



**In re Baby VM (Adoption Cause E016 of 2023)
[2024] KEHC 6727 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADOPTION CAUSE E016 OF 2023**

G MUTAI, J

MAY 24, 2024

IN THE MATTER OF THE CHILDREN ACT, 2022

AND

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF ADOPTION
OF BABY VICTOR MSHINDI BY EDWARD MSHILA MGHANGA AND
VERA GRACE KULOLA MWANJUMWA (THE JOINT APPLICANTS)**

IN THE MATTER OF

EMM 1ST APPLICANT

VGKM 2ND APPLICANT

JUDGMENT

Introduction

1. The Joint Applicants, EMM and VGKM are a married couple aged 52 and 56, respectively. They are both Kenyans of the African race and profess the Christian religion. They have no children of their own. The Joint Applicants live in Mombasa.
2. The child was found abandoned in Likoni. Upon being found, he was taken to the Coast Province General Hospital by a good Samaritan and police officers. The matter was reported to Likoni Police Station vide OB No:XXXX/2020. A court order issued by the Tononoka Children's Court on 18th June 2020 vide P&C No. 107/2020 ordered that the child be placed at Baby Life Rescue Center, following submissions by the Children's Officer Mvita Sub-county. On 4th April 2022, the child was released from Baby Life Rescue Center and handed to the Joint Applicants in this matter, who signed a Foster Care Agreement with the said Center dated 4th April 2022. Since then, the child has been living with the Joint Applicants.



The Pleadings

3. Vide an Originating Summons filed on 10th August 2023 the Joint Applicants sought the following orders:-
 1. Pursuant to Article 14 of the Constitution of Kenya, 2010 and Section 11 of the Children Act, 2001, this Honourable Court be pleased to declare the child be formally adopted by the Joint Applicants;
 2. Pursuant to the provisions of section 159 of the Children Act, 2001, this Honourable Court be pleased to dispense with the requirement of consent to the formalisation to the adoption as required by the provision of section 158 of the Children Act, 2001;
 3. The Joint Applicants, EMM and VGKM be authorised to formally adopt Baby VM;
 4. Upon the making of the adoption formalisation order WM be appointed as the Legal Guardian of the child as provided for by the provision of section 164 of the Children Act, 2001;
 5. Upon the making of the adoption formalisation order, the Registrar General do make an entry recording the adoption and the estimated date of birth of the child as shall be appropriate in the Adopted Children Register as provided for by section 170 of the Children Act, 2001; and
 6. The costs of this application be costs in the cause.

Appointment of a Guardian-ad-litem

4. The Joint Applicants also filed a Chamber Summons application dated 4th December 2023 vide which they sought to have MLDFM appointed as a guardian-ad-litem of the child the subject of these proceedings.
5. The said Chamber Summons application was heard on 18th December 2023. Being satisfied that the proposed guardian-ad-litem was suitable. I appointed him as such and ordered him to prepare and file a social enquiry report within 30 days of the said date. I also directed the Director of Children Services, through the Children's Department, Mombasa, to prepare and file their own social enquiry report within a similar period of time.

The Hearing of the Originating Summons

6. The Originating Summons was heard on 7th May. A total of 5 witnesses testified. I shall set out the synopsis of their evidence below.
7. The first witness was Mr Ephraim Muteru Njama. Mr. Njama is the Managing Trustee of the Change Trust, an adoption society. Mr Njama testified that the minor the subject of these proceedings was declared as being free for adoption on 3rd December 2025 vide certificate serial Number XXXX. The Joint Applicants were approved as being suitable adoptive parents upon assessment on 17th March 2021. He testified that his adoption society recommends the adoption.
8. The second witness was Karen Njeri Mwangi. Ms Mwangi, works for the Directorate of Children Services and is based in Mombasa. She testified that they conducted a home visit to the home of the Joint Applicants on 9th April 2024. Thereafter they prepared a report dated 13th April 2024. The said directorate established that the child is in PP1. The Joint Applicants are in a happy marriage and have the capacity to take care of the child. Ms Mwangi recommended the adoption.



9. The third witness was the guardian-ad-litem MLDFM. He testified that he is a congregant of the same church as the Joint Applicants and had known them since 2003. He further testified that the Joint Applicants have the capacity to take care of the child. Consequently, he recommended the adoption.
10. The fourth witness was EMM. He testified that he is a businessman engaged in shoe repair business. It was his testimony that he had been married to the co-applicant since 2005 but that they had not managed to have children of their own. In 2020 they decided to adopt a child. They approached Baby Life Rescue Centre and filed the requisite forms. They also approached the Change Trust. The child was delivered to their custody on 4th April 2022. They have been taking care of the child ever since. It was his testimony that the child is now in PP1.
11. The last witness was VGKM. She described herself as a housewife. The co-applicant is her husband. Ms M testified that if the adoption order was issued, she would take care of the child herein as though he were her own. She further testified that she wouldn't change. She prayed that the child be given to her.

Analysis and Determination

12. The Originating Summons refers to the *Children Act*, 2001 (repealed). As the *Children Act*, 2022, is now the law of the land, I shall refer to the latter legislation.
13. 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 Joint Applicants are fit to adopt the baby, and, most importantly, whether the adoption is in the best of the child.
14. I have already set out the circumstances under which the child was found. The child was abandoned immediately 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.”
15. 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.
16. 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.
17. Concerning the Joint Applicants’ suitability, they are Kenyan citizens aged 52 and 56 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 records. 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.



18. 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.”

19. 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.

20. 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.”

21. The child herein was found abandoned. He, therefore, needs basic necessities like food, shelter, education and clothing. He has fully integrated with the Joint 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

22. The upshot of the foregoing is that in my view, the application has merit. Consequently, I issue the following orders:-

1. Baby VM is hereby declared a Kenyan citizen by birth;
2. The consent of the biological parents of the child to the adoption is hereby dispensed with;
3. The Joint Applicants, EMM and VGKM are hereby authorized to adopt Baby VM;
4. Baby VM shall retain his name, VM;
5. Wilson Mghanga is hereby appointed as a legal guardian of Baby VM and entrusted with the responsibility of taking care of him in the event the Joint Applicants become deceased or are otherwise permanently unable to take care of him before he attains the age of majority;
6. The Registrar General is hereby ordered to make an entry recording the adoption order made herein and the date of birth of Baby VM as being 22nd April 2020 in the Adopted Children Registrar; and
7. The guardian-ad-litem MLDFM is hereby discharged.

23. I make no orders as to costs.



24. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF MAY 2024.

GREGORY MUTAI

JUDGE

In the presence of: -

No appearance for the Joint Applicants; and

Arthur - Court Assistant.

