody of the child on 8.8.11. The biological father of the child granted his written consent to the proposed adoption prior to his demise. I examined the biological mother of the child and L who travelled all the way from Loitoktok and both confirmed that the child was gifted to the Applicant and L who had no child of their own. They also confirmed that they are agreeable to the adoption of the child by the Applicant. The child also informed the Court that he lives with the Applicant who has been taking care of him. He confirmed that he is willing to be adopted by the Applicant. He further stated that he always visits his family back in Loitoktok during the school holidays. I have also noted that the Applicant has taken the child to visit her family in her country of origin several times. My observation in Court of the child and the Applicant revealed a strong bond between them. In view of the foregoing, I am satisfied that there is no evidence of any ulterior or clandestine motive on the part of the Applicant. She is well meaning and her intentions are known to the biological family of the child who have no objection. The child has known no other mother other than the Applicant who has taken care of him since he was 8 months old. To tear him apart from her would no doubt militate against his best interests.

15. The Court is also cognisant of the fact that the Applicant, a single female seeks to adopt a male child. The Children Act at Section 158(2) provides that an adoption order shall not be made in favour of a sole female applicant in respect of a male child, unless the Court is satisfied that there are special circumstances to justify the making of the order. The Adoption Committee established under Section 155(1) of the Children Act, formulated guidelines dated 12.1.10 which the Court may take into consideration while considering whether special circumstances exist to justify adoption of a male child by a sole female applicant. The special circumstances include *inter alia*, that the child is a relative of the applicant or the applicant is the legal guardian of the child or children appointed by will or in adoption proceedings and the parents die or become permanently incapacitated. The child herein is the nephew of the Applicant's husband. As such, this is a kinship adoption. Further, the Applicant was on 8.8.11 granted legal custody of the child in Tononoka Children's Court Miscellaneous Application No. 63 of 2011. Additionally the biological father of the child died on 31.8.19 while the mother has 6 other children under her sole care. In the premises, the Court is satisfied that special circumstances do exist herein to justify adoption of the child by the Applicant.

16. The Applicant has demonstrated that she has the psychological and emotional capacity as well as the material resources to continue raising the child. The Applicant is not younger than 25 years of age and not yet 65 years of age. She is also more than 21 years older than the child. The prerequisites of Section 158 of the Act has thus been met.

17. The Applicant has been made aware of the consequences of an adoption order, namely that the same is final; that the Applicant shall assume all of MM's parental rights and duties in respect of the child; that she shall continue to treat the child as if he was born to her; that the adoption order is binding during the lifetime of the child and that the child shall have the right to inherit her property; that she cannot give up the child owing to any subsequent unforeseen behaviour or other changes in him.

18. The Applicant has nominated DML to be the legal guardians of the child in the event of the Applicant dying or becoming incapacitated before the child is of full age. The Court examined the proposed legal guardian and is satisfied as to her readiness, willingness and ability to be legal guardian of the child.

19. Having taken into account the foregoing factors, this Court has formed the opinion that it would be in the best interests of the child to be adopted by the Applicant. The Court is further satisfied that all the legal requirements for the adoption herein have been met and makes the following Orders:

- a) The Applicant, LEB also known as EB, holder of British Passport No. [...] and Foreigner Certificate No. [...] is hereby allowed to adopt DK.
- b) DML holder of national identity card number [...] is hereby appointed legal guardian of the child in the event that the Applicant dies or is otherwise incapacitated before the child attains the age of eighteen years.
- c) I direct the Registrar General to enter this order in the Adoption Register.
- d) Pending the lifting of the moratorium on inter-country and residents adoptions by the Cabinet, the Applicant is hereby forbidden from removing the child from the Jurisdiction of this Court without the express leave of this Court.
- e) WSM, the guardian *ad litem* is hereby discharged.

**DATED, SIGNED and DELIVERED at MOMBASA this 18<sup>th</sup> day of February, 2020**

\_\_\_\_\_  
**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Applicant**

.....**Court Assistant**