REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Adoption Cause 52 of 2009
IN THE MATTER OF J K (THE CHILD)

CV ………..………………
APPLICANT

JUDGMENT

Facts of the Cause:

This cause involves a unique story of an unfortunate girl who was a sad victim of the genocide in Rwanda. She escaped to Kenya with her cousin and sought refuge around October, 1994.

JK stayed in Kiserian with her cousin in abysmal poverty. The applicant herein met the child in 2001 when her cousin became sick and could not really take care of the girl.

It so happened that one lady called N.K.A, herself a victim of genocide, had been given migratory residence in Holland and thereby acquired Dutch Citizenship. She came to Kenya to look for her one child who, she believed, survived genocide. She met the girl JK and thought she could be her survived daughter. But as the fate would have it, DNA test carried out was negative and thus Dutch Authorities refused the said lady the permission to take the child back to Holland. Thus by 2003, JK had no place to belong to.

The supposedly mother of JK was supported financially by Dutch well wishers when she was undergoing treatment at Holland. She was injured during genocide atrocities.

Those well wishers also sent money for upkeep of JK and requested the Applicant (who is a Kenya Citizen of Dutch origin) to be a go between and she thus received the money through her bank account.

Due to the fact that JK could not establish her link with the lady, her nationality became fluid and her refugee status also came under question. In short, she had become stateless person.

At Green Garden Boarding School at Kikuyu, she did not do well and was beaten for her non-performance. The Applicant withdrew her from school and after undergoing treatment supported by the Applicant she was found to be dyslexic. The Applicant, after looking for an appropriate school for JK, placed her at Braeside School in September, 2006. JK has improved in her studies and well settled in the school.

The applicant has been taking care of JK since 2003 and after failing to get any legal papers for JK, she applied for guardianship through the advice of CRADLE, a NGO for children welfare. The children court at Nairobi., vide Misc. Application No.79 of 2007 gave her the guardianship of JK. The order was given on 6th April, 2008 and issued on 18th May, 2008. The said order was based on the report of District

Children Officer, Westland Division, Nairobi dated 5th May, 2008 addressed to the Children Court.

After she obtained her guardianship, the applicant tried to acquire a legal status for JK from Kenya Immigration Authorities and Rwanda authorities in Kenya. As she was unable to give JK's Birth Certificate, she was not successful in her endeavours.

In the process, JK's legal status is in jeopardy and the Applicant thus discussed with JKthe possibilities of her being adopted. JK has in her own words consented to such adoption. Hence, the petition and Chamber Summons dated 27th April, 2009 respectively.

Chamber Summons:

The Chamber summons dated 28th April, 2009 seeks very unique prayers from this court based on the circumstances hereinbefore stated.

It seeks:

(1) That the requirement of Section 160(1) of the Children Act No.8 of 2001) relating to adoption application be dispensed with.

(2) That the requirements of Section 163(f) of the said Act also be dispensed with in this adoption application.

It cannot be over emphasized that the Applicant implores this court to exercise its inherent powers so that the best interest of JK can be safeguarded.

JK, the child in question, has been living with and was under care control and custody of the Applicant since 2003. As stated hereinbefore, she had taken all the caring actions and precautions to preserve and protect the interest of the child in all respect. The child has adopted the home of the Applicant as her own and, from the facts deponed, is happy to be with the Applicant in any kind of relationship.

Due to turmoil in her own country, JK had to migrate to Kenya and faced the misfortune of being homeless and, with the turn of events, also a stateless person. There is no doubt that she is in precarious condition with no identity of her own.

The Children Act (herein after referred to as 'the Act') has made special provisions to safeguard the rights and welfare of the child in part II thereof.

Sec.5 bars discrimination of the child on the ground of Origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.

Section 11 specifies that every child shall have a right to a name and nationality, and where a child is deprived of his identity the government shall provide appropriate assistance and protection with a view to establishing his identity.

The said part II of the Act also provides the guidance to the authorities as regards the considerations which shall be followed.

Section 4(3) of the Act stipulates that:

"**All Judicial and administrative institutions while exercising any powers conferred by the Act shall treat the best interests of the child as the first and paramount consideration to the extent that the same is consistent with adopting a course of action calculated to safeguard, conserve and promote the rights and welfare of the child".**

Under the Children Act the High Court is vested with powers to grant order of Adoption of a child. (Part XII of the Act).

Section 15(1) of the Act provides any child resident in Kenya whether he is a citizen or not of Kenya and was or was not born in Kenya eligible for adoption. It is further provided that the applicant must be staying with the child for three months and the applicant have been assessed by an Adoption Society.

Thereafter, the provisions for the procedure to be followed is laid down.

