



**In re Baby M alias Abandoned Child (Adoption Cause E002 of 2023)
[2024] KEHC 727 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADOPTION CAUSE E002 OF 2023**

G MUTAI, J

JANUARY 31, 2024

IN THE MATTER OF THE CHILDREN ACT, ACT NO 29 OF 2022

AND

IN THE MATTER OF ABANDONED CHILD ALIAS UNKNOWN MALE CHILD

ALIAS UNKNOWN BABY M ALIAS UNKNOWN M ALIAS

ABANDONED UNKNOWN MALE CHILD BABY M 7 MONTHS (A CHILD)

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF ADOPTION OF

ABANDONED CHILD ALIAS UNKNOWN MALE CHILD ALIAS UNKNOWN

BABY M ALIAS UNKNOWN M ALIAS ABANDONED UNKNOWN

MALE CHILD BABY M 7 MONTHS (A CHILD) BY ZOM AND BO

(THE JOINT APPLICANTS)

BETWEEN

IN THE MATTER OF

ZOM 1ST APPLICANT

BO 2ND APPLICANT

JUDGMENT

Introduction

1. The joint applicants filed the Originating Summons dated 10th February 2023, vide which they sought the following orders: -

- 1. That the joint applicants be authorised to adopt child Baby M;



2. That the consent of the biological parents be dispensed with as the child was abandoned;
 3. That upon the making of the adoption order, the said child be known as DMO;
 4. That the Registrar General do make the appropriate entry of DMO in the Adopted Children's Register;
 5. That the child DMO be presumed to be a Kenyan citizen born in Kenya and that the Director of Immigration Services do issue DMO with a Kenyan passport; and
 6. That HKO be appointed the legal guardian of the child DMO.
2. The joint applicants are Kenyan citizens aged 53 and 43 at the time the Originating Summons was filed and hold Kenyan identity card numbers 99XXX94 and 217XXX93, respectively. They got married on 20th June 1998 under the Kisii customary law. They reside in Ukunda in Kwale County. The 1st applicant is a sales clerk with [Particulars Withheld] (K) Ltd, while the 2nd applicant is a primary school teacher at [Particulars Withheld] Primary School. The applicants profess the Christian religion and have three biological children. The applicants received the child, the subject of these proceedings, into their custody on 3rd October 2018, and since then, he has been with them. They propose to rename the child DMO if the adoption application is successful.
 3. Baby M, according to the report of the Child Welfare Society of Kenya dated 2nd February 2022, is presumed to have been born on 8th November 2017 in Mombasa. His mother abandoned him outside a house in the Juakali "B" area within Tudor Location, Mombasa County. The incidence was reported at Makupa Police Station vide OB Number 12/16/11/2017. The rescued baby was taken to the Coast General Hospital for a medical check, where he remained until 18th December 2017, when he was discharged. He was admitted to CWSK Mji wa Usalama for temporary care and protection. He was committed to the same facility on 9th February 2018 vide the Children Court Care and Protection Cause No. 71 of 2018.
 4. The parents of the child are not known. The Child Welfare Society of Kenya conducted media tracing vide advertisements in the Taifa Leo, the Standard and the Sunday Nation on 29th June 2018, without success. No one came forth to claim the child. Neither the police nor the good Samaritan who found the child have been able to trace his mother. The child is thus an abandoned child.
 5. Upon making the above finding, the Child Welfare Society of Kenya issued a Certificate of Declaring a Child Free for Adoption with serial number 0990 dated 24th August 2018.
 6. The Child Welfare Society of Kenya also assessed the joint applicants. In their report dated 2nd February 2022, they found them suitable and recommended adoption by the joint applicants.
 7. The joint applicants attached to the Originating Summons their national identity cards, certificates of good conduct, and the identity cards of their children, among other documents. I have read the said documents and considered them when making my determination.

Court proceedings

Appointment of a guardian-ad-litem

8. The joint applicants filed, together with the Originating Summons, an application dated 10th February 2024, vide which they sought to have LE appointed as a guardian-ad-litem. I heard the said application on 27th April 2023. Upon hearing his oral testimony, I appointed Mr. E as the guardian-ad-litem



and directed him to file the requisite statutory report within 30 days. I also ordered the Director of Children's Services to prepare a social enquiry report within a similar period.

Testimonies of the Witnesses

9. This matter was heard on 15th June, 13th July 2023 and 25th January, 2024. A total of 7 witnesses testified.
10. The first witness was Francis Ndeleko Mwashumbe. Mr Mwashumbe is a social worker with the Child Welfare Society of Kenya. He testified that they assessed the applicants and found them suitable. The second witness was the guardian-ad-litem, LE. He testified that he conducted a home visit. The joint applicants' home, in his view, was suitable for the upbringing of the subject child. The joint applicants had bonded well with the child. The extended family was supportive of the application. He thus recommended the adoption.
11. The joint applicants were the 3rd and 4th witnesses. They testified that the child had been with them since 2018. They both professed knowledge of the fact that adoption is permanent and that Baby M would have the right to inherit their property. They prayed for the issuance of the adoption order.
12. Zephaniah Apoko of the Kwale County Children's Department was the 5th witness. He testified that his department conducted a home visit twice, once by his officer and the second time by him. He testified that the joint applicants stay in a rented 2-bedroom house in Diani. The house, in his view, is child-friendly. He further testified that the child had bonded well with the joint applicants and that he went to a Catholic school at Ukunda and was in PP2. he recommended adoption as, in his view, it would be good for the child.
13. The proposed legal guardian, HKO, was the 6th Witness. She is a teacher at [Particulars Withheld] Junior Secondary School, having been employed in February 2023. The applicants are her parents. She testified that she knows the duties of a legal guardian and expressed her willingness to be appointed as one. She prayed that the Court allow the adoption application. Her sister, LNO was the 7th and last witness. She supported the adoption.

