



REPUBLIC OF KENYA



**In re PMM (Child) (Adoption Cause E009 of 2023)
[2024] KEHC 5901 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
ADOPTION CAUSE E009 OF 2023**

RN NYAKUNDI, J

MAY 27, 2024

IN THE MATTER OF ADOPTION OF MINOR PMM (A CHILD)

JUDGMENT

1. Before this court are originating summons dated 27th September, 2024 expressed to be brought under the provisions of Rules 7(1) of the *Children (Adoption Proceedings) Regulations*, 2023, Section 183(1), (2) and 4(b), Section 188(1) of the *Children Act*, 2022 and Section of 3A of the *Civil Procedure Act* seeking the following the orders:
 - a. That pending the hearing and determination of this application this honorable court be pleased to appoint MKK as guardian Ad Litem for the minor.
 - b. That the applicant JJ be authorized to adopt “PMM” and the child shall be called “RJ”.
 - c. That the Registrar General shall make an entry of the adoption order herein in the adopted children register in the prescribed form.
 - d. That the Registrar of births be pleased to issue JJ with new birth certificates of the minor, delete the biological mother and father’s names “JJ” as biological mother of the minor.
 - e. That the court be pleased to appoint “KC” and “JC” as the legal guardians of the minors.
 - f. That the court do issue such further orders as it may deem fit in the interest of the children.
2. The summons is supported by an affidavit sworn by the applicant and grounds as hereunder:
 - i. That the applicant is 33 years old single woman and does not have biological children of her own as she is unable to conceive as she has a condition Hypoplasia (small uterus) and on ovary and chances of conception are minimal.
 - ii. That the minor’s biological parents willingly gave up the minor PMM at 6 weeks as they state the child was as a result of an incestuous relationship the parents being closely related and as such considered a taboo in their culture.



- iii. That the applicant has fostered the minor for more than three months since 13th June, 2022.
 - iv. That the minor herein is a minor in dire need of care and protection and requires necessary documents to enable her to fully benefit from the applicant who is willing to continue providing for her and providing a conducive home environment.
 - v. That Little Angle Network is the adoption society that have monitored the fostering period.
 - vi. That the applicant is willing to offer the minor a home and an opportunity to live a normal family life in comfortable surroundings.
 - vii. That the committee at Little Angels Network sat and after a thorough scrutiny of paper work and circumstances therein and having being satisfied declared the minor legible for adoption.
3. In addition, the application for adoption is supported by a joint affidavit of KC and JC who deposed as follows:
- a. That they are conversant with the facts of the application by the applicant.
 - b. That they are within the bloodline of the applicant and biological parents of the minor herein set to be adopted by the applicant.
 - c. That they have consented to being appointed legal guardians of the minor and do covenant to play their role as guardians.
4. This was also the position taken by Micah Kipruto Koech who assumed responsibility as a guardian Ad Litem. In any adoption proceedings, the director of children bears greater responsibilities in providing an independent and objective report as to the suitability of the adoptive parents seeking leave of the court to adopt the proposed minor. In summary, the director of children services in a report dated 20th May, 2024 stated as follows:
5. That the applicant has not been in any marriage. According to her doctor, she has a trophic (small) uterus and one ovary and due to his condition, chances of conception are near to impossible hence the decision for adoption. That during the stay at the Children’s Home, no parent or relative turned up to claim the child and neither the Director of Children’s Services or National Police Service regarding any claimants.
6. On observation, the report indicated that the child is aware that the prospective mother is out of the country. They often communicate through video calls. She addresses her as mum. The applicant is so attached to the child and she misses her a lot. She has ensured that the child has all she needs in terms of basic needs. She has good plans for her.
7. Other factors taken into account included home environment, financial ability, educational background of the adoptive parent and rights to inheritance in accordance with section 17 and 205 of the *Childrens Act*, 2022. In essence, the children’s officer found the applicant to be a good candidate as an adoptive parent of the minor. The nature of the recommendations is as captured in the following language:

“That the applicant in my considered view meets all the requirements for adoption under Section 186 of the *children’s Act*, 2022. She has proved during the mandatory placement period prior to adoption that she is capable of taking up parental responsibility. Socially, she qualified as she has been assessed and found fit to take up parental responsibilities upon the child permanently as would be conferred on her by adoption orders sought. The child was born through an incestuous relationship and thus could not be brought up within the



family set up. Her parents gave consent and the child was declared free for adoption on 8th June, 2022. I recommend on behalf of the Secretary, Directorate of Children’s Services that the final orders be granted in favor of the Prospective Adoptive parent, JJ and that the applicant be allowed to adopt the minor PMM who she has proposed to be named RJ.”

Determination

8. The thrust of this application is on whether in this in the best interests of the child to be adopted by the applicant within the ambit of Kinship adoption. The best interests of the child as a concept has been ringfenced in the Childrens Act, prior to the constitutional dispensation. In the new dawn, our drafters of the new constitution place a premium on the rights of the child in Art 53 as a whole and for our purposes sub-section 2 reads as follow:

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

9. Two obligations seem to arise from the provisions of the Constitution the court to consider and take into account the interests of children and give appropriate weight in each case to a consideration to which the law attaches the highest value namely the interests of the children who may be concerned. Therefore, in every decision, the court’s formulation is to ensure that the interests of the children must extend beyond those that are given explicit constitutional protection in Art 53(1) and (2) of the Constitution. The jurisprudence is nonetheless evolving and the courts must continue cementing the recognition of the best interests of the child in their decisions. In the instant case, section 193 of the Childrens Act sets out guidelines for alternative family care of children in Kenya. From the inclusion of the best interest principle and the children rights, the kinship adoption is dependent on the surrounding circumstances laid out in section 186 of the Childrens Act, 2022 which provides:

The court may make an adoption order on application (1) by-

A sole applicant; or

Two spouses jointly.

