



**In re TNM (Child/Minor) (Adoption Cause E004 of 2022)
[2024] KEHC 430 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
ADOPTION CAUSE E004 OF 2022
SN MUTUKU, J
JANUARY 26, 2024
IN THE MATTER OF THE CHILDRENS ACT, 2022
AND
IN THE MATTER OF T.N.M(A CHILD/MINOR)
AND
AND IN THE MATTER OF AN APPLICATION FOR KINSHIP ADOPTION
S.N.M.....APPLICANT**

JUDGMENT

1. The Applicant filed an Originating Summons dated 9th September 2022 under sections 183, 184, 185,186(1)(a), 2(a), (4), (8a), 188, 192,193, 194, 195,201 of the *Children Act* 2022 seeking the following orders:
 - a. Spent.
 - b. That an order be and is hereby issued to the Director, Children Services Department in the Office of the Vice President and Ministry of Home Affairs through the Provincial Children’s Officer, Kajiado, to investigate the Applicant’s fitness to adopt the child and file a report.
 - c. That the Applicant be authorized to adopt T.N.M (child/minor) in this matter.
 - d. That P. M. M and M. W. M, being the father and mother, of the subject minor and of identification Numbers 31XXXX16 and 32XXXX58 respectively, be appointed as legal guardians of the subject minor.
 - e. That the Registrar General be directed to make the appropriate entries in the Adopted Children’s Register, and do issue a certificate to that effect.
 - f. That the court be pleased to make any further orders as it deems fit and necessary.



2. In support of the Originating Summons, the Applicant has filed a statement on the same date which gives the circumstances surrounding this application. From the statement in support, the Applicant is the paternal grandmother to the minor. She is 52 years of age. The biological parents of the minor have given their consent to the adoption. The biological parents have been unable to take care of the minor, necessitating the Applicant to take the minor under her care and protection and has been providing her needs.
3. The Statement further shows that the Applicant migrated to Canada and left the minor in the care of the minor's maternal grandmother but the Applicant provides for the upkeep of the minor. She states that she is due to be issued with a Canadian Residence Permit where she would wish to declare the minor as her adopted daughter. She further stated that she is financially stable and has a two-bedroom house where she works as a house-keeper and would therefore be able to meet the needs of the minor. She states that she is physically, emotionally fit and healthy and hence fully capable of taking care of the minor.
4. The Applicant has proposed T. W. N and P.M.M, her sister and son respectively, to be appointed as Legal Guardians of the minor. She has stated that both are fit, able and willing to act in the capacity of legal guardians and that they have consented to be so appointed through letters of consent dated 5th October, 2023.
5. The records in the court file show that the minor was given up for adoption by her biological parents, M.W.M and P.M.M who gave their consent on 9th September, 2022 and that the minor was declared free for adoption on 31st August, 2022 by KKPI Adoption Society as required under Section 156(1) of the *Children Act*.
6. The Applicant has attached Clearance Certificate dated 6th June 2022 showing that she has been cleared by the police from any criminal activity.
7. This court appointed K.W. K as Guardian Ad Litem on 8th November, 2022 and directed that the Guardian Ad Litem and the Director Department Children Services file their respective reports within 45 days. Both reports have been filed and are in the court file.
8. The Guardian Ad Litem report is dated 20th February, 2023 and a further report dated 5th September, 2023. The Reports show that the minor lives with her maternal grandmother; that she has visited the minor on several occasions; that the minor has also visited her house and stayed there for a week; that the minor is well taken care of and her needs are met by the Applicant who resides in Canada; that the minor, when interviewed about going to live with the applicant in Canada, stated that she is excited about going to Canada; that the Applicant has been paying for school fees for the minor since she started attending school and that the Applicant used to live with the minor and left for Canada when the minor was 4 years old.
9. The Reports further show that the Applicant talks to the minor through phone call regularly and that the minor knows her well and that they have bonded well. The Report is positive and recommends that the Applicant be allowed to adopt the child.
10. The report from the Director of Children Services is dated 12th September, 2023. It is prepared by Anne Wangari Kang'ethe, County Coordinator Children Services. It does not recommend that the Applicant be granted the adoption order. It states that the Applicant has not met the legal requirements needed for adoption as per section 191 of the Children's Act of 2022. That no clearance report has been issued from the Applicant's country of residence to recognize the adoption order if granted by this court.



11. The Report further raises the issue of the residency status of the Applicant, which has not yet been granted to her. The Report shows that the application is not in good faith and if granted it could act as an enabler of migrating the child outside Kenyan Jurisdiction without factual information of what would happen once she is migrated.

Analysis and Evaluation

12. Article 53 (2) of the *Constitution* provides for the over-arching principle which must apply whenever any decision concerning a child is to be considered. It provides that:

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

13. International law also provides for the best interest of the child under the *UN Convention on the Rights of the Child (CRC)*, which Kenya ratified on 30 July 1990, where Article 3 provides that: -

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.

