



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Adoption Cause 14 of 2007

IN THE MATTER OF: THE CHILDREN’S ACT NO. 8 OF 2001

AND

IN THE MATTER OF: A.A.A, M.A.M and W.A.M

(THE CHILDREN) BY F.A.A

BETWEEN

O.A.M and F.A.A.....APPLICANTS

AND

G.A.M.....RESPONDENT

RULING

The subject matter of this ruling is the Originating summons dated 26th October 2007, in which O.A.M and F.A.A, hereinafter referred to as the ‘applicants’, applied to adopt A.A.A, M.A.M and W. A.M. The Originating Summons is said to be brought under Section 154, 157, 158(b), 160 and 161 of the Children’s Act No. 8 of 2001. O. A.M swore an affidavit in support of the Originating Summons. A statement of fact was also filed to accompany the Originating Summons. S.A.M and A.M.S being the father and mother respectively of M.A.M and W.A.M each filed a consent for the making of an adoption order in favour of the applicants. R.A.M and A.A M the mother and father respectively of A.A.A too filed a consent approving the making of the adoption order in favour of the Applicants.

O.A.M, the 1st applicant herein is married to F.A.M, the 2nd applicant. They aver that they are desirous to have the three children, who have under their care and custody since the date of birth adopted. They also aver that the biological parents of the children have given them their consents for the intended adoption. There is an averment that the aforesaid children have been under the care of the 2nd applicant for a long period of time. The 1st applicant, a Kenyan citizen resident in Canada annexed to his affidavit a copy of his pay slips to show that he is financially capable of bringing up the three youngsters. He also produced copies of receipts showing that he has been paying for the school fees of those children. The applicants aver that they have never been convicted of any criminal offence.

When the originating Summons came up for hearing, the 1st applicant informed this court that he earns between 2,500/- to 3,000/- Canadian Dollars, which has enabled him to educate those children. He

said the children are his nephews being his sister's children. He also said he earns an extra 3,800/- Canadian dollars per month. Mr. Bakala Wambuni the Coast Provincial Children Officer filed his report dated 21.5.2008. In that report he stated that the persons seeking to adopt the Children are not 21 years older than children sought to be adopted. He also pointed out that the applicants are newly married and their marriage has just lasted for a year. He was of the view that the applications should have been made separately for each child. He also pointed out that he was unable to interview the 1st Applicant who is not a permanent resident of Kenya.

Miss Karuku, a representative of the L.A.N Adoption Society presented her report in court dated 3rd October 2007. she was of the view that since the biological parents of the children have given their consents then the adoption orders should be given. It is also pointed out that the applicants are related to the minors hence they will be in safe hands.

On his part, Mr. Hamza is of the view that the children Department gave two conflicting reports. He urged this court to ignore the reports in view of the fact that they raise technical issues. The learned advocate urged this court to allow the application because all the requirements of S.158 were met.

I have considered the evidence of the witnesses who testified before this court. I have also considered the reports and the pleadings plus the affidavits filed in support of the Originating Summons. I have perused the provisions of Section 158(1) of the Children Act and it is clear that an applicant must be at least 25 years old and that he or she is 21 years older than the child. The applicant also has a head-start if he or she is a relative of the child or if he or she is a mother or father. The law also bars courts from issuing the adoption orders if it is shown that the applicant is aged 65 years and above or is of unsound mind or an homosexual or not married or he is a sole foreign male applicant and or it is not to the best interest and welfare of the child. The record is very clear that by the time of making the application, O.A.M 1st applicant was aged 24 years. The second applicant F.A.A was aged 23 years at the time of making the application. The 1st and 2nd applicants got married on 20th July 2007. The children are aged between 10 and 11 years. It is clear that both the applicants are aged below 25 years and that they are not 21 years older than the children. By the time of making the application, they were only married for about two (2) months. It is also clear that M.A.M are living with their grandmother before the couple expressed their intention to adopt them. Under regulation 19 (d) of the Children (Adoption) Regulations, 2005, the adopter in the case of joint applications must have been married for at least 3 years prior to the date of commencement of adoption arrangements.

In the end I am convinced that the applicants do not meet the requirements of S.158 of the Children's Act and regulation 19 (d) of the Children (Adoption) Regulations, 2005. I have no discretion to waive compliance of the law. For the above reasons, I hereby dismiss the Originating Summons dated 26th October 2007 with no order as to costs.

Dated and delivered at Mombasa this 28th day of November 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mrs. Ali h/b Mr. Hamza for Applicants.