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

Adoption Cause 92 of 2004

IN THE MATTER OF THE CHILDREN ACT NO. 8 OF 2001

AND

IN THE MATTER OF BWO

J U D G M E N T

Before me is an Originating Summons brought under the Children Act No. 8 of 2001 dated and filed on 30th April 2004. The orders sought in the Originating Summons are as follows –

1. That **RO** of P.O. Box Number *[particulars withheld]* Nairobi be appointed to act as guardian *ad litem*.

2. That consent of the natural parents be dispensed with.

3. That the applicants JOO and GFO be authorized to adopt the infant.

4. That the registrar make appropriate entries in the register.

The Notice of Motion was filed by Janet Odero & Company advocates. The Notice of Motion is supported by the affidavit of one of the applicants JOO sworn in Texas United States of America on 16th February 2004 requesting for dispensation of consent of parents, and another affidavit sworn on the same date in Texas by both applicants, in support of the application for adoption of the child. The affidavit in support of the application for adoption annexes several documents including documents from Government offices in Texas showing that the two applicants are husband and wife.

JOO was a Kenya citizen by birth, he was an American citizen at the time of application and was residing and working in the United States of America. The second applicant**GF O** was an American citizen by birth and residing and working in the United States of America. Therefore, after hearing evidence I ordered the Director of Children Service to file an additional report to address the international aspects of the proposed adoption. That report from the Director of Children Services dated 8.6.2007 was filed on 3rd July 2007. The Director agreed with me that the proposed adoption was an international adoption in terms of section 162 of the Children Act. He observed that the 2nd applicant had not been interviewed by the Director but an assessment report by a registered adoption agency in the USA was provided. The Director's report also observed that both the applicants were married in the United States of America, that they resided in Texas State, and that there was no complaint against them that could disqualify them from adopting a child.

I observe that on 7th May 2004, RO was appointed guardian *ad litem*. The child was declared free for adoption by Child Welfare Society of Kenya. The guardian *ad litem* RO filed her report on suitability the of the applicants to adopt the which was child dated 12th May 2006. The child being above 14 years of age filed his own consent to the adoption. Some brothers of the 1st applicant that is **JOO** and **POO** filed their consents to the adoption.

Initially, this matter was treated as a local adoption, but I considered that it was an international adoption as, though the 1st applicant was born a Kenya citicen, when the application was filed both applicants were citicens of the USA and woking and residing in the USA.

I have considered the application, perused the documents and reports filed and also the verbal evidence adduced before me.

This application will not succeed. Firstly, the guardian *ad litem* **RO** stated in her **CONSENT TO ADOPTION** that she was a sister in-law of both applicants. As a close relative of the applicants and the child, her report is not likely to be impartial. That however could be a preliminary point. The more serious point relates the report filed by the guardian *ad litem*. It is dated 12th May 2006. It states in paragraph 3, 5 and 6 as follows –

3. **I have studied the statement of the applicants and I have interviewed the applicants when they were in Nairobi. Their aforesaid statement appears to be true in every respect. Supporting documentation shows that the applicants hold responsible jobs and are financially stable.**

5. The 1st applicant is a Kenyan by birth and now American and the 2nd applicant is an American by birth they both reside at Grand Prairie Texas USA.

5. The applicant are comfortably situated financially and in my view would be able to bring up and care for the minors welfare.

The above report does not give the factual exposition for the recommendations. For example it does not say when and for what duration the guardian ad liten met any of the applicants. It does not say where, or in what residence the guardian met the applicants. It does not say whether the guardian ad liten met the applicants with the child or separately It does not say how the child and the applicants relate. I observe that the applicants documents appear to have been signed not in Kenya. In addition, the Director of Children Services admits in his last report that he was not able to meet the second applicant. I get the impression that the guardian *ad litem* was replying on documents filed, rather than assessed the applicant by observing the applicants live and relate with the child before writing her report. The report, in my view, does not satisfy the requirements and obligations of a guardian *ad litem*, as provided for under section 160 of the Children Act.

Secondly, though I can agree by the report of the Director of Children Services that the adoption regulations might not have been operational when the application herein was filed, in my view, the provisions of section 157(1) of the Children Act were not complied with the said provisions state –

'157. (1) Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was or was not born in Kenya. Provided that no application for an adoption order, shall be made in respect of a child unless the child concerned has been in the continuous care and control of the applicant within the republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants as the case may be evaluated and assessed by a registered adoption society in Kenya".

All the facts in the documents filed, as well as the oral evidence adduced before me, do not indicate that the two applicants were in continuous care and control of the child, for at least 3 months in Kenya, before filing the application for adoption.

The evidence on record shows that the child has been living with uncles and the guardian *ad litem*. The first applicant has indeed been helping the child in all material and educational ways. However, he appears to be coming to Kenya on and off as a tourist. The legal requirements in the provisal to section 157(1) of the Act are mandatory. They have to be complied with, and there has to be evidence to that effect placed before the court. The absence of that evidence or facts means that the application cannot succeed. The burden was on the applicants to prove to this court provisions of section 157(1) of the Act. They have failed to do so. Therefore, on that account I have to dismiss the application.

From the evidence on record, I appreciate that the applicants, especially the 1st applicant has been assisting this child and apparently he wants to adopt the child. He appears to be capable financially of taking care of the child, when adopted. However, the law has to be complied with in all respects. The Children Act of 2001 was made with the interests of the child in mind. One can assist a child, educate a child who is a relative without necessary adopting that child. Adoption has its own life long obligations and that is why elaborate steps were provided for in the written law, which must be followed in order to protect the interests of the child, not the interests of the proposed adopters. In this particular case, I have to dismiss the application, but I urge the applicants to continue assisting the child.

For the above reasons, I dismiss this Notice of Motion.

Dated and delivered at Nairobi this 5th day of November, 2007.

George Dulu

Judge

In the presence of –

Mr. Amuga for applicants – Mr. Okumu holding brief.

Mr. Wamakobe for Director of Children Services - absent

Eric - court clerk