- (2) The court shall not make an adoption order in any case unless:-

The applicant has attained the age of twenty-five years, but is not above the age of sixty-five years; and

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

10. the Constitution demands the paramountcy of Children’s best interest in matters affecting them. This principle is restated under Section 8 of the Children’s Act which provides as follows:

“In all actions concerning children whether undertaken

1. By public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies

The best interest of the child shall be the primary consideration;



The best interest of the child shall include, but shall not be limited to the considerations set out in the first schedule.”

11. It is now sufficiently clear that the in-depth of the *Children’s Act*, holistically as a matter of principle and policy any decision by a court of law, tribunal or administrative agency has to lend itself to factor in the welfare and the best interests of the child. The categories of questions that merit the court’s jurisdiction, constitute the following list of factors
- a. The nature of the personal relationship between: -
 - i. The child and the parents, or any specific parent; and
 - ii. The child and any other care giver or person relevant in those circumstances;
 - b. The attitude to the parents, or any specific parents, towards –
 - i. The child; and
 - ii. The exercise of parental responsibilities and rights in respect of the child
 - c. The capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
 - d. The likely effect on the child of any change in the child’s circumstances, including the likely effect on the child or any separation from: -
 - i. Both or either of the parents; or
 - ii. Any brother or sister or other child, or any care-giver or person, with whom the child has been living;
 - e. The practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
 - f. The need of the child: -
 - i. To remain in the care of his or her parent, family and extended family; and
 - ii. To maintain a connection with his or her family, extended family, culture or tradition;
 - g. The child’s
 - i. Age, maturity and stage of development;
 - ii. Gender;
 - iii. Background; and
 - iv. Any other relevant characteristic of the child;
 - h. The child’s physical and emotional security and his or her intellectual, emotional, social and cultural development;
 - i. Any disability that a child may have;
 - j. Any chronic illness from which a child may suffer;



- k. The need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - l. The need to protect the child from any physical or psychological harm that may be caused by:-
 - i. Subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior; or
 - ii. Exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behavior towards another person;
 - m. Any family violence involving the child or a family member of the child; and
 - n. Which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.
12. In essence, the welfare and the best interests of a child centered approach both as a Constitutional imperative and statutory acknowledgement is aimed at protecting the needs and entitlements of children born within our borders. The unique circumstances of a particular child would then determine the different factors the court should consider in order to exercise discretion to secure the best interests of that child. I consider the case before me as one such case with unique circumstances seeking kinship adoption order. Following the promulgation of the Constitution 2010, it was a ground breaking moment in the advancement of Children’s rights as it recognizes in the express language provided under Art 53 of this supreme law. The universal declaration of Human Rights ensuring that everyone understood the rights it enumerated supplemented children’s core rights as human beings. Moreover, whereas the 1924 Geneva declaration encouraged the men and women of all nations to accept as their duty to fulfillment and protection of Children’s Rights. Under the 1959 declaration, children were recognized as subjects rather than objects with rights to non-discrimination, adequate nutrition, housing, Medicare, name, nationality, social security, recreation and education. It is not surprising that the drafters of our Constitution foresaw the importance of family to the African child with relationships that were reciprocal and multilateral by expressly stating the strength of international law, treaties and conventions as part of our sources of law in Art 2(5) & (6) of the Constitution. This article expressly requires courts to consider international law when making decisions and to favor interpretation of statutory law consistent with international law whenever reasonable. Therefore, the children of the Republic Kenya enjoy protection of their rights enumerated not only in the nation’s constitution but also in the conventions and other human rights treaties on the rights of the child.
13. In *B v M* [2006] BCLR at 138 1066E & F the court recognized that the best interests standard is not an inflexible rule, it has to be construed and given diverse interpretation dependent on different settings. No one factor can be given pre-eminence in all cases involving children. The complexity of the best interests principle require the court to consider all factors which contribute to ascertain children’s best interests. It is necessary to avoid a unidimensional focus which fails to suggest a careful balancing of the different ingredients which may all point towards and comprise the children’s best interests. At the heart of the court’s jurisdiction and decision making as to what is in the best interests of a particular child, it is involved in interpreting and applying that concept within chapter 4 of the Constitution in the bill of rights. It is consequently also necessary for courts to have regard to the dictates of Art 2(5) and (6) of the Constitution in coming to their determination and of particular importance in this context



is the requirement to incorporate international law when interpreting the bill of rights. For instance, the *United Nation Convention of the rights of the child* in Art 21 states as follows:

“State parties which recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

Ensure that the adoption of a child authorized only by competent authorities who determine, in accordance with the applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.”

14. The *Convention on the Rights of the child* further stipulates that when considering placement options due regard shall be paid to the desirability of continuing in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background. Similarly, the Preamble of the *Hague Convention* records the recognition of the state parties that: -

The child, for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding.

15. I have carefully analyzed the adoption application, the affidavit evidence in support, the children’s social inquiry report and the report by the Little Angels Network Adoption agency in line with the best interests of the child, the solution lies in granting the application dated 27th September, 2023. Bearing in mind the above principles, the following orders shall abide:

- a. That the Applicant JJ is hereby authorized to adopt “PMM” a minor and the child shall be called “RJ”.
- b. That the Registrar General is hereby directed to make an entry of the adoption order herein in the adopted children’s register in the prescribed form.
- c. That the Registrar of births do issue JJ with a new birth certificate of the minor, delete the biological mother and father “MK & CMM” name on the birth certificate and insert the applicant’s name as a biological parent of the minor.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 27TH DAY OF MAY 2024.

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R. NYAKUNDI

JUDGE

