IN THE MATTER OF THE CHILDREN ACT (Act. No.8 of 2001)

1. M.A

2. T.O.....MINORS

VERSUS

1. J.O.O

2. R.A.O……..... APPLICANTS

AND

NEW LIFE HOME TRUST..... INTERESTED PARTY

RULING

This ruling relates to the objection taken by the New Life Homes Trust, supported by Little Angels Network. The latter is a registered Adoption Society in Kenya. The objection was taken in respect of the two consolidated adoption applications numbers 135 of 2008 and 136 of 2008. As can be discerned from the numbers of the adoption applications, this matter has been ongoing for several years now. The children in respect of which the objection was taken are **M.A** in Adoption Cause No.135 of 2006 and **T.O** in Adoption Cause No.136 of 2006.

Mr. Bosire is the learned counsel for the Applicants in both applications while Miss Kiguatha is the learned counsel for New Life Home Trust.

On 9th March 2012, both counsel recorded a consent requiring the court to render a decision on the objection on the basis of the affidavit evidence and evaluation and assessment reports filed in the consolidated adoption applications and the written submissions of both counsel.

The Objection to adoption in each application was taken by New Life Home

Trust on the ground that the intended adoptions are not in the best interest of the welfare of the children. Allegations were made that the children were abused and neglected by the applicants after they were placed with them. Reliance was made on the assessment reports by Little Angels Network, the Director of Children Services and Child Welfare Society of Kenya.

I have perused the objection and the reports filed by the said Adoption Societies and the Director of Children's Services. I have also perused the submissions filed by Messrs Ongegu and Associates, Advocates, on behalf of the Applicants and the submissions filed by M/s Musyimi and Company, Advocates, on behalf of the Objector, New Life Homes Trust.

T.O the male child was abandoned near Khwisero Health Centre by his biological mother in June 2003. He was one month old or thereabouts. He was transferred to Kakamega Provincial General Hospital where he was tested and found to be HIV positive. The hospital then caused him to be admitted on 30.6.2003 to New Life Home Trust (in Kisumu), a registered charitable children's home. He was aged about 2 months then. It was in New Life Home Trust that he was provided with care and protection. At the behest of the Home, the Children's Officer in Kakamega gave his approval for T to remain in the Home as no committal order had been procured. The child was at the Home for foster care and possible adoption.

Little Angels Network is an affiliate of New Life Home Trust. It is through Little Angels Network that T was placed with the Applicants for adoption on 21.8.2003 when he was aged 1 ½ years. On 19.7.2006, he was withdrawn from the Applicants on allegations of child abuse. He was re-admitted to New Life Home Trust.

M.A, the female child, was born of a mentally ill mother in Kisumu town. The child was conceived out of an incestuous relationship as the biological parents of the child were cousins. The child's grandmother offered her to the Children's Department for adoption. She was later placed in **Rescue Centre** and was subsequently referred to New Life Home Trust where she remained until she was placed with the Applicants for adoption on 5.11.2001. The child stayed with the Applicants until 19.7.2006 when she was withdrawn from the Applicants on allegations of child abuse as aforestated.

To start with, the law relating to adoption of children is contained in the Children Act, Chapter 141 of the Laws of Kenya. Under S.157 (1) of the

Children Act, no application for an adoption order should be made in respect of a child unless the child concerned has been in the continuous care and control of the Applicant within Kenya for a period of three consecutive months preceeding the filing of the application AND both the child and the applicant have been evaluated and assessed by a registered adoption society in Kenya. The Children Act also requires that

(i) the provisions of Section 157 (1) & (2) & (3)

157(1), (2), (3), & (4) must be met.

(ii) no adoption order shall be made before the court is satisfied that the order, if made, shall be in the best interest of the child (see S.163(1)(b)

(iii) both the Applicant and the child must first be assessed and evaluated by a registered society in Kenya in accordance with the regulations made by the Minister and such reports must be availed to the court.

The jurisdiction of the High Court to make an adoption order is donated by Section 154 of the Children Act.

