**In re RMM (A Child) (Adoption Cause 143 of 2005)**
**[2006] KEHC 3384 (KLR) (Family) (3 July 2006) (Judgment)**

*In Re RMM (A Child) [2006] eKLR*

Neutral citation: [2006] KEHC 3384 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**ADOPTION CAUSE 143 OF 2005**

**BP KUBO, J**

**JULY 3, 2006**

**IN THE MATTER OF THE CHILDREN ACT, 2001**

**AND**

**IN THE MATTER OF RMM (A CHILD)**

**Age requirements for applicants that sought to adopt a child must be met.**

*The main issues before the court were whether the word, 'may, as used in section 158(1)(a) of the Children Act, (2001) (repealed) that provided that an applicant that sought to adopt a child had to have attained the age of twenty-five years and was at least twenty-one years older than the child was couched in mandatory terms, and whether the Children's Court could issue an adoption order to applicants that were not twenty-one years older than the child. The High Court held that the word 'may' was permissive but in the context of its usage in section 158 (1) (a) of the Children Act, (2001) (repealed), it did not permit the court to ignore the age requirements but rather it was mandating the court to consider making an adoption order if the age requirements stipulated thereunder were met. The age requirements were not the sole criteria for the making of an adoption order, other criteria including the best interests of the child, but the age requirements were among the starting points. Non-fulfilment of the age requirements gave the adoption a false start and rendered the adoption application incapable of standing. Consequently, the application for adoption was denied.*

Reported by John Ribia

***Statutes*** *– interpretation of statues – interpretation of section 158(1)(a) of the Children Act, (2001)(repealed) – where section 158(1)(a) of the Children Act (repealed) provided that an adoption order may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants had attained the age of twenty-five years and was at least twenty-one years older than the child but had not attained the age of sixty-five years - whether the word, 'may, as used in section 158(1)(a) of the Children Act (repealed) that provided that an applicant that sought to adopt a child applicants had have attained the age of twenty-five years and was at least twenty-one years older than the child was couched in mandatory terms.*

***Children Law*** *– adoption – requirements that an applicant that sought to adopt a child in Kenya had to meet – requirement to have attained the age of twenty-five years and to be at least twenty-one years older than the child -*

*whether the Children Court could issue an adoption order to applicants that were not twenty-one years older than the child - Children Act, (2001) (repealed) section 158(1)(a)*

**Brief facts**

The applicants sought to adopt a child aged 15 years. The applicants were 31 years old and 29 years old respectively. The 1st applicant was 16 years older than the child while the 2nd applicant was 14 years older than the child. The applicants had not fulfilled the requirements of section 158(1)(a) of the Children Act, (2001) (repealed) that set an age difference of at least 21 years as between either applicant and the child for an adoption order to issue. Consequently, the Children's Department and the Little Agents Network did not recommend the proposed adoption.

The applicants' principal contention was that the court was able to and should ignore the age requirement stipulated by section 158(1)(a) of the Children Act because it was not couched in mandatory terms, the operative word used there being 'may'. The applicants' counsel urged the court to grant the adoption application.

**Issues**

i. Whether the word, 'may,' as used in section 158(1)(a) of the Children Act, (2001) (repealed) that provided that an applicant that sought to adopt a child applicants had have attained the age of twenty-five years and to be at least twenty-one years older than the child was in the context of its usage referring to mandatory requirements.

ii. Whether the Children Court could issue an adoption order to applicants that were not twenty-one years older than the child.

**Held**

1. Section 22 of the Interpretation and General Provisions Act provided that where a written law was repealed wholly or partially a former written law and substituted provisions for the written law repealed, the repealed law shall remain in force until the substituted provisions come into operation. As at the time of filing the instant application on September 16, 2005, there was already in force the Children Act, (2001) (repealed) which came into operation on March 1, 2002 vide Legal Notice No. 23 of 2002. There was no relevance of section 22 of the Interpretation and General Provisions Act to the instant cause.
2. Section 158(1)(a) of the Children Act, (2001) (repealed) provided that an adoption order may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants had attained the age of twenty-five years and was at least twenty-one years older than the child but had not attained the age of sixty-five years'. The 1st applicant was 31 years old, the 2nd applicant was 29 years old, and the child was 15 years old. The 1st applicant was 16 years older than the child while the 2nd applicant was 14 years older than the child. The age difference of at least 21 years as between either applicant and the child had not been met as statutorily required.
3. Section 156(1) of the Children Act, (2001) (repealed) provided that no arrangement shall be commenced for the adoption of a child unless the child was at least six weeks old and has been declared free for adoption by a registered adoption society in accordance with the rules prescribed in that regard. Little Angels Network, a registered adoption society in Kenya, had not declared the child free for adoption, principally because of non-compliance in the instant case with the statutory age requirements. The Director, Children's Services had not recommended the proposed adoption, partly because of the age factor and also because in the Director's assessment, the child's biological parents did not fully appreciate the implications when they gave consent to their child's adoption by the applicants.
4. The biological father was of the view that the child was being educated abroad and would come back to Kenya as an adult to assist them. The child's biological father's perception of the adoption was misconceived.

