



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ADOPTION CAUSE NO. 145 OF 2015
IN THE MATTER OF THE CHILDREN ACT
AND
IN THE MATTER OF BABY A M

H M K1ST APPLICANT

A U K2ND APPLICANT

RULING

The Applicants, H M K (“the 1st Applicant”) and A U K (“the 2nd Applicant”) are citizens of Sweden. They filed an application in this court on 8th June 2015 to adopt Baby A M under the provisions of the Children Act. The petition was supported by an affidavit sworn by the Applicants. In the application, the Applicants sought, among others, orders from this court that the Director of Children Services be ordered to investigate the suitability of the Applicants to adopt a child. The Applicants deponed that they had obtained the requisite approvals from the relevant authorities in Sweden to adopt a foreign child. This was after they were investigated by the Family Legal Affairs Office on behalf of the Solna-Sundbyberg Joint Family Legal Affairs Committee which has jurisdiction under the Swedish adoption laws to approve the Applicants application for adoption. The comprehensive home study report providing all the necessary information for the purpose of adoption was filed in court. On 26th June 2015, this court gave an order directing the Director of Children Services to file his report within Forty five (45) days.

By a chamber summons application filed in court on 10th July 2015 under the provisions of **Section 4** of the **Children Act**, the Applicants now seek an order from this court to dispense with the report of the Director of Children Services. According to the Applicants, the Director of Children Services has declined to interview the Applicants as ordered by this court. The application was served upon the Director of Children Services on 15th July 2015. Despite having been served the Director of Children Services did not file a response to the application.

The application was set down for hearing on 31st July 2015. During the hearing, the Applicants were represented by learned counsel Mr. Marira. In his submission on behalf of the Applicants, Mr. Marira brought to the attention of the court a directive from the Principal Secretary, Ministry of Labour, Social Security and Services addressed to the Director of Children Services communicating a Moratorium on inter-country adoption of Kenyan children that was declared on 27th November 2014. The directive reads as follows;

“As you are aware, on 27th November 2014, the cabinet declared an indefinite Moratorium on

Inter-Country Adoption of Kenyan Children to foreigners.

You will also recall that our ministry was tasked with developing a paper with detailed policy, institutional and legal framework to streamline child adoption process in this country, an exercise which is to be undertaken through the Committee of Experts which was recently gazette by the then Cabinet Secretary.

The purpose of this letter is to reiterate that the Moratorium is still in force and will continue to be so until such time that the afore-mentioned issues have been adequately addressed and we have been directed accordingly.

You are required to ensure full compliance with this Moratorium by ensuring that no inter-country adoption takes place and that the correct information in this regard is communicated to stakeholders at all times.

Please bring the contents of this letter to the attention of all staff in the Department of Children's Services.

Signed

Principal Secretary”

According to learned counsel for the Applicants, it is this directive from the Principal Secretary, Ministry of Labour, Social Security and Services that is the basis in which the Director of Children Services has declined to interview the Applicants. In order to appraise itself of the fore mentioned directive, this court issued summons to the Director of Children Services to appear in court on 14th August 2015. When Ms. Karani, the acting Director of Children Services appeared in court, she informed the court that a Moratorium on foreign adoptions was declared following a Cabinet meeting held on 27th November 2014. She informed the court that following a meeting held between the Cabinet Secretary and the Principal Secretary, Ministry of Labour, Social Security and Services together with the Attorney General it was agreed that the stalemate with regard to foreign adoptions would be resolved by 22nd September 2015. She further informed the court that two separate suits had been filed at the Constitutional and Judicial review divisions of the High court concerning the Moratorium declared by the Cabinet.

In a rejoinder, learned counsel for the Applicants was of the view that this court ought to proceed with these adoption proceedings since the directive on the Moratorium was issued after the Applicants commenced their application for adoption. According to Mr. Marera, the Moratorium should not apply retrospectively. He argued that in any event, the Applicants had already been granted approval to adopt the child by the National Adoption Committee where the Director of Children Services is a member. The approval certificate was granted at a meeting held on 18th November, 2014 and orders granted on 20th January, 2015.

This court has given due consideration to the pleadings and the submissions made in court by the parties. The application concerns the Moratorium declared by the cabinet on 27th November 2014 touching on adoption of Kenyan children by foreigners. The decision was informed following Kenya's ranking by the Global report on trafficking in persons, 2014 that cited Kenya as a source, transit and destination country in human trafficking. The Applicants' application raises the following issues for determination by this court.

1. The effect of the Moratorium on these adoption proceedings; and
2. Whether or not this court can dispense with the report of the Director of Children's Services.

In addressing these issues, this court shall take cognizance of the provisions of **Article 53 (2)** of the **Constitution** which 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.”

This court shall first address the effect of the Moratorium declared by the cabinet on these adoption proceedings. **Article 47** of the **Constitution** provides:-

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been infringed or is likely to be adversely affected by administrative action, the person has the right to be given reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in cause (1) and that legislation shall-

(a) provide for the review of administrative action by a court or if appropriate, an independent and impartial tribunal and

(b) promote efficient administration.

In the instant case, although the Applicants do not have a vested right to be granted an adoption order; they have a right to be certain of the legal consequence for their conduct. The Cabinet Secretary published Gazette Notice No. 1092 of 20th February 2015 establishing and appointing an Expert Committee to review and develop a detailed policy and legal framework to regulate and manage child adoptions in Kenya. By this time, the Applicants had commenced the adoption process. They were investigated by the relevant adoption agency in Sweden to adopt a foreign child and obtained the requisite approvals on 30/5/2013 having found to be suitable to adopt a child. They also obtained the approval of the National Adoption Committee in Kenya to proceed with the adoption vide Certificate dated 20/01/2014. The child has been in the continuous custody and care of the Applicants since 7/03/2015. The retrospective application of an enactment may mean affecting the rights of parties. In the opinion of this court, the application of the directive would adversely affect the Applicants' substantive rights. The Applicants had a legitimate expectation that if they followed due procedure they would have been granted the adoption order. Thus, it would be reasonable and just that the Applicants are allowed to continue with the proposed adoption.

In addressing the second issue, the Applicants in their application filed in court on 10th July 2015, the Applicants seek an order from this court to dispense with the report of the Director of Children's Services. **Section 162** of the **Children's Act** makes provisions regarding international adoptions. The said Section does 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”

In this case, the court gave an order on 26th June 2015 directing that the Director of Children Services to file its report within forty five (45) days. The Director of Children Services has declined to assess the Applicants citing the Moratorium issued by the cabinet on 27th November 2015. The applicants have been assessed by a qualified social worker in Sweden and home study report was prepared and found to be suitable adoptive parents. There is a requirement that the Applicants will be monitored after the adoption order is granted. They have had the child in their continuous custody and care since 7th March 2015. Guided by the “best interest of the child” principle both under the **Constitution** and the **Children’s Act**, this court is of the view that it would be in the best interests of the child for the adoption proceedings to continue in the absence of the report of the director of Children Services. This court therefore dispenses with the report of the Director of Children Services as ordered by this court on 26th June 2015. It is so ordered.

DATED DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS DAY OF 27TH OCTOBER, 2015

M.W. MUIGAI

JUDGE