In re FAO (Baby) (Adoption Cause E271 of 2024)
[2025] KEHC 11796 (KLR) (Family) (7 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11796 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

ADOPTION CAUSE E271 OF 2024

H NAMISI, J

AUGUST 7, 2025

IN THE MATTER OF

YO ..... 1ST APPLICANT

YO ..... 2ND APPLICANT

JUDGMENT

1. The Applicants filed Originating Summons dated 25 November 2024 seeking the following orders:
    i. That the Applicants, Y.O and Y.O, be authorised to adopt FAO;
    ii. That upon adoption the minor continues to be known as FAO;
    iii. That SNN be appointed as the legal guardian of F.A.O;
    iv. That the Guardian ad litem be discharged;
    v. That the Court do issue such further orders as may be deemed fit to meet the interests of justice.

The Child

2. The child (female) was born on 30 July 2021 to JAO (Deceased) and BOO. She has a twin sister, FAO, who is the subject of a similar adoption Cause No. E044 of 2025. Regrettably, the child's mother passed away a few months later, on 11 November 2021, leaving the child and her sister in the care of their father. According to the biological father, B.O.O, he was unable to properly care for the child and her sister. The Applicants herein then assumed parental responsibilities for the child and her sister, took them under their care and control and continued to provide for their basic needs.

3. On 3 April 2023, the Applicants were appointed as guardians of the child and her sister by the Nairobi Children's Court in Cause No. E237 of 2023. The child holds a Kenyan Passport and has made several trips to Turkey, in the custody of the Applicants.

4. At the hearing, the Court was able to see the child, who appeared healthy and happy. The child speaks Turkish and limited English, which presented a challenge in communication with the Court.

The Applicants

5. The Applicants are citizen of Turkey, currently residing in Nairobi. They are residents of Kenya and hold Foreigner Certificates. They presented their International Certificate of Marriage, which indicates that they got married on 21 July 2019. The 1st Applicant is 65 years old, while the 2nd Applicant is 54 years old. The Applicants have a son, aged 21, who resides in Ankara, Turkey. His undated consent is attached to the Application. The same is not notarized.

6. The 1st Applicant is the Managing Director of [Particulars Withheld] Limited, a company duly incorporated in Kenya. The 2nd Applicant is a stay-at-home mom. The 1st Applicant presented copies of his payslips to prove his financial capability to take care of the child.

7. The Applicants have had custody of the child and her sister for the last 3 years. They have travelled with both children to Turkey on several occasions, with the consent of the biological father and pursuant to the Decree dated 3 April 2023 issued by the Children Court in Cause No. E237 of 2023.

8. The 1st Applicant informed the Court that it is their desire that the child and her sister acquire Turkish citizenship, eventually. In their Statement, the Applicants confirm that they have appointed a lawyer based in Turkey to act on behalf of the biological father of the child to assist with obtaining legal residence for the child and her sister.

9. The Applicants confirmed that they understand the implications of an adoption order and are fully aware that the same is not reversible.

Biological Parents

10. The child's mother, J.A.O, passed away on 11 November 2021, about 4 months after the child was born.

11. The biological father, B.O.O, is employed as a security guard employed by the 1st Applicant's company. According to the Adoption Agency Report dated 24 September 2024, there is good rapport between the 1st Applicant and the biological father.

12. The biological father filed his consent dated 25 November 2024. He appeared before the Court to confirm his consent to the adoption, and his understanding that an adoption order is irreversible.

The Adoption Application

13. I have considered the Summons, the evidence on record, as well as the various reports filed.

14. The duty of this Court is to analyse the material before it to determine whether the Applicants are suitable adoptive parents. In the Report dated 24 September 2024 presented by Change Trust, a duly registered adoption society, the child identifies well with the Applicants. She is in good health and her development can be considered normal. The child was declared free for adoption vide Certificate Number XXX.

15. The Adoption Agency, Change Trust, provided a second report dated 11 October 2024 assessing the Applicants. The Report recommends the adoption of the child.

16. The Guardian ad litem presented an equally favourable report dated 7 March 2025. Her Report notes that the child identifies the Applicants as mom and dad.