5. By the adoption sought, the applicants would if authorized to adopt the child would do so as first – time parents to a teenager and that it would be difficult to start a parent – child relationship in the circumstances of the instant case.
6. The word 'may' was permissive but in the context of its usage in section 158 (1) (a) of the Children Act, (2001) (repealed), the section was not permitting the court to ignore the age requirements but rather it was mandating the court to consider making an adoption order if the age requirements stipulated thereunder were met. The age requirements were not the sole criteria for the making of an adoption order, other criteria included the best interests of the child, but the age requirements were among the starting points. Non-fulfilment of the age requirements gave the adoption a false start and rendered the adoption application incapable of standing. The child's best interests' were paramount, but such interests must be pursued within the law. That was not the case in the instant case.
7. It was incumbent upon children's homes which purported to assist children in need of protection and care to well acquaint themselves with the Children Act, (2001) (repealed) and ensure they complied with its provisions. The child in question was not free to be adopted by the applicants according to Kenyan law. Little Angels Network did the correct thing not to declare the child free for adoption. Kenya's Children's Department too did the correct thing not to recommend the proposed adoption. The court would not, in any event, be bound by any adoption recommendation made contrary to the law.
8. The intention behind the applicants to transfer the child to a better school may have been good but it ran afoul of the law as the applicants were not eligible to adopt the child. The reported misconception of the child's biological parents regarding what the proposed adoption entailed could not be ignored. It was the unpleasant duty of the court decline to authorize the applicants to adopt RMM and their application was refused.
9. It was the responsibility of Homeless Children International to make alternative arrangements for the remainder of the child's education. The court record showed that it was suggested by the Children's Department to the applicants that they consider alternative ways of helping in the instant matter. By uplifting the living standards of the child's family, but the applicants said their interest was only in helping this child. The applicants were entitled to take that stand though some may consider it selfish.
10. If the applicants truly loved the child, no doubt they would liaise with Homeless Children International and continue to sponsor the child under new educational arrangements to be made by Homeless Children International notwithstanding the failure of the adoption application. There was also nothing here to stop the applicants from bequeathing property to the child. It must be emphasized that whether or not the applicants continue to sponsor the child's education, Homeless Children International had the responsibility to see to it that the child continued with her education as previously undertaken.

***Orders***

*Application for adoption was denied.*

**Citations**

**Statutes**

1. Adoption Act (Repealed) (cap 143) In general — Cited
2. Children Act, 2001 (Act No 8 of 2001) sections 154; 156 (1); 157 (1); 158 (1) (a); 159 (1) (a (i) (ii), (4), (6), (7); 160 (1) (2); 162 (a), (b), (c); 163; 164 (1); Schedule 6 — Interpreted
3. Interpretation And General Provisions Act (cap 2) section 22 — Interpreted

**Advocates**

None mentioned

## JUDGMENT

1. On September 16, 2005 CMB and KEB of [particulars witheld], United States of America filed originating summons dated the same day applying for various orders the bulk of which were procedural. The substantive prayers or orders sought for purposes of this judgment are numbers 4 and 5, which are as under:

    4. That the applicants be authorized to adopt RMM,a child.

    5. That upon making the Adoption Order, the child be known as RMB.'

2. The application is stated to have been brought under sections 154, 156(1), 157(1), 158(1)(a), 159(1)(a)(i)(ii)(4)(6)(7), 160(1)(2), 162(a)(b)(c), 163, 164(1) and 170 of the *Children Act* No 8 of 2001 and section 22 of the *Interpretation and General Provisions Act*, chapter 2 Laws of Kenya.

3. The application was filed on the applicants' behalf by Archer & Wilock Advocates. On October 4, 2005 a notice of change of advocates was filed showing that Githaiga & Co Advocates had replaced Archer & Wilcock Advocates in representing the applicants. On December 2, 2005 another notice of change of advocates was filed to the effect that RH Wanga & Co Advocates had replaced Githaiga & Co Advocates in representing the applicants.

4. At the hearing of the application on June 16, 2006, Learned counsel, Miss MA Wanga appeared and prosecuted the originating summons on behalf of the applicants.

5. There is small procedural matter I would like to dispose of at this early stage. It relates to the reference by the applicants to section 22 of the *Interpretation and General Provisions Act*. The section provides as follows:

    22. 'Where a written law repeals wholly or partially a former written law and substitutes provisions for the written law repealed, the repealed law shall remain in force until the substituted provisions come into operation.'