The Applicant, due to peculiar circumstances of the case, has sought prayers to dispense with requirement of appointment of a guardian ad litem, under Section 160 of the Act.

It is to be noted that the applicant herein has already been appointed a legal guardian of the child after the assessment report of the Children Officer has been submitted to the Children Court, and moreover, the child has been living with and has been under the care and control of the Applicant since 2003. From the facts laid down before the court, it is apparent that JKhas progressed well and has taken the applicant and her home as her own. In her own handwritten consent she has described the care given by the Applicant as a mother. I shall quote the following from her consent in Annexture "**JCV 11**".

"**Carla take care of me like my mother. She is good in everything that I need help she is always there for me. Also I go to Braeside high school which they give a lot of support so that I can improved (sic) my study in that I am happy to be adopted by Carla Viezee**".

The assessment report JCV (7) mentions JK's age at 11 years, 9 months on 9th July, 2003. It is obvious thus that she would attain majority around 9th October, 2009, just few months from now.

The Applicant also seeks to dispense with the assessment by the Adoption Society in this case, as required under Section 163(1) (f) of the Act.

I shall first deal with the issue whether I have inherent jurisdiction to grant orders despite the general statutory provisions, which, I shall unhesitantly observe, were made to protect and promote the best interest of the child.

To arrive at a right determination, I would take a deep look at the concept of inherent power of the court. Under the Constitution this court has unlimited jurisdiction to hear any civil and criminal proceedings. Moreover, the general civil law also grants the court inherent powers to make any order deemed fit and just in the circumstances of the case. (Section 3A of Civil Procedure Rules).

Then what is inherent power?

Black Law's Dictionary defines "***Inherent power' of a court as that which is necessary for the proper and complete administration of justice and such power is resident in all courts of superior jurisdiction and essential to their existence."***

The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfill, properly and effectively, its role as a court of law and it must be distinguished from the exercise of judicial discretion, and it may be exercised even in circumstance governed by rule of court" (see Langley –vs- North West Water Authority (1991) 3 All E.R.

It is further observed in the above case that:

"**it may be said that the inherent power of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary when it is just and equitable to do so."**

In an Australian case (1944) Cameroon –Vs- Cole (1944) 68 (LR. 57 at 589 – it was observed.

"**in the absence of clear words, a statute should not be treated as depriving a court of inherent jurisdiction possessed by every court.**"

In the Act the court has been given power to preserve, promote and conserve interest and welfare of a child and to arrive at the decision of the court which is just and equitable in the circumstances of the Act.

In United Kingdom, the court intervened in the best interest of a child of 17 years, by granting leave for her to undergo sterilization. The girl was severely retarded and developed medical complications while being impregnated. This order was made, although she was over the age of 16 years for whom a court could issue an order of wardship. {See **Re. B (a minor) (Wardship: Sterilization) 1987**} **2 All.E.R – 206.**

Similarly, in the case of **Re: J. (a minor) Wardship Medical Treatment) (1991) Fam.33 –** the court held that a minor over the age of 16 does not have an absolute right to refuse medical treatment and the court have power to override the minor's refusal.

These are few cases, where the court by exercising its inherent power in the interest of a minor did override the statutory provisions.

I am thus, in view of the premises aforesaid, of a view that in proper case, the court can exercise the inherent jurisdiction so as to make the Act virile and to preserve the fundamental principle of the interest and welfare of a minor.

I am of a further view that, in view of the fact that the child JK has been in continuous care of the Applicant and who has been appointed as her '***legal guardian***' by an order of the competent court, undergoing a process of appointment of a guardian ad litem will be a futile exercise and shall not be of any interest to this child.

Furthermore, the applicant has been, in all practical purposes, in the place of JK's mother since 2003 and her appropriateness and capability to take care of the child has been given a seal of approval by a competent court after considering her ability and fitness to be in a position of a guardian.

It is reiterated once again that the applicant was in place of a mother in the life of JK since 2003, which fact has been given a legal authority, and an assessment by any other authority shall once again be an exercise in futility.

With what I have observed hereinbefore, I do exercise my inherent power to dispense with the requirement of Section 160(1) and Section 163(f) of the Act as prayed in the Chamber Summons dated 28th April, 2009.

Once I have made the findings as aforesaid, I can now proceed with the grant of order authorizing the applicant to adopt the child before me and I do hereby authorize the applicant to do so.

The child shall hence forth be known as JKA as prayed in prayer No.1 of Originating Summons dated 27th April, 2009.

The date of birth of the child shall be recorded as 9th October, 1991.

The said order be recorded in the adoption register.

Dated, Signed and **Delivered** at **Nairobi,** this **10th** day of **July, 2009**

K.H. RAWAL

JUDGE

10.7.09