Mr. J.O.A, the Male Applicant and **Mrs. R.A.O**, the Female Applicant, are man and wife. They applied in adoption cause No.135 of 2006 for authority to adopt M.A, a minor, and in Adoption Cause No.136 of 2006 they sought authority to adopt T.O, a male child. Both **M** and **T** were placed with the Applicants by New Life Home Trust in 2001 and 2004 respectively. Even after having had the custody of M for more than five years and the custody of T for more than three years, the applicants did not initiate adoption proceedings by filing adoption applications in court for the required authority to adopt. This was strange considering that in seeking to adopt, the Applicants claimed to be motivated by the fact that they had no biological children of their own and that they were desirous of having a family. The Applicants seem to have been prompted by New Life Home Trust when the latter required to have assessment and evaluation of the children and the Applicants carried out. It was Little Angels Network, a registered adoption society in Kenya that New Life Home Trust turned to for the assessment exercise. The report by the latter was adverse to the Applicants. **Ms Susan Achieng**, a social worker with Little Angels Network, found that the Applicants were abusing the children. Upon this discovery New Life Home Trust, not surprisingly, withdrew the Children from the care of the Applicants on 19th July 2007 and then caused medical and psychological assessment of the children to be carried out. It was confirmed

that the children were indeed abused. On examination, T was found to have been abused and a P3 form dated 1.9.2006 was completed by the police doctor. Pictures of the minor also revealed the various injuries sustained by the minor.

The Applicants filed their applications for authority to adopt the minors on 19.9.2006 whereupon New Life Homes Trust lodged objection to the applications on the basis that it was entitled by virtue of S.158 (4) (a) to do so as its consent to the adoption was necessary by dint of the fact that the magistrate court at Winam had committed the children to the Home. At any rate, it was the Objector's contention that it was acting in the best interest of the children in lodging the objection.

In the Affidavit sworn on 13.10.2006 by **Mr. Clive Beckham** on behalf of New Life Home Trust, it emerges that when T was placed with the Applicants, he was in good physical condition but while in the care of the Applicants, he seems to have been neglected and physically abused, a fact disclosed not only by the report of Ms Susan Achieng, but also by the **P3 Form** and the photographs of T annexed to the affidavit of Clive Beckham.

In her supplementary affidavit sworn on her own behalf and on behalf of the Male Applicant, R.A.A, the Female Applicant, denied the allegations of abuse and stated in paragraphs 6, 7, 8, 9, 10, 11, 12 and 14 of her affidavit thus;

6. *That ever since the said minors were placed with us, we have lived with them*

as loving parents taking the greatest possible care for their well being as any other parent would do. Indeed I was desperate for a child as I had never been blessed with any child in my life and I therefore became emotionally and socially attached to these children and they too recognized us as their parents.

7. That whereas the child M.A has never had any serious health problem whilst in our custody other than normal sickness, the child T.O[N] has had a worrying and recurrent health problem ever since he was placed with us. He has always had problems with boils, rashes, septic skin infections and wounds, multiple abscess, suspected small pox, vomiting, cough, dental/gum problems which was affecting his teeth, abdominal pains, loss of appetite, constant fever and pneumonia.

8. THAT I have always taken the child T.O[N] for medical attention and

endeavoured to give him the very best medical care in the same hospital and dispensaries which I have been attending for my own check-ups. Annexed hereto is a bundle of medical records from three different health institutions regarding the child – Catholic Dispensary Likoni, Tibwani Community Dispensary Unit; and Ladopharma Medical Centre for the period between 8.2.2004 to 7.5.2006 – marked RAO – 1.

9. THAT in spite of the best possible treatment which has always been given to this child, his boils and skin disorders kept on recurring and given his general poor state of health, I even started wondering whether he was properly tested HIV/AIDS before being committed under my care but I must admit that I was not bold enough to take him for a test out of fear.

10. THAT the stunted growth of this child should not be attributed to child abuse by me but possibly to ante-natal factors that could have eventually led to the child being abandoned a few days after birth for most likely being an HIV/AIDS victim.

11. THAT I feel deeply hurt to learn that the Interested Party is accusing me of child abuse and neglect of the child T.O[N] with regard to his state of health, the scars, the wounds now appearing all over the body and his missing teeth which are recurring through no fault of my own and despite the kind of medication and the nursing care I have always given him by trying to squeeze his boils with my hands to remove the pus and cleaning his wounds which many mothers cannot even do.

12. THAT it is deeply hurting that the social worker has decided to make such adverse report against me without offering me an opportunity to explain the medical history of this child ever since he came into my custody and I sincerely believe that her report is biased and not backed up by any serious and thorough diagnosis and medical examination of the child.

