



In re MMK (Adoption Cause 29 of 2022) [2025] KEHC 337 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEHC 337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
ADOPTION CAUSE 29 OF 2022
JRA WANANDA, J
JANUARY 24, 2025
IN THE MATTER OF THE CHILDREN ACT, NO. 29 OF 2022
IN THE MATTER OF AN APPLICATION FOR ADOPTION OF MMK**

IN THE MATTER OF

**PWW 1ST APPLICANT
AAW 2ND APPLICANT**

JUDGMENT

1. The Application before Court is the Originating Summons dated 16/01/2024 filed through Messrs Githongori & Harrison Associates Advocates. The same seeks orders as follows:
 - i. That the Applicants be authorized to adopt the child: [MMK] who is a Kenyan citizen born on 29th September 2011.
 - ii. That upon adoption, the child to be known as MKW
 - iii. That SK of Kenyan National Identity Card Number [.....] be appointed as legal guardian of the child: MMK.
 - iv. That the Registrar General be directed to enter this adoption into the Register of Adoptions and a subsequent Birth Certificate do issue by the Registrar of Births and Deaths.
2. The Application is supported by the joint Affidavit (Statement) sworn by the two Applicants.
3. In the Affidavit, the Applicants deponed that they are Kenyan citizens, that they are older than the child herein by more than 21 years in accordance with Section 186(2) of the *Children Act*, 2022, having been born in 1960 and 1968, respectively, that they got married in 1986 and later solemnized the union under the Anglican Church of Kenya on 9/01/1999. They deponed that they are both farmers and have a combined gross annual income of approximately Kshs 200,000/- and as such, financially and emotionally capable of taking care of the child. They deponed further that they are blessed with 4



- biological children of their own, born between 1987 and 1992, that they are related to the child by dint of the fact that she is their granddaughter having been born to their son, AIW (who died in 2021) and one LNO.
4. They deponed further that the child was brought by the mother, the said LNO to live with the Applicants from the age of 8 months until she turned 6 years because the mother was still in school, that the mother took her back in 2017 after completing school and stayed with her. They urged that after the demise of the child's father in 2021, the mother returned the child to the Applicants and they have been living with her since. They urged further that they are desirous of adopting their said granddaughter so as to secure her under permanent parental control, secure her future and give her the same opportunities as their own children. They also deponed that they are in good health, that they have no criminal record and that they practice the Christian faith in which the child shall be brought up in, that they have obtained all the necessary consents in accordance with Section 186(6) of the *Children Act*, including consents from the child, from the child's said biological mother, from the child's maternal grandmother and from the Applicants' own children. They further swore that they have not received or agreed to receive or been promised any payment or reward in consideration of the adoption. In conclusion, they deponed that the child was declared free for adoption by an Adoption Society in accordance with Section 184(a) of the *Children Act*, that the said SK has consented to be the legal guardian of the child in the event that any eventuality should befall the Applicants and also swore that they have not made any previous adoption application relating to the same child herein.
 5. On 2/02/2024, I appointed one PNW to be the Guardian ad Litem of the child pending hearing and determination of this matter. I also directed the Children's department to make the necessary evaluations and present the resultant Report to this Court. Such Report, dated 28/05/2024, was accordingly prepared and filed on Court.
 6. On 1/08/2024, I took the oral evidence of all the 7 witnesses in this matter, and also that of the child. They were led by the Applicant's Counsel, Ms. Githongori.
 7. PW1 was Diana Jelimo Komen. She testified that she is the Assistant Director, Children's Office, Turbo sub-County Children's Office, and that at the material time, she was attached to the Soy sub-County Children's office. She referred to the Report dated 28/05/2024 from her office and stated that she is the one who prepared it after evaluating the concerned parties. She testified that she had verified that the Applicants are the grandparents of the child and that the child's biological father is deceased. She also testified that she interviewed the child's biological mother on phone as she was away and who confirmed her consent to the adoption as she not in a position to cater for the child and who also confirmed that she gave up the child to the Applicants since the child was 8 months old. In conclusion, she recommended that the Application, which is for a kinship adoption be allowed, and basically, reiterated the matters put forward by the Applicants in their Affidavit.
 8. PW2 was Irene Ogutu who testified that she is a Social Worker at Buckner Kenya Adopting Services. She testified that she interviewed and evaluated the Applicants and verified that they had met all the pre-requisites, that they also conducted a home assessment and presented the application to their Case Committee which approved it on 6/10/2023 and the child freed for adoption on the same date. She then referred to her Report dated 11/12/2023 prepared by her colleague, James Jumba.
 9. PW3 was LNO, the child's biological mother. She stated that she is 31 years of age and resides in Mombasa, and that she is not employed nor married. She testified that the child was born on 29/09/2011, that the child's father, AIW was her boyfriend around 2010-2011 but died in 2021, that after birth, she lived with the child briefly in Nairobi but took her to the Applicants, (the child's paternal grandparents) in [Particulars Withheld], when she turned 8 months, because she had to go



