REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Adoption Cause 115 of 2005

IN THE MATTER OF THE CHILDREN ACT, 2001

AND

IN THE MATTER OF LA (A CHILD)

JUDGMENT

By amended originating summons dated 29th November, 2005 and filed on 2nd December, 2005, AES and EAAS both of Post Office Box ***[particulars witheld]***, Washington U.S.A. prayed for the following orders:-

1. That the court dispenses with the consent of the natural father.

2. That GA of Post Office Box ***[particulars witheld]***, Nairobi within the Republic of Kenya be appointed guardian *ad litem* in this cause.

3. That the applicants be authorized to adopt LA, to be known as LAS after adoption.

4. That the Director of Childrens Services Department, Ministry of Home Affairs and National Heritage do appraise the appraise the applicants and adoptive child and file a report in respect thereof.

The application is stated to be brought under sections 154; 156 (1); 157 (1); 158 (1) (a), (3) (a), (b), (c), (4) (a); 159 (1) (a) (i), (4), (6), (7); 160 (1), (2), (4); 163 (1); 164 (1) and 170 of the Children Act, 2001 as well as under section 22 of the Interpretation and General Provisions Act, Cap.2.

I wish at the outset to make the following observations regarding the reference to the Interpretation and General Provisions Act. Section 22 of the Act provides that where a written law repeals wholly or partially a former written law and substitutes provisions for the written law repealed, the repealed written law shall remain in force until the substituted provisions come into operation. As at the time of filing the amended originating summons, there was in force the Children Act, No.8 of 2001 which came into force on 1st March, 2002 vide Legal Notice No.23 of 2002. The originating summons was filed under the Children Act, 2001 which was in force. I do not, therefore, see the relevance of the reference to section 22 of the Interpretation and General Provisions Act and I ignore it.

On 31st March, 2006 Grace Ajula was appointed guardian *ad litem* as per prayer 2 and the Director, Childrens Services, Kenya was directed to inquire into the suitability of the applicants or otherwise to adopt the child as per prayer 4. The main adoption application contained in prayer 3 came up for hearing

before me on 7th July, 2006 whereat the issue of dispensing with the consent of the natural father raised at prayer 1 was also considered. The applicants were represented by learned counsel, Miss J. Wonge.

The applicants, AES (1st applicant) and EAAS (2nd applicant) are husband and wife, respectively, having got married on 22nd November, 2003 in the State of Washington, United States of America. The 1st applicant, AES is an American national (citizen). He was born on 5th September, 1962 and is now aged around 44 years. The 2nd applicant, EAAS is a Kenyan citizen and is reported to be in the process of acquiring American citizenship by marriage. She was born on 7th March, 1963 and is now aged around 43 years. The child to be adopted was born on 19th September, 1991 and is now aged around 14 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. The statutory age requirements have been met in this case.

Prior to the applicants getting married on 22nd November, 2003, each had been previously married to somebody else but got divorced. The applicants' present marriage to each other is now 2 2/3 years old. Regulation 19 (d) of the Children (Adoption) Regulations, 2005 dated 10th May, 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 Kenyan registered adoption society concerned in this case is Little Angels Network. The society vide its report dated 30th June, 2006 declared the child free for adoption but acknowledged the technical difficulty the applicants face having regard to the requirement that for them to qualify as joint adoptive parents under regulation 19 (d), they must have been married for at least 3 years prior to the date of commencement of the adoption arrangements. The society conceded that the 3 – year marriage requirement had not been met by the applicants and left the matter to the court to determine the fate of the applicants' joint adoption application.

Kenya's Director of Children's Services, who had been directed to inquire into the suitability of the applicants or otherwise to adopt the child, made the requisite inquiry and filed a report on the matter on 5th July, 2006. The report acknowledged the technical difficulty posed by regulation 19 (d) as far as the age of the applicants' marriage goes but took the position that it is for the court to decide how the difficulty should be resolved. The emerging final position of the Director, Children's Services is that it would be in the overall interests of the child to be adopted by the applicants and that they should be authorized to adopt the child if the technical problem posed by regulation 19 (d) is resolved in their favour. I shall suspend further consideration of the effect of regulation 19 (d) until after I have considered other important aspects of the application.

