



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

Adoption Cause 97 of 2006 (OS)

IN THE MATTER OF THE CHILDREN ACT, 2001

AND

IN THE MATTER OF L. M. W. (A CHILD)

JUDGMENT

By originating summons dated 3rd July, 2006 stated to be brought under sections 158, 159 and 160 of the Children Act, 2001, section 24 of the Interpretation and General Provisions Act, Cap.2 and section 3A of the Civil Procedure Act, Cap.21, DAVID JAMES MICHALSKI and TIFFANY ANNE MOORE of P.O. Box 38897, Nairobi, Kenya, *inter alia*, applied for the following substantive orders, namely:-

- a) That the applicants be authorized to adopt LOGAN MBUGUA WATAALAM, a child.
- b) That upon the adoption order being granted, the child be known as LOGAN MBUGUA ROBERT MICHALSKI.

The applicants were represented in these adoption proceedings by learned counsel, Mrs R.W. Mbanya.

Salient facts pertaining to the application may be stated as under. The applicants are Canadian citizens who have worked and lived in Kenya since September, 2003. Both work for a medical non-governmental organization called Medecius Sans Frontieres, i.e. Doctors Without Borders, which runs and operates hospitals in Somalia and also furnishes medical supplies there but they (applicants) are based in Kenya. The 1st applicant, David James Michalski told this court that this training is in construction and logistics; that his original occupation was in carpentry and that it evolved into project management. He is the Head of Somalia Mission. The 2nd applicant, Tiffany Anne Moore is the Administrator for the Kenya Mission.

When the applicants initiated the adoption process, the issue of their marital status arose. In response, they provided the office of Kenya's Director of Children's Services with documentation from the High Commission of Canada in Nairobi to the effect that they have been residing in Kenya since September, 2003 as common – law partners, until their marriage in February, 2006. A testimonial dated 10th April, 2005 from the Canadian High Commission on them states that according to Citizenship and Immigration Canada, a common – law partner is:

'One (who) has lived with his/her partner in a relationship for at least one year. Documents should be provided that prove that the party has combined their affairs and have set up their household

together in one home.’

In support of their claim of common-law partnership, they furnished copies of documents relating to their joint accounts, joint insurance policy for property, joint mortgage statement, joint property tax summary and payslips for both of them indicating cohabitation. Among documents in the court file is a report dated 2nd April, 2007 compiled by Kenya’s Director of Children’s Services as part of the investigation conducted into the proposed adoption application. The report notes that a letter from Little Angels Network, the Kenyan adoption society which initially evaluated and assessed the applicants and the child had by letter dated 19th January, 2006 indicated to the applicants that their application to adopt the child could be considered if they formalized their relationship through marriage. It appears that arising from that advice, the applicants contracted a marriage at the Registrar’s office Nairobi on 8th February, 2006 under Kenya’s Marriage Act, Cap.150. Kenya’s Director of Children’s Services wondered whether the applicants’ act of contracting marriage before Kenya’s Registrar of Marriages on 8th February, 2006 was undertaken purely for purposes of facilitating the adoption process. The applicants’ position is that they have been in a conjugal relationship since 1996, have combined their affairs in such a manner as to bring their relationship within the bounds of Canadian common-law marriage for over 3 years and that their marriage ceremony at the Registrar’s office, Nairobi merely formalized their Canadian common-law marital status.

Regulation 19 (d) of the Children (Adoption) Regulations, 2005, being Legal Notice No.43 of 2005, provides as under:

’19. No child shall be delivered into the care and possession of an adopter by or on behalf of an adoption society until –

(d) the adopters, in the case of joint applicants, have been married for at least three years prior to the date of commencement of adoption arrangements.’

The child in this case was received into the applicants’ foster care on 16th March, 2006. I accept the applicants’ evidence as supplemented by their High Commission in Nairobi that they have lived together as Canadian ‘common-law partners’ since 1996 in circumstances which would entitle the court to deem their partnership as amounting to a Canadian common-law marriage. I also accept the applicants’ evidence that the marriage ceremony they underwent at the Registrar’s office, Nairobi on 8th February, 2006 was a formalization of their aforesaid Canadian common-law marriage and that the provisions of regulation 19 (d) of the Children (Adoption) Regulations, 2005 appear to have been complied with.

The 1st applicant was born on 6th March, 1969 and is aged around 38 years. The 2nd applicant was born on 12th September, 1970 and is aged around 37 years. The child to be adopted was born on 3rd October, 2004 and is aged around 3 years. Section 158 (1) (a) of the Children Act is to the effect that for the applicants to qualify as adoptive parents, they or at least one of them should have attained the age of 25 years and be at least 21 years older than the child but should not have attained the age of 65 years. These statutory age requirements have been met.

The child to be adopted, a Kenyan boy of the African race, was abandoned in Ruiru town after birth. He was rescued; the matter was reported to the police; the child was thereafter taken to hospital and eventually to New Life Home Trust from where the applicants took him for foster care on 16th March, 2006 and they have fostered him since.

