



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ADOPTION NO. 34 of 2015

IN THE MATTER OF BABY H J T H

L L W H1ST APPLICANT

M S H2ND APPLICANT

R U L I N G

The applicants LLWH and MSH are a married couple who are American citizens residing in Kenya with missionary permits. They have resided in Kenya for more than 3 years and they intend to live longer. On 10th April 2015, they applied to this Court, by way of an Originating Summons, to be allowed to adopt "AW" alias "HM" alias "HJTH" a child. On 23rd April 2015 when the application came up for hearing, this court gave an order directing the County Children Officer to prepare and issue a report complimenting the application for adoption. On 29th April 2015, the order was served upon the County Children Officer. Upon receipt of the said order, the County Child Officer wrote a letter to the Deputy Registrar of the High Court at Kisumu on 27th May 2015. In his letter, he stated that his office was not in a position to prepare a report as ordered by the court following the cabinet directive suspending international adoptions via gazette notice No. 1092. He annexed a copy of the gazette notice.

On 26th November 2014, there was a cabinet directive from the Principal Secretary of the Ministry of Labour, Social Security and Services that communicated a "Moratorium on Inter-Country Adoption of Kenya Children". Cabinet approved an indefinite moratorium on inter-country adoption of Kenyan Children and revoked all licences to conduct adoptions in Kenya. Following the moratorium, the Cabinet Secretary for Labour, Social Security and services published gazette notice No. 1092 establishing and appointing an "Expert Committee" to review and make decisions on all applications for resident and inter country adoptions that had been initiated before the issuance of the moratorium and to develop a Policy and Legal Framework to regulate and manage Child Adoptions in Kenya. It is this gazette notice that the County Children Office sought to rely on.

On 31st July 2015 the applicants herein approached this court via their Chamber Summons application dated 30th July 2015 asking the court to dispense with requirement of the report of the County Children Officer. Counsel for the applicants, Mr. Lungaho swore a supporting affidavit stating that the applicants were approved by the legally constituted Case Committee of the Kenyans to Kenyans Peace Initiative (KKPI) ADOPTION Society and that the child in issue has been in their care since 11th November 2014, before the Government declared a ban on foreign adoptions and has bonded with them. That the applicants have in the past adopted two minors, T J H and T J H and the delay in adoption is causing strains on the security family. Counsel emphasized the need to act in the best interest of the child in question which was to give him a home and a supportive family. Counsel further argued that failure to prepare a report is based on the moratorium and the gazette notice which are certainly inferior to the court order which has a statutory basis. He relied on the recent decision by the High Court in Nairobi regarding the same issue in **Re. Baby K.R(Adoption) Adoption Cause No. 123 of 2015,**

I have considered the application herein at length. The children Act was designed to afford protection to all children whether born into a functional family or abandoned. Section 4(2)(3) of the Children Act states the principles that the Court ought to follow in determining matters where the welfare of children is concerned. It states as follows:

“(2)In all actions concerning children whether undertaken by public or private welfare institutions, the Courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration.

(3) All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-

- a) **safeguard and promote the rights and welfare of the child;**
- b) **conserve and promote the welfare of the child; and**
- c. **secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.**

The position is that these cases are not about anything else but the child. In determining the cases the courts ought to give prominence to this consideration. The Constitution of Kenya in its Article 53(2) recognizes paramontcy principle and provides thus: **"A child's best interests are of paramount importance in every matter concerning the child."** This court is therefore bound to determine this application within the frontiers of Article 53(2) of the Constitution and Section 4(2) and (3) of the Children Act.

Section 154 of the Children Act empowers the High Court to make adoption orders. Section 155 creates the National Adoption Committee which is entrusted with the duty of monitoring adoption activities in Kenya. Before an adoption order is made a report from the guardian *ad litem* is required for international adoptions that is where the adoptive parents are not citizens of Kenya and do not reside in Kenya. Section 163(1) of the Act requires that the court shall satisfy itself on a number of issues before making an adoption orders.

“The court before making an adoption order shall be satisfied—

(not dispensed with, has consented to and understands the nature and effect of the a adoption order for which the application is made, and in particular in the case of a) parent, understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;

(b) that the order if made will be in the best interests of the child, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child, and to the ability of the applicant to maintain and educate the child;

(that the applicant has not received or agreed to receive, and that no person had made c or given or agreed to make or give to the applicant, any payment or other reward in) consideration of the adoption;

(
d that any person whose consent is dispensed with on the grounds of incapacity is still
) incapable of giving consent at the date of making the order;

(where the applicant is not a relative of the child, that reasonable steps have been
e taken to inform the relatives of the child of the proposed adoption and no relative
) able to accept the care of the child has expressed willingness to do so; and

(that both the applicant and the child have been assessed and evaluated by a registered
f adoption society in Kenya in accordance with the regulations made by the Minister
) and such report has been availed to the court.

From the above, the court does not require a report from the County Children Officer in order to make an adoption order. Secondly, every decision must be made in the best interest of the child. As was correctly put by my brother Hon. A. O Muchelule J. in **Re. Baby K.R (Adoption)(supra)**, the cabinet moratorium and the gazette Notice are certainly inferior to the Children Act which empowers this court to make adoption orders and to require suitability reports from the director of Children Services under its section 38. Thirdly, the child in question herein was abandoned by its mother after birth, he has spent a better part of his life in child orphanages. For some time now he has been living with the applicants and their children here in Kenya. He has formed a bond with them and regards them as his family. The best interest of this child would only be served best by allowing the process of adoption to continue.

It is for this reasons that I allow the applicants application dated 30th July 2015.

Dated, signed and delivered this 23rd day of September 2015.

H. K. CHEMITEI

J U D G E