Analysis of the Facts and the Law

14. I have considered the application herein, the documents in support thereof and evidence of the various witnesses. The issues that emerge for determination are whether the child is available for adoption, if the applicants are fit to adopt the baby, and, most importantly, whether the adoption is in the best of the child.
15. I have already set out the circumstances under which the child was found. The child was abandoned by the mother a few weeks after birth. Nobody has come forward to claim him. Given the period that has elapsed since the said occurrence, it is most unlikely that the biological parents will ever turn up. The need for consent pursuant to sections 186(8) and 187 of the *Children Act* 2022 is therefore dispensed with. I am guided by the case of *In re HN (Baby)* [2020] eKLR, where the court stated:-

“As there is nobody laying claim over the baby, the requirement for consent is hereby dispensed with pursuant to Section 159(1) of the *Children's Act*. In view of the above consideration, it is my finding that the child is available and suitable for adoption.”
16. Regarding the baby's nationality, it is clear from the evidence adduced that he was found abandoned immediately after his birth. Article 14(4) of the *Constitution* of Kenya, 2010 states that a child who is



- less than eight 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.
17. In terms of age, the child is above six weeks and below 18 years, which provision falls within the age bracket of any adoptive baby pursuant to Section 184 (b) of the [Children Act](#), 2022. Further, Section 185(1) states that any child who is a resident of Kenya, whether born in Kenya or not, is eligible for adoption. I have no doubt the child is fit for adoption.
 18. Concerning the Joint Applicants' suitability, they are Kenyan citizens aged 54 and 44 years, respectively, at the time of this judgment, which places them within the age bracket of not less than 25 years nor more than 65 years for an adoptive parent in compliance with Section 186(2) of the [Children Act](#), 2022. From the records that I have seen, the joint applicants have the means to take care of the child. They have no criminal record. Since the placement of the minor into their custody, the child has fully bonded with them. They also understand the consequences of adoption and know that once an adoption order is made, it is permanent.
 19. Consequently, I have no doubt that they have met the necessary requirements to adopt the baby. I am guided by the case of [In re B \(Baby\)](#) [2018] eKLR, where the court stated: -

“I am of the considered view that weighing all factors and the evidence placed before me, the applicants are of sufficient ability to bring up the child and to furnish her with appropriate support and maintenance within their resource base available to them.”
 20. On the question of whether the adoption is in the best interests of the baby, I am guided by Article 53(2) of the [Constitution](#) of Kenya, 2010 and Section 8(1) and (2) of the [Children Act](#), 2022 which underscores the best interests of a child as the primary consideration before making any decision concerning a baby.
 21. Further, the court in the case of [In re MA \(Baby\)](#) [2021] eKLR stated:-

“This court, in the case of [In re B \(Baby\)](#) [2018] eKLR, held 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 is the best interest of that very child.”
 22. The child herein was found abandoned. He, therefore, needs basic necessities like food, shelter, education and clothing. He has fully integrated with the applicants. It is obviously in the child's best interests that this adoption application is allowed. I am guided by the case of [In re IK \(Child\)](#) [2020] eKLR, where the court stated:-

“She needs parental care to grow up as a normal child with emotional and physical protection, which the applicants have stepped in to offer. In that regard, the applicants meet the legal requirements for adoption. Further, all reports recommended adoption for the benefit and well-being of the child. As the [Constitution](#) and the law state, in all matters concerning a child, the child's best interests are paramount.”

Disposition

23. Based on the foregoing, I find and hold that the adoption application has merits. Consequently, I issue the following orders: -



1. The child Baby M is hereby declared a Kenyan citizen by birth pursuant to Article 14(4) of the Constitution of Kenya, 2010 and Section 7(1) of the Children Act, 2022;
2. The requirement of consent of the biological parents of the child to the adoption under section 186 of the Children Act, 2022 is hereby dispensed with;
3. The joint applicants, ZOM and BO, are hereby authorised to adopt Baby M, who shall hence be called DMO;
4. HKO is hereby appointed as the legal guardian of Baby M, now known as DMO, in the event the joint applicants ZOM and BO become deceased or are otherwise permanently unable to take care of Baby M, now known as DMO before he attains the age of majority;
5. The Registrar General is hereby ordered to make an entry recording the adoption order made herein and the estimated date of birth of the child as being 8th November 2017 in the Adopted Children's Register; and
6. The guardian-ad-litem, LE, is hereby discharged.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 31ST DAY OF JANUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS.

.....

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. ZOM – The 1st Applicant; and

Arthur – Court Assistant

