



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ADOPTION CAUSE NO. 90 OF 2015
IN THE MATTER OF THE CHILDREN ACT

AND

IN THE MATTER OF BABY D alias ABANDONED BABY BOY

B V1ST APPLICANT

M V2ND APPLICANT

RULING

The Applicants, B V (“the 1st Applicant”) and M V (“the 2nd Applicant”) are citizens of Denmark. They filed a chamber Summons dated 17th August 2015 brought under the provisions of **Rule 3 (1) and (2) of the High Court (Practice and Procedure) Rules** under the **Judicature Act, Section 160 of the Children’s Act and Section 24 of the Interpretation and General Provisions Act**. The Applicants sought for orders *inter alia* that the assessment by the Director of Children Services, Ministry of Labour, Social Security and Services to investigate the Applicants’ fitness to adopt be dispensed with as prayed. The application is accompanied by an affidavit sworn by the 1st Applicant. The application originates from the orders given by this court on 8th May 2015 directing the Director of Children Services to file his report within forty five (45) days. According to the Applicants, the Director of Children Services has declined to assess their suitability to adopt a child and file a report in that regard citing a Moratorium on foreign adoptions declared by the Cabinet.

The application was served upon the Attorney General on 31st July 2015. Despite having been served the Attorney General did not file a response to the application. During the hearing of the application, the Applicants were represented by Mr. Kamenju. The Applicants relied on their submissions filed on 31st July 2014. Mr. Kamenju further made oral submission in support of the Applicants’ application. According to learned Counsel for the Applicants, the Applicants commenced the adoption process before the Moratorium was declared by the Cabinet. He submitted that the Applicants obtained the approval of the National Adoption Committee to adopt a child on 10th July 2014. Mr. Kamenju was of the view that the Moratorium declared by the Cabinet ought not to apply retrospectively as it would adversely affect the Applicants. He submitted that this court ought to dispense with the report of the Director of Children Services as it was not mandatory. It was Mr. Kamenju’s further submission that the report of the Director of Children Services was not also necessary since the Applicants had obtained the approval of the National Adoption Committee where the Director of Children Services sits as the Secretary. For these reasons, Mr. Kamenju urged the court to allow the Applicants’ application and dispense with the report of the Director of Children Services.

This court has given due consideration to the pleadings and the submissions made in court on behalf of the Applicants. The Applicants' application raises the following issues for determination;

1. Whether these adoption proceedings are subject to the Moratorium declared by Cabinet on 27th November 2014; and
2. Whether or not this court can dispense with the report of the Director of Children's Services.

Article 53 (2) of the **Constitution** provides that a child's best interests are of paramount importance in every matter concerning the child.

The best interests of the child should therefore be the guiding principle in matters relating to children. The best interest of the child principle is also emphasized under **Section 4** of the **Children Act** which provides as follows:-

“4 (2) 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.

(3) All judicial and administrative institutions, and all persons acting in the name, 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;

c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”

In the particular circumstances of this case, the Applicants commenced the adoption process in the year 2013. They were investigated by the relevant Adoption agency in Denmark to adopt a foreign child and obtained the requisite approvals having been found to be suitable to adopt a child. There is a report from the State Administration for the Greater Copenhagen the Adoptive Office dated 10th October, 2013 and National Social Appeals Board dated 7th November, 2013.

They also obtained the approval of the National Adoption Committee in Kenya vide a certificate dated 10th July 2014. The child was declared free for adoption by the Kenya Children's Home Adoption Society vide a certificate serial no. [Particulars Withheld] dated 15th October 2014. The child has been in the continuous custody and care of the Applicants since 2nd January 2015. On the other hand, it is alleged that following the Moratorium on foreign adoptions declared by the cabinet on 27th November 2014, the Director of Children Services has declined to investigate the Applicants as ordered by this court on 8th May 2015. In the opinion of this court, both the child and the applicants would be adversely prejudiced were the Moratorium to be applied on the present application for adoption. Ordinarily, laws may not apply retrospectively if it would have an adverse effect on a party's substantive rights.

On the second issue, the Applicants in their application filed in court on 17th August 2015, the Applicants seek an order from this court to dispense with the report of the Director of Children's Services. Requirements for international adoptions are outlined under **Section 162** of the **Children Act** which provide as follows;

“An adoption order may be made in respect of a child upon the joint application of two spouses who are Kenya citizens and not resident in Kenya (in this Act referred to as an “international adoption”)

- a. ***have obtained the consents specified in paragraph (e) of subsection 4 of section 158; and***

- b. *have satisfied the court that the country where they ordinarily reside and where they expect to reside with the child immediately after the making of the adoption order will respect and recognize the adoption order and will grant resident status to the child; and*
- c. *have been authorized and recommended as persons who are suitable (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 immediately after the making of the adoption order.”*

These provisions do not provide for a report by the Director of Children’s Services for the grant of an adoption order. However, **Section 38 (2) (g)** of the **Act** provides that the Director shall-

‘Make such inquiries and investigations and may provide such reports as may be required by any court or for the enforcement of any order made by a court under this Act’ (emphasis mine)

In this case, the court gave an order on 8th May 2015 directing that the Director of Children Services do file its report within forty five (45) days. The Applicants allege that the Director of Children Services has declined to assess the Applicants citing the Moratorium issued by the cabinet on 27th November 2014. The applicants have been investigated by relevant authorities in Denmark and found to be suitable adoptive parents. The Applicants have had the continuous custody and care of the child since 2nd January 2015. There is also a requirement that the Applicants will be monitored after the adoption order is granted. Guided by the “best interest of the child” principle both under the **Constitution** and the **Children’s Act**, this court finds it reasonable to dispense with the report of the Director of Children Services as ordered by the court on 8th May 2015. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF OCTOBER 2015

M.W. MUIGAI

JUDGE

In the presence of;

Mr. Roy Kamenju for the Applicants