17. The Report dated 28 February 2025 from the Directorate of Children Services was prepared by Ezekiel Kimani, who makes the following recommendation:

> "I have considered the fact that the applicants are foreign nationals who may be precluded from adopting a Kenyan citizen by the Government Moratorium that was imposed in 2014 and which has codified in the *Children Act*. I have equally considered the fact that the Applicants have lived with the minor since her mother died and they have given her the best life money can afford. They have travelled with her and her twin sister to Turkey many times since they were granted legal custody by the Children Court. The male Applicant has incorporated a company in Kenya and had stayed here for more than 9 years. The applicants therefore are not motivated by the desire to remove the minor out of the country. Their only desire is to have the child and her twin sister acquire Turkish citizenship which will open more doors for them. The purpose and object of the moratorium was meant to bar foreigners from adopting Kenyan children with a view to moving them abroad..."

18. The Applicants presented copies of payslips, Police Clearance Certificate as well as various recommendations, all pursuant to the provisions of The Children (Adoption) Regulations, 2020. These disclose that the Applicants are financially, socially, physically and mentally fit to adopt the child.

19. Additionally, pursuant to section 195 of the *Children Act*, the Applicant provided a sworn affidavit from S.N.N., consenting to be appointed as the legal guardian of the child in the event that anything untoward happens to the Applicants. The proposed legal guardian is an employee of [Particulars Withheld] Company, which is owned by the 1st Applicant.

Analysis and Determination

20. The child herein was born of Kenyan parents. Her biological father is still alive. The child has lived with the Applicants since January 2022, and they continue to provide for all her needs.

21. In deciding any matter involving a child, the Court is obligated to give priority to the best interests of the child. Section 8 of the *Children Act* provides:

    1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies–

        (a) the best interests of the child shall be the primary consideration;

        (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule;

    2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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; and

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

22. I have considered the Reports filed by the Adoption Agency the Guardian ad Litem, and the Director of Children Services, all of which were positive and recommended the adoption.

23. Notwithstanding the positive reports, the provisions of the law must also be considered and delicately balanced against the best interests of the child. The first issue to address is that of guardianship. The law relating to guardianship is provided under Part X of the *Children Act*, 2022. Section 122 thereof provides as follows, inter alia:

    1. In this Part, "guardian" means a person appointed by will or deed by a parent of a child or by an order of Court to assume parental responsibility over a child on the death of the parent of the child either alone or jointly with the surviving parent of the child in accordance with the provisions of this Act;

    2. A guardian may be appointed on application in the prescribed form in respect of any child who is resident in Kenya whether or not the child was born in Kenya or is a Kenyan Citizen.

    3. A guardian appointed under this Act shall be a Kenyan citizen. (emphasis added)

24. Regarding the provisions of section 122(3), there is a point of departure from the previous provision under section 102(3) of the *Children Act*, 2001. In the latter, a guardian appointed under the Act need not be a Kenyan citizen or resident in Kenya. The *Children Act*, 2022 now provides a mandatory requirement that an applicant for guardianship must be a citizen of Kenya. I note that Guardianship orders in respect of the child herein were made in April 2023, after the current Act came into force in July 2022. This places the Applicants herein in a rather precarious situation. Since the same is not before this Court, I will not address it further.

25. Now I turn my mind to the adoption herein.

26. The Applicants filed submissions in support of their Application.

27. The Applicants submitted that whereas it is a non-contestable fact that the Applicants are foreigners, the question before the Court is whether or not to sanction an intended adoption in light of the provisions of section 186(6)(f) of the *Children Act*, 2022.

28. Section 186 (6) 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.

29. The Applicants submitted section 186(6)(f) cannot be read in isolation, and must be read together with the provisions of section 183 (1), which empowers the court to make an adoption order. The Applicants argued that section 183(3) recognizes three kinds of adoptions, namely, kinship, local and

foreign adoptions. It is the Applicants' argument that by virtue of the provision of section 183, foreign adoptions are permitted.