college. She stated that she sometimes stays with the child but on most occasions, the child lives with the Applicants where she is to date. She then stated that she fully understands that by giving up the child for adoption, she cannot reverse the same and confirmed that nevertheless, she is ready to give up all her rights over the child. She stated that she does not have a job and thus cannot cater for the child. When asked by the Court what would then happen if she obtains a job, she undertook that even then, she will not change her mind. It was her testimony that she had discussed the matter with her family and parents and that they were all in agreement that the adoption be allowed. She denied that she had been coerced and confirmed that she had signed the Affidavit dated 17/07/2023 consenting to the Application and that her father, ZO had, too, given his consent. As for her mother, she stated that she is deceased.

10. PW4 was the appointed Guardian ad Litem, PNW He stated that since his appointment, he has adequately carried out his duties as such Guardian ad Litem, and that he has visited and assessed the home and satisfied himself that it is suitable for adoption. According to him, the child is also very happy in the home and he referred to his Report dated 26/04/2024. He stated that the people residing in the home are the Applicants and workers, and that the Applicants take good care of the child. He then stated that he is acquainted with the Applicants as he worships in the same church as the Applicants and that they are his friends.
11. PW5 was the proposed Legal Guardian, SK who stated that she is the Applicants' 1st born child, and that the deceased father of the child herein is her brother. She testified that she resides in the United States of America (USA), is married and has 2 children of her own, aged 1 and 4 ½ years, respectively, and that she is an engineer by profession. She stated further that she has consented to being appointed the Legal Guardian as confirmed by her Affidavit and understands her responsibilities as a Legal Guardian, and that if her parents are not there, she will take over the care of the child. When asked by the Court how long she had been living in the USA and how she would perform her role while living abroad, she stated that although she went to the USA in 2006 before the child was born in 2011, she speaks to her on phone and/or on video call quite often and also that she travels to Kenya to see her family at least once every year. Asked by the Court what level and which school the child was in, she stated that the child is in Grade 6 in a private school in [Particulars Withheld] but she could not recall the name of the school. Asked by the Court whether her husband is aware of her participation herein, she stated that her husband is also a Kenyan and supports the adoption.
12. PW6 was the 1st Applicant, PWW He stated that he is 64 years old, that he is a farmer and is married to the 2nd Applicant, AAW whom he married in 1986. He referred to his Statement (Affidavit) filed herein and prayed to be allowed to adopt the child who is his grand-daughter and whom he has been living with. He testified that the adoption will allow the child to even use his National Hospital Insurance Fund (NHIF) and also allow the child to inherit his property. He confirmed his understanding that adoption is irreversible and that the child will have full rights like all his other children. He stated that he has 3 surviving children, aged 37, 34 and 31 years old, and all have no problem with the adoption.
13. PW7 was the 2nd Applicant, AAW She stated that she is 56 years old, and is also a farmer. She stated that the child the subject hereof is her grandchild (her son's child) with whom she has been living since 2012 when she was 8 months old and she is the one who has always taken care of her and that the child is now 13 years old. She confirmed her wish to formally adopt the child and undertook to treat her as her own. She referred to her statement and proposed SK to be appointed as the Legal Guardian since she is their 1st born child and urged that the whole family also agrees. When asked by the Court about their source of income, she responded that they have rental houses in Kitale, that their farm also gives them financial returns and also that their children also send them sufficient funds. She then revealed



that it is the child's biological mother who by herself approached the Applicants and requested them to adopt the child.

14. After hearing all the 7 said witnesses on 1/08/2024, I also on the same date, interviewed the child and/or conducted an inquiry from her in person. In response to my questions, she told me her full name and stated that she is 12 years old. She identified PW1 and PW2 (the Applicants) in Court as her grandparents and stated her knowledge that all of them were in Court because of the hearing of the Application for her adoption. She stated that she is a Grade 6 pupil at [.....] school, studying under the Competency Based Curriculum (CBC) system. Regarding her biological mother, she mentioned her by her full name, LNO and stated that they speak regularly. She then stated that she is happy to be adopted by her grandparents whom she loves and lives with together with workers. On a light touch, she quipped that she knew that I am a Judge, that she has only been seeing Judges on television and requested that I should allow the adoption. Regarding the proposed Legal Guardian, SK, she confirmed her knowledge that she lives in the USA but stated that they speak often on phone. Asked when she last saw SK last, she stated that she last did so in April 2024 when SK travelled to Kenya, thus 4 months before.
15. I thereafter directed the Applicants' Counsel to file brief written Submissions which she did on 7/08/2024.
16. In her Submissions, Counsel cited and expounded on the Statement, Reports and other documents filed in support of the Originating Summons. She then recounted the contents of the various Affidavits filed and the testimony of witnesses and pointed out that the Applicants stated that their motivation to adopt the child was to secure the child's permanent parental control and her future and to give her the same opportunities as the Applicants' other children. In conclusion, she submitted that this is a local adoption, that the Applicants have fulfilled all the legal requirements and that it would be in the interest of the child under Article 53(2) of the *Children Act* 2022 to be adopted by the Applicants.