The guardian *ad litem*, Grace Ajula filed her report on 5th July, 2006. The bottomline of the report is that the applicants are of sound mental and physical health and have stable financial resources to take care of the child. The report acknowledges the technical problem posed by regulation 19 (d) and leaves it to the court to resolve the problem and that if the court resolves the problem in the applicants' favour, then the applicants be authorized to adopt the child.

Both applicants testified before me and readily acknowledged that each was in a previous marital union which ended up in divorce. Neither had children in his or her former union. There are no children of their present union. Both applicants look forward to being authorized to adopt the child in question. They told the court that the United States of America (U.S.A.(recognize Kenyan adoptions and that they (applicants) can adopt a child of up to age 16 years in the United States of America. The message here is that the subject child is eligible for adoption by them in the U.S.A.

The African American Resource Center, a licensed Children's Agency in the State of Washington where the applicants live, has in its foster home assessment report dated '1/12/05' assessed the applicants favourably as prospective adoptive parents.

Evidence tendered before this court establishes that the 2nd applicant, EAAS is a maternal aunt to the child in question and that the said 2nd applicant brought up the child during the child's first 5 years of childhood before the 2nd applicant relocated to the U.S.A where she got married to the 1st applicant. The child's mother, EOA requested both applicants in a letter dated 12th November, 2004 (Exhibit 1) to adopt and take care of the child as she herself could not afford to do so from her meagre income. The letter shows that the child's biological father abandoned the child's mother, EOA when she was expecting this child. In the letter the child's mother, EOA makes no secret of her bitterness towards the child's biological father whom she would not even name but merely referred to him as 'The so-called father' and said of him that he never sent any money for the child's upkeep or fees. The letter reports that as at the time the child's mother was writing it, she and the child had also been abandoned by the child's step-father who had displayed so much hatred towards the child that the child became 'detached'. Paragraphs 4 and 5 of the letter are instructive and are reproduced below. They state:

'4. My sister (referring to 2nd applicant) you raised my daughter for six years while I was studying and so this will not be a new person to you.

5. She is also very fond of you as in the her detachment she tells me she does not want to leave (sic) in Kenya any more. Please accept my request and give my daughter whom I am entrusting to you and adopt her for her better future as I have hit the wall.'

It appears that, arising from the passionate plea made by the child's mother vide the above letter (Exhibit 1), the applicants agreed to take responsibility for the child's education and have been paying her school fees here in Kenya even as they await conclusion of the adoption process with a view to translocating the child to the USA to live with and continue to be educated by them. The 2nd applicant told this court in her oral evidence that the child's mother faxed Exhibit 1 to her and the 1st applicant in the US and later mailed the original letter to them. The 2nd applicant added with regard to the original letter:

'We filed it with U.S. Immigration for them to allow the child to immigrate to U.S. after adoption.'

The child's mother, EOA died on 18th April, 2005. Thereafter the child has been in the immediate care of her grandmother Mrs MA. She together with other family members including her two sons TO and JO held a meeting on 25th May, 2005 and resolved that the applicants take over guardianship of the child LA immediately. Evidence of this is contained in a record of the said meeting tendered before this court as Exhibit 2.

As the child's biological father is at large, his consent is hereby dispensed with.

The 2nd applicant told this court in his oral evidence that he is a stock broker in Washington State of the U.S.A and that he also works for a freight company doing sales there. The report of the guardian *ad litem* shows that the said guardian *ad litem* calculated the applicant's financial ability and assessed it globally as under:

'AES and EAAS are well endowed with resources, their joint income together with income from stock investments and tax refunds amounts to Kshs.11,111,250 per annum. (Currency conversion US $ - 75Kshs).'