14. THAT before these children were forcefully taken away from me on the 19th July, 2006 in company of five Police officers who bundled me at the back of a police land rover as if I were a criminal, none of my neighbours were aware that these were not my own children and even the children themselves regarded us as their mother. If there is any trauma which these children are now suffering from it has been caused by the violent manner of their separation from us as they had become very much used to us. They have always enjoyed the warm and homely environment of their upbringing at our home with a lot of facilities and opportunities.

The assessment report by Little Angels Network is adverse to the Applicants. The social worker, Susan Akinyi, carried out physical inspection on the conditions under which the children were living while with the Applicants and her report dated 27.7.2006 shows that the Male Applicant was an **absentee father** and that the female applicant was the probable perpetrator of T's abuse.

The report by the Director of Children's Services, signed on 15.10.2007 by Mrs. J. N. Ndungu, Assistant Director of Children's Services, is also adverse to the Applicants. The report observed, not incorrectly, that it was not until the children were withdrawn from the Applicants that the Applicants rushed to court to file the Adoption Application.

I have also perused the assessment report dated 25.6.2010 made by the Child Welfare Society of Kenya. It is not unfavourable to the Applicants but it is ambivalent about the abuse of the children. It correctly observes that M was not free for adoption while T was. In spite of this, the Child Welfare Society of Kenya correctly observed that the Applicants were "more enthusiastic" in seeking to adopt M but did not want T, the male child.

I have given due consideration to the affidavit evidence and the assessment reports referred to as well as the written submissions by counsel for the parties. In reaching my decision in this case, I am guided by the provisions of the Constitution in Article 53(2) which enshrines a child's interest as of paramount importance in every matter concerning the child. Article 24 sub-article 1 of the International Covenant on Civil and Political rights adopted by the General Assembly of the United Nations on 16.12.1966 and ratified by Kenya on 1st May 1972 also enshrines the right of every child to have the right to such measures of protection as are required by his status as a minor on the part of his family, society or State and to have, under Article 26 of the Covenant, the right to equal protection of the law. This right is also embedded in Article 27(1) of the Constitution of Kenya. The latter Article enshrines the right of every person to equal protection of the law. More pertinently, Section 4(3) of the Children Act enjoins "all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by the Act to 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 safeguard, secure, promote, and conserve the rights and welfare of the child.

The evidence before the Court shows that Todd has suffered harm while

in the care of the Applicants. Whether such harm was inflicted by the Applicants or whether it was suffered due to negligence on their part, it is clear to see that the children are not safe in their care. A look at the pictures of T annexed to the Affidavit of Clive Beckham at the point in time when he left New Life Home Trust shows a boy neatly dressed and seemingly in good health with his front teeth intact. In contrast, a look at T's pictures taken when he was in the care of the Applicants shows Todd to be in a very sorry state. Not only are his front teeth missing, but he has a multiplicity of bodily injuries and he appears to be in unkempt state. Did the female Applicant ever observe this unacceptable state in which T was? If she did, she seems not to have done nothing about it. If she didn't, then it is clear that she was totally remiss of her duty and hence negligent. In my view, the Applicants cannot be trusted to care for either T or M. They cannot be said to be suitable to adopt the children not least because the welfare of the children would be compromised. At any rate, the Applicants have expressed their preference for M, the female child, yet the latter has not been declared free for adoption. T, who is free for adoption, has lost favour with them. And yet he is the one who is free for adoption. The allegations of abuse of the children by the Female Applicant are far too serious and yet they have not been satisfactorily explained. In my view, the Female Applicant has not fully exonerated herself from the charge of neglect and/or abuse of T. I am not satisfied that if an Adoption order was made, it would be in the best interest of either T or M.

In the result, I find merit in the objection by New Life Home Trust. In the light of this, no Adoption Order shall be made in favour of the Applicants in respect of T or M as the evaluation and assessment carried out by the Registered Adoption Societies to wit, Little Angels Network and Child Welfare Society of Kenya and by the Director of Children Services clearly show that the Applicants are not suitable persons to adopt the children. Moreover, the consent of New Life Home Trust has not been forthcoming.

Accordingly, the objections taken by New Life Home Trust in Adoption applications Numbers 135/2006 and 136/2006 are hereby upheld. These adoption applications must fail.

Dated at Milimani Law Courts, Nairobi, this 24 day of May 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Miss Kiguatha Advocate, of Musyimi & Company advocates for the Objector

Mr. Bosire Advocate, of Ongegu & Associates Advocates for the Applicants

Mr. Kugwa – Court Clerk