Determination

17. The issue for determination is whether the Applicants should be allowed to adopt the child.
18. Regarding litigation concerning minors, Article 53(2) of *the Constitution* stipulates the over-arching principle which must apply whenever any decision concerning a child is to be made, to be the "best interests" of the child. It provides that:

"A child's best interests are of paramount importance in every matter concerning the child"

19. The said principle is echoed in Section 8(1) of the Children's *Act, No. 29 of 2022*.
20. Regarding the law of adoption in Kenya, the relevant provisions are to be found in Part XIV of the Children's Act, 2022 which provides as follows:

" 183.

- (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", authorising 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;

.....

184.

- (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.

.....

185.

- (1) Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was born in Kenya.
- (2) Without prejudice to the generality of subsection (1), no Court may entertain an application for an adoption order in respect of a child unless—
 - (a) the child concerned has been in the continuous care and control of the applicant within Kenya for a period of three consecutive months preceding the filing of the application; and
 - (b) the application for an adoption order is supported by a report made by a duly registered adoption society recommending that an adoption order be made.
- (3) The report referred to in subsection (2)(b) shall contain the society’s findings and recommendations in respect of the child and the applicant or applicants, as the case may be.
- (4) The following children shall be eligible for adoption —
 - (a) a child who is an orphan and has no guardian or caregiver able and willing to take care of the child
 - (b) a child who has been abandoned or whose parents’ or guardian’s whereabouts cannot be traced within a period of one year;
 - (c) children who are willingly offered for adoption by their biological parents in accordance with regulations made under this Part.

186.



- (1) The Court may make an adoption order on application by—
 - (a) a sole applicant; or
 - (b) two spouses jointly.
- (2) The Court shall not make an adoption order in any case unless—
 - (a) the applicant has attained the age of twenty-five years, but is not above the age of sixty-five years; and
 - (b) the applicant, or both of the applicants in a joint application, is more than twenty-one years older than the child.
- (3) The restrictions in subsection (2) shall not apply in any case where a sole applicant or one of the joint applicants is the mother, father or relative of the child.

- (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

21. Section 2 of the Act defines "kinship adoption" as the adoption of a child by a person who is a relative of the child. Section 193(1) provides that a kinship adoption order may only be made in favour of a relative of the child. Section 2 also provides that for the purposes of adoption, a relative means:

“a mother, father, brother or half brother, sister or half-sister, maternal or paternal uncle or aunt or grandparent or step-parent of a child”.

22. The Applicants being the child’s paternal grandparents, the Application herein is therefore for a kinship adoption and is permitted under the *Children Act*.

23. Regarding merits of the Application, I have read the Report dated 28/05/2024 submitted by the Directorate of Children’s Services and which gives the particulars and background information of the Applicants as the prospective adoptive parents, the biological mother and the proposed Legal Guardian. The Report states that interviews by the Children’s office were conducted with the Applicants, the child’s maternal aunt, the Applicants’ one biological child who happens to also be the proposed Legal Guardian, the child’s maternal grandfather, the child herself, and the child’s biological mother. The Report also states that the Children’ officers visited and inspected the Applicants’ home setting in [Particulars Withheld], Trans Nzoia County, whose environment they found to be child