The guardian *ad litem* also testified that the applicants have appointed their Bible Study leader, Larry Lewis as legal guardian of the child, in case of their incapacitation before the child attains majority age.

The child to be adopted, LA was in court at the hearing of these adoption proceedings on 7th July,

2006. After interviewing her, I found her to know the meaning of an oath and so allowed her to give sworn evidence. She told the court that she was 14 years old and that she was born on 19th September, 1991. She attends International School in Westlands, Nairobi and is in Grade 8/Standard 8. She confirmed that the applicants pay her school fees and that they intend to take her to America. She has never been there but looks forward to going there to join the applicants whom she described as aunt EAAS and uncle AES. She said her mother, EOA, who died on 18th April, 2005, had told her that her aunt EAAS (2nd applicant) had raised her from infancy until the age of 5 years. This was also the 2nd applicant's evidence. LA added that she is the first child of her mother; that her mother gave birth to another daughter, MA after her but she died at the age of 4 years; and that her mother did not get another child after MA. LA is, therefore, now the only child of her deceased mother. She consented to be adopted by the applicants.

I have given due consideration to the adoption application before me.

It emerges clearly from the evidence on record that all other factors, except regulation 19 (d), weigh heavily in favour of the application. Viewed from the perspective of the regulation, the applicants as a couple which married $2^2/_3$ years ago does not meet the 3 – year marriage requirement to qualify to adopt the child.

On the other hand, the 2nd applicant as elder sister to the child's deceased mother is a blood relative and aunt of the child. The 2nd applicant did not physically live with the child for a period of three consecutive months preceding the adoption application as required by the proviso to section 157 (1) of the Children Act. However, there is evidence, which I accept, that the said 2nd applicant raised the child during the child's first five years of childhood. The 2nd applicant and 1st applicant have kept in touch with the child, e.g. through e-mail and paying her fees. The evidence contained in Exhibit 1 points to the 2nd applicant having bonded with the child when she was raising her during her first five years of life. About a year before she died, the child's mother requested the 2nd applicant vide Exhibit 1 to adopt the child and take care of her and thereafter the 2nd applicant and her husband the 1st applicant took to educating the child. Subsequently they initiated these adoption proceedings to formally assume the responsibilities they had already undertaken over the child. But as a couple they have hit a technical hitch in the nature of regulation 19 (a). There is no doubt in my mind that in the peculiar circumstances of this case, the adoption sought would be in the best interests of the child.

The presence of the 2nd applicant in the team of applicants makes the proposed adoption partly an adoption within the family. The only stranger there is the 1st applicant. But the 1st applicant has an important role to play in the matter because he as an American citizen married to the 2nd applicant provides the route to the 2nd applicant's acquisition of American citizenship, which is reported to be under process. As between the 2nd applicant and the child, the 2nd applicant is entitled in her own right to adopt the child and I am going to allow the adoption using the 2nd applicant as the qualifying factor and then bring the 1st applicant on board through his association with the 2nd applicant, which has been formalized and recognized in its own right. The 2nd applicant remains the child's blood relative and aunt whether she is in union with a man or not. In the present case the 2nd applicant is in a recognized union with the 1st applicant, who is happy to join the 2nd applicant to bring her orphaned niece into the household she and him have founded. That is something to be encouraged.

The end result is that I am satisfied on the evidence tendered before court that the proposed adoption is in the best interests of the child and can and should be accommodated within our law as shown above. It also straddles the boundaries of a local adoption as well as an international adoption. I shall treat it as the latter. Accordingly, I hereby make an international adoption order under sections 154 and 162 of the Children Act, 2001 authorising the applicants, AES and EAAS to adopt the child, LA who shall henceforth be known as LAS. The Registrar – General of the Republic of Kenya is hereby directed to make appropriate entries in the Adopted Children Register in compliance with section 169 of the Children Act.

Orders accordingly.

Delivered at Nairobi this 14th day of July, 2006.

B.P. KUBO

JUDGE