



REPUBLIC OF KENYA



**In re CW (Minor) (Adoption Cause 97 of 2013)
[2013] KEHC 2462 (KLR) (Family) (30 August 2013) (Ruling)**

In Re C.W (Minor) [2013] eKLR

Neutral citation: [2013] KEHC 2462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
ADOPTION CAUSE 97 OF 2013
WM MUSYOKA, J
AUGUST 30, 2013
IN THE MATTER OF THE CHILDREN'S ACT (NO. 8 OF 2001)
AND
IN THE MATTER OF BABY C W (MINOR)**

Adoption orders under the Children Act can be amended.

If there were errors on the face of an adoption order or discovery of matters that could not be placed before the court during the adoption hearing or for any other sufficient reason, the court seized of an adoption cause had discretion to review the order accordingly.

Reported by Teddy Musiga

Family Law – adoption – adoption orders – application to amend an adoption order – whether adoption orders under the Children Act could be amended – grounds for amendment of adoption orders – , sections 68 and 70.

Family Law - adoption - date of birth of an adopted child as reflected in an adoption order - whether the court had discretion to determine the date of birth of an adopted child where that date was known.

Brief facts

The applicants had adopted two babies under separate adoption causes. They intended to raise the two babies as twins. They therefore made an application to court seeking to amend the adoption order earlier made in court. Their intended amendment was to have the effect of changing the birth dates of the two babies to reflect that they were born on the same day so that they could be raised as twins.

Issues

- i. Whether adoption orders under the Children Act can be amended.
- ii. Whether the court had discretion to determine the date of birth of adopted children where the date of birth was a known fact.

Held

1. The scope of section 68 of the as regards the amendment of adoption orders was limited to adoption orders made under the repealed Adoption Act.



2. The was silent on whether the adoption order made under the could be amended as there was no provision which empowered the court to effect such amendment. That notwithstanding, the General Rules and Regulations, operationalized through Legal Notice Number 77 of 2002 availed a remedy of review where a court made an error in an adoption order.
3. The rules imported order XLIV of the old (now order 45), which provided for review into the civil process governed by .
4. If there were errors on the face of an adoption order or discovery of matters that could not be placed before the court during the adoption hearing or for any other sufficient reason, the court seized of an adoption cause had discretion to review the order accordingly.
5. Whereas section 170 of the gave the court discretion to determine the date of birth of a child for adoption purposes. That discretion was only exercisable in cases where the child's precise date of birth was unknown or was not proved to the satisfaction of the court. In the instant case, the child's date of birth was a known fact thus not subject to speculation. It was a matter with respect to which the court had no discretion as the court could not alter a fact.

Application dismissed.

Citations

Cases

Kenya

Kimita v Wakibiru Civil Appeal 80 of 1985; [1985] KECA 120 (KLR); [1985] KLR 317 - (Explained)

Statutes

Kenya

1. Adoption Act (Repealed) (cap 143) In general - (Cited)
2. Children Act, 2022 (Act No 29 of 2022) sections 157, 160, 168 , 170(2)- (Interpreted)
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 45 rule 1- (Interpreted)
4. Guardianship of Children (Practice and Procedure) Rules, 2023 (Act No 29 of 2022 Sub Leg) In general - (Cited)

Advocates

None mentioned

RULING

1. This court pronounced on May 20, 2011, that Baby SCW, renamed ZIM (minor), had been adopted by the applicants, PMT and FWM. The applicants in another adoption cause, High Court Adoption Cause Number 98 of 2010, were allowed, on the same day, to adopt Baby HZ, renamed AAM (minor). Both children had been abandoned. ZIM (minor) was born on September 9, 2009 at the Nakuru Provincial General Hospital to a known person, while AAM (minor) birth date is unknown as she was found abandoned at a dumpsite in Kangemi, Nairobi.
2. The applicants are the adoptive parents of these two children. They have come to court by their application dated May 24, 2013. They would like the adoption order amended so as to change the birth date of ZI (minor) from September 9, 2009 to October 23, 2009. This would have the effect of the birth dates of the two children falling on the same date. The objective of the applicants is to have the two children treated and raised as twins.
3. The application is premised on sections 157, 160, 168 and 170(2) of the *Children Act* and Legal Notice 75 of 2002. Sections 157 and 160 are wholly irrelevant to this application. Section 157 deals with children who may be adopted and it says that children who may be adopted are those resident within



Kenya. Section 160 provides for appointment of guardians ad litem. Appointment of such guardians is a matter of no moment so far as the issues raised in the application are concerned. Section 168 of the Act is equally irrelevant. It deals with amendment of adoption orders; however, its scope is limited to adoption orders made under the repealed Adoption Act. The adoption order the subject of these proceedings was not made under the repealed Act and therefore Section 168 of the Act can be of no application to the present matter.