- friendly and conducive for the child's mental, social and physical growth. The Report also returns a favorable assessment regarding the Applicant's financial ability, confirms the arrangement as one of kinship adoption and also confirms that the child has been declared free for adoption. In the end, the Report recommends that the adoption be allowed.
24. Also before Court is the Report dated 11/12/2023 from Buckner Kenya Adoption Services, an Adoption Society. The Certificate Serial No. 0714 dated 29/09/2023 issued by the Adoption Society declaring the child free for adoption is also attached thereto. The Report's methodology is similar to the one from the Directorate of Children's Services and also returns similar findings. In the end, it, too, recommends that the adoption herein be allowed.
 25. I also have before me the Confidential Report dated 26/04/2024 filed by the Guardian ad Litem, PNW whereof he also registers his opinion that the Applicants are suitable persons to adopt the child and that it is in the best interest of the child to be so adopted.
 26. There is also on record, the child's biological mother's (PW3) signed Affidavit sworn on 17/07/2023 voluntarily consenting to the adoption, and by which she also confirms her understanding of the consequences of giving up the child for adoption. A copy of her National Identity Card and an acknowledgment from the Adoption Society has also been supplied.
 27. The child has herself also signed her Consent to the adoption, though undated.
 28. Also on record are Affidavits of Consent from the biological mother's own parents (the child's paternal grandparents), and from the Applicant's children, including the proposed Legal Guardian, all acceding to the adoption.
 29. Also on record and which I have also carefully perused are copies of the child's Certificate of Birth, Applicants' National Identity Cards and their Certificate of Marriage, 1st Applicants' Safaricom M-Pesa statements meant to demonstrate financial ability, title deeds of two parcels of land owned by the Applicants, respectively, Certificates of Birth for the Applicants' children, including the Legal Guardian, Certificate of Death for the child's biological father, Medical examination particulars of the Applicants, respective Clearance Certificates from the National Police Service indicating no previous criminal records on the part of the Applicants, and a copy of the maternal grandfather's National Identity Card.
 30. From the child's Certificate of Birth on record, she was born on 29/09/2011. She is therefore currently 13 years of age. On the other hand, from their National Identity Cards, PNW (1st Applicant) was born on 1/1/1960 while AAW (2nd Applicant) was born on 12/10/1968. PNW is therefore currently 64 years of age while AAW is 56 years old. As already cited above, under Section 186(2)(b) of the Children's Act, 2022, it is stipulated that the Court shall not make an adoption order "unless the Applicant has attained the age of 25 years, but is not above the age of 65 and the Applicant, or both of the Applicants in a joint application, are more than 21 years older than the child".
 31. The 1st Applicant is therefore tottering on the brink of the "forbidden" age of above 65 years which once exceeded, would disqualify him from adopting the child. The 1st Applicant is still below that maximum age but even if he had exceeded it, sub-section (3) of Section 186 which provides that "the restrictions in subsection (2) shall not apply in any case where a sole applicant or one of the joint applicants is the mother, father or relative of the child" would still give him a safe refuge. In any event, this Court would still be empowered to invoke its inherent powers, "the interest of justice" and the "best interests of the child" principle and use these to override the statutory limitations, where necessary.



32. Since as aforesaid, the child was born in the year 2001 and the Reports on record indicate that, save for brief interludes when her biological mother would come for her, she has been living with the Applicants since she was 8 months in 2022. The Applicants have definitely during this period extended parental care and protection to the child, and have safeguarded her welfare. As aforesaid, I gave the child the opportunity to express her opinion on the adoption and she readily informed me that she was happy to be adopted by the Applicants. I carefully and quietly observed the Applicants in Court when relating with the child and they appeared to have bonded well. The Applicants have, in my view, demonstrated that they have the psychological and emotional capacity as well as the material resources to raise the child in a loving home environment.
33. After a careful assessment of the Reports and Affidavits filed herein, together with the witness testimonies, and noting that the minor has been in the custody and care of the Applicants for almost 12 out of her 13 years life, with no negative report of any mistreatment or neglect throughout these years, this Court has formed the opinion that it would be in the best interest of the children to allow the child to be adopted by the Applicants.
34. However, regarding the prayer that the name of the child be changed and the Registrar General do issue a new Birth Certificate for her, the Applicants have not offered any explanation or reason for this prayer. Considering that the child is already 13 years old and has always been known by her current name, I feel that it would be necessary and important for the Applicants to justify this prayer since, if not handled well, it has the potential to emotionally destabilize or disrupt the child's life. At the age of 13 years, it is also important to consult the child regarding the proposed change of name and obtain her views thereon. On this issue, I will therefore give the Applicants leave to file a Further Affidavit to justify this prayer before I make any further orders thereon.

Final Orders

35. In the end this Court makes the following Orders:
 - i. The Applicants, PWW and AAW, being the minors' paternal grandparents, are hereby allowed to jointly adopt the minor known as MMK who is a Kenyan citizen born on 29/09/2011, in terms of Prayer 1 of the Originating Summons filed herein and dated 16/01/2024.
 - ii. The Guardian ad Litem, PNW is now accordingly discharged from his such responsibilities.
 - iii. The said SK is hereby appointed the Legal Guardian of the child MMK in terms of prayer 3 of the Originating Summons.
 - iv. The Registrar General is directed to enter this Order in the Adopted Children's Register.
 - v. Regarding prayer 2 seeking that the name of the child be changed and the portion of prayer 3 seeking that the Registrar General do issue a new Birth Certificate for the child, I give the Applicants a period of 21 days from the date hereof, to swear and file a Further Affidavit clearly explaining and/or justifying the reason why they wish to change the child's name which she has been known by for the last 13 years. Such Affidavit shall also contain a disclosure on whether the child herself has consented to the proposed change of name.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY 2025

.....

WANANDA J.R. ANURO

JUDGE



Delivered in the presence of:

Mr. Haggai h/b for Ms. Githogori for the Applicants

Court Assistant: Mr. Kuto