The applicants are employed by Doctors Without Borders on annual contracts and their current contract started on 14th July, 2007. The 1st applicant told a representative of Kenya’s Director of Children’s Services that his earnings were Euros 2,500 per month. However, before this court be updated the figure to Euros 2,700 per month and stated that the 2nd applicant earns Euros 2,200 per month. The applicants’ combined income totals Euros 4,900 per month, which works out at the equivalent of approximately Ksh.470,000 per month at an exchange rate of Kshs.96/= to the Euro. The applicants are

reported to own a 2 – bedroom house in Toronto, Canada which they have rented out. Their employer provides benefits for the family including healthcare, school fees, insurance and housing. The applicants have adequate means to cater for the needs of the child.

The 1st applicant told this court in his oral evidence that he and the 2nd applicant have already adopted a female child of the same age; that they have no biological children principally because previously they were working in war zones like Afghanistan, Sudan and Somalia whose environment they did not consider conducive to the raising of a family but that they now have a stable home in Kenya conducive to the raising of a family. The 1st applicant also said he and the 2nd applicant opted to adopt children to provide a home for needy children. Although the applicants have not ruled out getting biological children, it does not seem to feature in their plans for now. They intend to accord the child to be adopted inheritance rights in the same way as a biological child.

The applicants have no plans to leave Kenya but say that if their current contracts in Kenya are not renewed, they may go to their employer's headquarters in Brussels, Belgium or look for alternative employment in Kenya. The 1st applicant said they have no intention of going back to live in their home country, Canada in the foreseeable future. Their family friends Alex Huter and his wife Anja Huter of Ontario, Canada have consented to be the child's legal guardians in the event of the applicants' death or other incapacity before the child attains majority age.

Little Angels Network, a registered adoption society in Kenya, has declared the child free for adoption. The society also indicated vide their testimonial dated 23rd April, 2007 that they are in partnership with Mission of Tears Canada, an approved foreign agency, and that Little Angels Network will liaise with Mission of Tears of Canada for post - placement follow - up in Canada should the applicants relocate there.

The guardian *ad litem*, Monicah Wambui Mwaura has recommended the proposed adoption.

Mbaya Madahana, Senior Children's Officer at the Adoption Secretariat in Kenya's Children's Department Headquarters, Nairobi reported that the child to be adopted has bonded well with the applicants and also with the other child already adopted by the applicants. Kenya's Director of Children's Services has recommended the proposed adoption.

The proposed adoption straddles the boundary between a local adoption and an international adoption. Local because the applicants have worked and lived in Kenya since September, 2003 and are still working and living here at least until next year, 2008. Their current contract may or may not be renewed. If they are renewed, they (applicants) will continue living here with the child. If their contracts are not renewed, they may go to their employer's headquarters in Brussels, Belgium and continue working there. In such event the proposed adoption would assume an international dimension. The 1st applicant also said they may look for alternative employment in Kenya. They apparently have no intention of going back to live in their home country, Canada in the foreseeable future. In the latter scenario, it appears that Mission of Tears Canada may not be in a position to undertake post – placement follow-up as they are reported to have offered to do. This does not, however, necessarily prevent the applicants' application from being accorded favourable consideration. I note that the applicants profess the Christian faith and intend to bring up the child in the same faith.

I am satisfied on evidence tendered before court that the applicants qualify to be the child's adoptive parents; that they have requisite resources to cater for the welfare of the child; that they are fit and proper persons to adopt the child; and that it is in the child's best interests to be adopted by the applicants. I treat the proposed adoption as local, with the proviso that if the applicants are authorised to adopt the child and they have to relocate elsewhere with him, they shall furnish Kenya's Director of Children's Services with particulars of an appropriate adoption agency at the place they relocate to for purposes of post – placement follow – up. Accordingly, I hereby make an adoption order under section 154 (1) of the Children Act, 2001 authorising the applicants DAVID JAMES MICHALSKI and TIFFANY ANNE MOORE to adopt the child, LOGAN MBUGUA WATAALAM who shall henceforth be known as

LOGAN MBUGUA ROBERT MICHALSKI.

The Registrar – General, Kenya is directed to make appropriate entries in the Adopted Children Register as required by law.

The applicants shall in the event of their relocation with the child to a foreign destination so notify Kenya's Director of Children's Services at least 3 months before such relocation and furnish the said Director with particulars of an appropriate adoption agency at the place of their relocation which shall in turn furnish the Director with post - adoption follow - up reports at 6 months intervals for 2 years after the relocation. For that reason, I direct that a copy of this Judgment be furnished to Kenya's Director of Children's Services to enable him to do a follow up on this matter.

Orders accordingly.

Delivered at Nairobi this 2nd day of November, 2007.

B.P. KUBO

JUDGE