14. From the facts of this matter, this is a kinship adoption. The law under section 193 of the *Children’s Act* provides for kinship adoption.

15. The report of the Director Children’s Services does not recommend the adoption as the Applicant has not met the legal requirements under section 191 of the *Children’s Act*. The section provides as follows:

The Court may make an adoption order in respect of a child on the joint application of two spouses who are not citizens or residents of Kenya, in this Act referred to as an “inter-country adoption”, if the applicants—

- a. have satisfied the Court that—
 - i. all efforts to trace the child’s parents and relatives, and reunify with them have, despite State support, failed; and
 - ii. all local arrangements for the placement of the child in family based alternative care have been exhausted and failed;
- (b) have obtained the consents specified in section 186(8);
- (c) have satisfied the Court that the country where they ordinarily reside and where they intend to reside with the child immediately after the making of the adoption order will respect and recognize the adoption order and grant resident status to the child; and
- (d) have been authorized and recommended as persons who are fit, including being morally fit and financially capable, to adopt a foreign child by a competent government authority or Court of competent jurisdiction in the



country where they intend to reside with the child immediately after the making of the adoption order.

16. In this matter the Applicant seeking to adopt the child is the paternal grandmother who, as indicated in court records, is taking care of all the minor's needs. She was previously living with the minor before going to Canada and has regular communication with the minor. That the biological parents have consented to the minor's adoption.

17. *In re R.N.W. (minor)* (2019) eKLR it was stated as follows;

“ 11. This is a Kinship Adoption as the applicant is related to the child since the child's biological mother was a cousin to the Applicant.

12. Lady Justice Achode *In re J.N.A.* [2018] eKLR held that: -

“The indefinite moratorium issued by the Kenyan cabinet on 27th November, 2014 involved inter-country and resident adoptions of Kenyan children by foreigners. It does not affect adoptions by Kenya applicants, even those living abroad. Dual citizenship in our country is anchored in Article 16 of the Kenyan Constitution. According to the Guidelines for Alternative Family Care of Children in Kenya page 153, “kinship adoption is adoption by adopters who are kin or relatives within the extended family of the child.” Kenyans living abroad and wishing to adopt a Kenyan child will adopt as Kenyans by way of domestic adoptions. This is therefore considered to be a local adoption.”

18. It is therefore upon this court to determine whether the Applicant is a suitable person with the demonstrated financial and social means to provide and care for the minor.

19. This court did not deliver its judgment on this matter on 14th November 2023 as earlier scheduled. Instead, the matter was mentioned on that date and the Applicant to provide information on the issues raised by the Children's department that there is no evidence that this adoption will be recognized in Canada where the Applicant resides, and that the Applicant is yet to be granted Canadian residence.

20. To address those concerns, Mr. Abiero, learned counsel for the Applicant, filed a Supplementary Affidavit in which he has provided material in support of granting an adoption order to the Applicant. He has cited Nairobi Adoption Cause No. 31 of 2013 (OS) reported in *In Re Baby CE [Minor]* eKLR where the court stated as follows:

“On citizenship, I am satisfied that a Kenyan adoption would be recognised in Canada and the child the subject of the adoption would be entitled to residency and citizenship. This is by virtue of section 5.1 of the Citizenship Act of Canada.

In the opinion of this court it would be in the interests of the child that the child is adopted by the applicants. The applicants will be able to provide a home and a family for the child to grow up in and thereafter be a useful member of the family and the society at large.”

21. Counsel also cited *In the Matter of Baby MC* [2013] eKLR where the court allowed an adoption in the best interest of the child and noted that adoptions made in Kenya according to the law are recognizable in Canada.



22. Counsel also attached a letter dated 18th October 2022 addressed to the Applicant in reference to her application for permanent residence in Canada under the protected persons class informing the Applicant that her application where she listed the minor in this adoption cause as her accompanying family member is eligible for consideration.
23. In respect of this additional information, this court finds that it is in the best interest of the minor that this adoption is allowed irrespective of the concerns of the Children Department. It is my considered view that the concerns raised by Ms Kang'ethe in her report are addressed in the additional information provided to the court. It is the view of this court therefore that to grant this adoption is in the best interest of the minor.
24. The following orders are granted:
- i. That the Applicant, S. N. M, is hereby authorized to adopt T.N.M, the minor.
 - ii. That T. W. N of National Identity Card No. 22XXXXX70 and P. M. M, of National Identity Card No. 31XXXXX16, are hereby appointed as legal guardians of the minor.
 - iii. That the Registrar General be and is hereby directed to make the appropriate entries in the Adopted Children's Register and do issue a certificate to that effect.
 - iv. That KWK is hereby discharged from being Guardian Ad Litem.
25. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH JANUARY 2024.

S. N. MUTUKU

JUDGE

