



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
ADOPTION CAUSE NO. 130 OF 2016

C M W **THE CHILD**

BY

K J B.....APPLICANT

R U L I N G

1. The Applicant is the adoptive parent of the child C M W (hereinafter referred to as C.M.W). The Originating Summons dated 17th October, 2016 is brought under **Section 176, 4, 22** of the **Children's Act**. The application is supported by the affidavit of K J B sworn on 17th October, 2016 and seeks orders that **the adoption order of C M W made on 10th August, 2016 by the Local Court of Cologne in the Republic of Germany be received and accepted in the Republic of Kenya and be issued by this court as an adoption order made by a Kenyan court.**

2. The proceedings herein concern the enforcement of a foreign judgment or decree. The Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya is the primary law on enforcement of foreign judgments. In its preamble, it provides that the enforcement of foreign judgments is subject to the principle of reciprocity. Kenya grants reciprocal treatment only to judgments emanating from courts of countries that accord reciprocal treatment to Kenyan judgments.

3. The Foreign Judgments (Reciprocal Enforcement) Act provides the blue litmus paper test for the enforcement of a foreign judgment. **Section 176** of the **Children Act**, should therefore be read in the context of the provisions of the Foreign judgments (Reciprocal Enforcement) Act.

4. **Section 176** of the **Children Act** provides a mechanism for recognition and enforcement of foreign adoption decrees outside the provisions of the Foreign Judgments (Reciprocal Enforcement) Act. In essence therefore a person seeking to enforce a foreign adoption decree has an alternative to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act.

5. **Section 176** of the **Children Act** which dwells on the effect of overseas adoptions provides as follows:-

“176(1). Where a person has been adopted (whether before or after the commencement of this Act) in any place and the adoption is one to which this section applies, then, for the purposes of this Act and all other written laws, the adoption shall have the same effect as an adoption order validly made under this Act, and shall have no other effect.

(2) Subsection (1) shall apply to an adoption in any place outside Kenya, if-

(a) the adoption order was made by any court of law in the Commonwealth and any court of competent jurisdiction in any other country.

(b) ...

(c) ...

(3) An adoption order made overseas in favour of an adoptor who is resident in Kenya shall be lodged in the court within the period and in the manner specified in the rules made by the Chief Justice.”

A foreign adoption decree can therefore be adopted in Kenya through Section 176 of the Children Act and the rules of procedure made thereunder without recourse to the Foreign Judgments (Reciprocal Enforcement) Act.

6. The Originating Summons before me seeks the adoption of the decision made in the German court as one which was made in Kenya. Ordinarily for an adoption order made in Kenya to be complete it entails a declaration that the subject child is a Kenyan citizen by virtue of having been adopted by a Kenyan citizen. Along with the declaration, the Applicant is availed secondary orders directing that the Directorates of Immigration and Registration of Persons to issue C M W with a national identification card and passport respectively.

7. The provision in Section 176 of the Children Act only provides for adoption of an adoption order made by a foreign court. Where a Kenyan court eventually adopts such an order under Section 176 of the Children Act, it would not have the effect of automatically making the adopted foreign child a Kenyan citizen.

8. The child so adopted still has to comply with the requirements of Article 15(3) of the Constitution, Section 14 of the Kenyan Citizenship and Immigration Act and Regulation 10 of the Kenya Citizenship and Immigration Regulations. The adoption of the foreign adoption decree by the Kenya court only avails to the applicant additional documentation that they may present to the Cabinet Secretary as required by Regulation 10 of the Kenya Citizenship and Immigration Regulations 2012.

9. The rules contemplated to be made by the Chief Justice to operationalise Section 176 of the Children Act are yet to be made. Currently therefore there is no framework under the said Act for entertaining applications under Section 176 of the Children Act.

10. The substantive law having however conferred a right under Section 176, the enjoyment of that right should not be curtailed by the omission by the Chief Justice to legislate rules to facilitate enjoyment thereof. This court has inherent jurisdiction to do justice in such circumstances as those in the present case. See the decision of Musyoka J in **Adoption cause No. 81 of 2015 in the matter of C.M.N. – minor**.

11. I have looked at the annexure **‘KJBI’** the adoption deed and I am satisfied that the adoption herein was approved by the local court of Cologne Germany and is a valid adoption for purposes of German law. Adoption under the German Civil Code has the same force as adoption under the Children’s Act 2001.

12. The adoption order in question was made by a court of law in Germany and is therefore valid. The court takes judicial notice of the fact that Germany is not a Commonwealth country but adoption orders made by competent courts of that country are among those envisaged in Section 176 of the Children Act. The court also notes that the adoptive parent K J B, is a German citizen by birth. The child in question was born in Kiambu in Kenya to one C W M who has since married the Applicant. It is not apparent from the record whether either of them changed nationalities upon marriage and adoption respectively.

13. I have also considered the issue of the moratorium declared by the government of Kenya on Inter-

Country adoption of Kenyan children on 27th November 2014. It is my view that this being an adoption which was already granted in a court of competent jurisdiction in another jurisdiction it is not a new process that is beginning within Kenya. What the court has been called upon to do is to recognize that adoption which was done in a foreign jurisdiction following due process.

14. Further and more importantly the court takes cognizance of **Article 53(2)** of the **Constitution** and is satisfied that it is in the interest of the minor that the orders sought be granted. **Article 53(2)** of the **Constitution** provides the guiding principle on this question as follows:

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

The other pertinent law is the **Children Act No. 8 of 2001** and in particular **Section 4(3)** thereof.

15. In the premise I find that the adoption order issued by the local court of Cologne Germany has satisfied the conditions set out under **Section 176(2)** of the **Children’s Act** and it is therefore received and adopted and issued as an adoption order of this court.

The applicant shall bear his own costs.

SIGNED DATED and **DELIVERED** in open court this **23rd** day of **February 2017**.

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L. A. ACHODE

JUDGE