30. I beg to differ. Whereas section 183(3) identifies three types of adoptions, section 183(4) merely provides a definition of the types of adoptions. In my considered view, in no way can this section be construed to be authorising foreign adoptions. This definition is important in demystifying what is a foreign adoption, the relevance of which is evident in subsequent provisions. Section 186(6)(f), on the other hand, is very clear that foreign adoptions are not permitted.

31. The Applicants further submitted that foreign or inter-country adoption is not a novel concept, it is not only permissible under the Act but also properly anchored in international statutes which Kenya has adopted as part of our domestic laws, and recognizes it as an alternative means of child care. They contended that section 186(6)(f) of the Act cannot be applied to the detriment of the best interest of a child which is the overarching principle in all matters concerning children. The Applicants argued that section 186(6)(f) of the Act cannot be applied blanketly without due regard to the unique circumstances of each case. Where it is apparent to the court that the best interests of a child would be served by adoption, then it must sanction the same in compliance with the noble duty placed upon it by section 183(1) of the Act.

32. The Applicants relied on the case of Re FJK & FPD (Adoption Cause E002 of 2024) [2024] KEHC 6711 (KLR) (4 June 2024), where the learned Judge while considering an Application of almost a similar nature took into consideration the unique circumstances of the case before her and formed the opinion that it would be in the best interest of the children that they be adopted. The Learned Judge held thus: -

> " The reports on record indicate that the children and Applicants have lived together as a family since 2015. The Court observed them and they appeared to have bonded well. They have during this period enjoyed parental care and protection, and their welfare has been safeguarded. The children were also given an opportunity to express their opinion on the adoption and informed the Court that they were happy to be adopted by the Applicants. The Applicants have demonstrated that the they have psychological and emotional capacity as well as the material resources to raise the children in a loving home environment. After a careful assessment of the reports filed herein and noting that the children have been in the custody and care of the Applicants for over 8 years, this Court has formed the opinion that it would be in the best interest of the children to be adopted by the Applicants. Having taken into account the foregoing factors, this Court has formed the opinion that it would be in the best interests of the children that they be adopted by the Applicants."

33. I have carefully read the cited case and drawn a few distinctions. In the cited case, the female Applicant was the biological mother of the children. The female Applicant was a Kenyan citizen, while the male applicant was the foreigner. The children were aged 17 and 15 years, respectively. They had been in the sole custody and care of their mother until their mother began cohabiting with the male Applicant. The biological fathers of the children were unknown and had never been part of the children's lives. The Applicants had lived together as a family since 2015, a period of 8 years.

34. The cited case greatly differs from the present one. In this instance, both Applicants are foreign citizens. Although the Applicants' counsel submitted that they were in the process of obtaining Kenyan citizenship, the same had not been obtained at the time of filing the Application. The Applicants have lived with the child for about 3 years only. The biological father of the child is alive and known.

35. Without a doubt, the mandatory provision of section 186(6)(f) poses a new challenge to an already complicated situation. This Court has been called upon to grant adoption orders in favour of the Applicants, in light of clear statutory provisions that prohibit such an adoption.

36. At the same time, this Court is alive to its duty under the *Constitution* to protect and promote the purpose and principles of the *Constitution*. Under Article 53(2) of the *Constitution* and section 8(1) and (2) of the *Children Act*, this Court is commanded that in all actions and cases concerning children the best interests of the children shall be the paramount consideration.

37. This principle is buttressed in various international instruments to which Kenya is a party. Article 4(1) of the African Charter on the Rights and Welfare of the Child provides as follows:

> In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

38. Article 3 of the Convention on the Rights of the Child provides as follows, inter alia:

    1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

    2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

39. While balancing the best interest of the child, this Court must also uphold the law. Despite all the positive reports, the Applicants have not presented any exceptional or extenuating circumstances that warrant this Court granting the adoption orders. For that reason, the Originating Summons dated 25 November 2024 must surely fail. The same is hereby dismissed, with no orders as to costs.

DATED AND DELIVERED IN NAIROBI ON 7 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Applicants: Mr. MohamedNur

Court Assistant: Lucy Mwangi