4. The applicants have also cited Legal Notice Number 75 of 2002. This Legal Notice operationalized the [Guardianship of Children \(Practice and Procedure\) Rules, 2002](#). The applicants have not placed reliance on any particular rule in these rules. However, the said Rules are of no application whatsoever to the current application. The said rules relate to guardianship of children and not adoptions, yet the matter before court is on adoption and not guardianship.
5. Section 170 is however relevant. It provides –
 1. Every adoption order made by the court order shall contain a direction to the Registrar-General to 3 make an entry in the Adopted Children Register in the prescribed form.
 2. For purposes of compliance with the requirements of subsection (1): –
 - (a) Where the precise date of the child’s birth is not proved to the satisfaction of the court, the court shall determine the probable date of his birth and the date so determined shall be specified in the order as the date of his birth; and
 - (b) ...
6. The first issue for determination is whether an adoption order can be amended once made. The [Children Act](#) appears to have provided only for the amendment of adoption orders made under the repealed [Adoption Act](#). This power to amend is given in section 168 of the [Children Act](#). The [Children Act](#) is silent on whether the adoption order made under the Children Act can be amended, as there is no provision which empowers the court to effect such amendment. I do not want to believe that it was the intention of Parliament or the drafters of the [Children Act](#) that the adoption order made under the [Children Act](#) is not available for amendment. Such a proposition would no doubt be unjust as it is open in the natural course of things for humans to err. Errors made in an adoption order for that reason must be amenable to amendment.
7. This however is not an omission as the rules of procedure set out by the subsidiary legislation in the General Rules and Regulations, operationalized through Legal Notice Number 77 of 2002, avail the remedy of review. The said General Rules and Regulations import Order XLIV of the old [Civil Procedure Rules](#), which provides for review, into the civil process governed by [Children Act](#). Following the reorganisation of the [Civil Procedure Rules](#) this rule is now order 45. If there are errors on the face of an adoption order or discovery of matter that could not be placed before the court during the adoption hearing or for any other sufficient reason, the court seized of an adoption cause has discretion to review the adoption order accordingly.
8. What the applicants are asking for is a review of the adoption order. It is however clear that the applicants have come to court by the wrong procedure. The applicants are asking the court to vary the adoption order for the reasons they have given. The objective is not to correct an error and therefore the question of an error on the face of the record does not arise. It is also not a matter of discovery of new evidence that the applicants would not have been able to furnish at the hearing of the adoption cause. It would appear that the only ground that they can plead is that of ‘any other sufficient reason.’ It was held in [Kimita v Wakibiru](#) (1985) KLR 317, that ‘any other sufficient reason,’ the third head under order 45 rule 1, need not be construed *ejusdem generis* with the other two heads, and therefore



it does not have to form a genus or class of things analogous to the other two heads. In other words the same is not confined to the kind of reasons stated in the two preceding heads.

9. Applied to the present case, the rule would mean that the reasons advanced for review in this case are valid so long as I am convinced that the said reasons are sufficient to warrant the disturbance of the adoption order. The applicants would like the birth date of ZIM (minor) changed from September 9, 2009 to October 23, 2009. The reason given for this: so that the child and the other adopted child of the applicants share a common birth date for the purpose of being treated as twins as their birth dates are fairly close.
10. I need to consider whether the reason is sufficient to warrant a review of the order. I have perused the record, which reveals that ZIM (minor) was born in hospital, the Nakuru Provincial General Hospital, on September 9, 2009. The records indeed show that he was born prematurely. He was in hospital for nine (9) days thereafter. A birth certificate serial number (particulars withheld) was issued. His date of birth is known. It is an immutable fact, and not a matter of speculation. It is a matter with respect to which this court has no discretion. The court cannot alter a fact.
11. The application before me is hinged on section 170 of the *Children Act*. This provision gives the court discretion to determine the date of birth of a child for adoption purposes. That discretion is only exercisable in cases where the child's precise date of birth is unknown or is not proved to the satisfaction of the court. As mentioned above that is not the case with respect to ZIM (minor). His date of birth has been proved beyond any shadow of doubt. Consequently, the discretion given to this court by section 170 of the *Children Act* to fix a birth date is not available. The principle of the best interests of the child cannot be called in to assist the applicants.
12. I find no merit in the application for the reasons given. I will and do hereby dismiss it. There will be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST, 2013.

W. M. MUSYOKA

JUDGE

