



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Adoption Cause 1 of 2008

IN THE MATTER OF: S M (MINOR)

AND

1. J.K.S

2. C.D.....APPLICANTS

R U L I N G

By an application by way of chamber summons, dated 2nd April 2008, under the inherent powers of the court, the applicant seeks orders:-

1. That this matter be certified urgent and service thereof at first instance be dispensed with.
2. That B M M of P O Box [*Particulars withheld*] Malindi be appointed guardian *ad litem* in this case.
3. That the director of the Children's Department do evaluate the applicant's application and file a report.
4. That the Child Welfare Society of Kenya and the District Children Officer Malindi be directed to prepare a home visit report and declare the minor free for adoption.
5. That this honourable court be pleased to make any further orders as it deems fit and necessary.
6. That cost of this application be provided for.

The application is predicated upon the annexed statement in support of **J.K.S** and **C.D** dated 30th day of November 2007.

On behalf of the applicants, K.S and C.D, it was argued that the former is a Kenyan citizen while the latter is an Italian citizen. They are husband and wife having celebrated their marriage at the D.C.s office at Malindi on 6th September 2001.

That the minor, subject matter of the adoption, was born on 2nd July 2001 to S.K, as appears in the birth certificate annexed at page 3.

S.K died on the 10th of April 2002 as per exhibit P1. Accordingly her consent to this adoption should be dispensed with.

That after the death of his (minor's) mother, the first applicant became the sole guardian. Upon meeting the 2nd applicant, the shared responsibility for the husbandry of the child fell to both applicants.

The minor has been in their joint custody since April 2003. Currently, the second applicant who has no other children has taken over the role of the mother for the minor who knows no other mother and who treats the applicants as his parents.

That in the foregoing circumstances, they wish to legally and properly adopt the minor. That it is advantageous to the minor that he should have a legal nexus to his putative mother so that he can take full advantage of the opportunities available to him as a child of a citizen of the European Union.

Last but not least, that he had no interest adverse to those of the minor. They have an adequate accommodation for the minor and they are both physically and mentally fit to adopt the minor. It is in the best interest of the minor that an adoption order be made.

On perusal of the file, I have since discovered that the *ex-parte* originating summons dated 2nd April 2007, and supported by the affidavit of J.K.S and C.D sworn on November 2007, has not been heard. If it was heard, the Judge would have ordered the director of Children's Department to file a report in addition to a report of suitability of the adopting parents. That report should have shown how long the proposed adopting parents had stayed with the child before applying for an adoption. The adopting society should have filed the report before the hearing of the originating summons dated 2nd April 2007.

As matter now stand, it is clear to me that prayers 2,3 and 4 in the **ex-parte** originating summons dated 2nd April 2004 were not granted.

Consequently, the hearing of the chamber summons dated 2nd April 2007 was premature. The applicant put the cart before the horse, so to speak.

Against that backdrop, I am inclined to strike out the chamber summons dated 2nd April 2008 and order that the **ex-parte** originating summons dated 12th April 2007 be fixed for hearing on a date to be fixed in the registry. Thereafter the applicant may file a fresh chamber summons and fix the same for hearing as by law enjoined.

Dated and delivered this 6TH day of MAY 2008.

N.R.O. OMBIJA

JUDGE

Mr. Machuka for Applicant