6. As at the time of filing the present application on September 16, 2005, there was already in force the *Children Act, 2001* which came into operation on March 1, 2002 *vide* Legal Notice No 23 of 2002. I do not, therefore, see the relevance of section 22 of the *Interpretation and General Provisions Act* to the present cause and I ignore the said section.

7. What emerges from evidence, both oral and documentary, in the file may be summarized as per ensuing paragraphs.

8. The applicants are American citizens of the Caucasion race. They are husband and wife, having got married on June 10, 2000 in the State of Illinois, United States of America. The 1st applicant, CMB was born on June 26, 1975 and is now aged around 31 years. The 2nd applicant, KEB was born on August 14, 1977 and is now aged around 29 years. The first applicant is a College Campus Minister at Northern Illinois University – Dekalb, Illinois State while the 2nd applicant is an Elementary Teacher at South East Elementary School in Sycamore, Illinois. They report having received the child sought to be adopted into their care and possession since June, 2005 and that they have been in touch with the child at least twice a month since June, 2004. The applicants state that they have no children of their own and that they deeply desire to be parents of the child herein having grown to love her. Applicants have not stated to this court directly why they have no children of their own. However, the report dated

June 14, 2006 compiled on them by the Director, Children's Services, Kenya indicates they told the officer who compiled the report as follows:

> 'They had planned to stay for 4 – 5 years into marriage before getting children and also to be financially stable. They have plans to have other children in their marriage in future.'

9. The applicants have indicated they are fit and financially capable of taking care of the child and that they have been investigated by the Child Welfare Society of Kenya in respect of their fitness. At paragraph 14 of their joint statement in support of the application, the applicants allude to original reports carried out on them by Homeless Children International – Kenya and Child Welfare Society of Kenya in respect of their (applicants') fitness to adopt. The statement adds that the reports are annexed and marked "B - 8(a)" and "B – 8(b)". I have not been able to find such reports in the court file.

10. There is a report from Family Counseling Clinic Inc. in Illinois on the applicants and their desire to adopt RMM born in Kisii, Kenya. The report, headed 'Adoption Home Study' is dated May 23, 2005. It dwells on things like the backgrounds of CMB and KEB, their income and the clinic's assessment of their suitability as adoptive parents, etc. No reference is, however, made as to the age bracket of the child to be adopted.

11. The *guardian ad litem* is GOO. His statutory report dated May 18, 2006 and filed on May 24, 2006 is stated to be under the Adoption Act, chapter 143 Laws of Kenya and it recommends the proposed adoption. This court draws attention to section 200(1) of the *Children Act, 2001* which repeals the various Acts specified in the sixth schedule to the *Children Act* and that the *Adoption Act* is one of the Acts repealed by the *Children Act*. The report of the *guardian ad litem* was, therefore, filed under a non-existent statute !

12. The child subject matter of these adoption proceedings, RMM was born on July 5, 1990. She is over 15 years old and will in a couple of days time attain the age of 16 years. Section 158(1)(a) of the *Children Act* is in the undermentioned terms:

> 158. (1)An adoption order may be made upon the application of a sole applicant or jointly by two spouses where the applicant or at least one of the joint applicants –
>
> (a) has attained the age of twenty-five years and is at least twenty-one years older than the child but has not attained the age of sixty-five years'.

13. Using the ages of 31 years for 1st applicant, 29 years for 2nd applicant and 15 years for the child, the 1st applicant is 16 years older than the child while the 2nd applicant is 14 years older than the child. The age difference of at least 21 years as between either applicant and the child has not, therefore, been met as statutorily required.

14. Section 156(1) of the *Children Act* provides that no arrangement shall be commenced for the adoption of a child unless the child is at least six weeks old and has been declared free for adoption by a registered adoption society in accordance with the rules prescribed in that behalf. Little Angels Network, a registered adoption society in Kenya, has not declared the child free for adoption, principally because of non-compliance of this case with the statutory age requirements. The Director, Children's Services in his report dated June 14, 2006 has not recommended the proposed adoption, partly because of the age factor and also because in the Director's assessment, the child's biological parents did not fully appreciate the implications when they gave consent to their child's adoption by the applicants. Here is, for instance, a recount of what the child's biological father is reported to have narrated to Assistant

Director, Children's Services (Mrs JN Ndcung'u) when questioned about his consent to the proposed adoption:

> 'When asked why he (child's biological father) is in Nairobi he answered that he knows that the sponsor is going to educate his daughter abroad. That the child's uncle had informed him last year that the sponsor wanted to go and educate the child abroad. He is also of the view that his daughter will get education and come back to Kenya as an adult to assist them.'

15. The above perception ascribed to the child's biological father as to what the adoption entails appears to be mis-conceived.

16. It was the assessment of Kenya's Children's Department that by the adoption sought, the applicants would if authorized to adopt the child make them first – time parents to a teenager and that it would be difficult to start a parent – child relationship in the circumstances of this case.

17. For the reasons outlined above, the Children's Department did not recommend the proposed adoption. The reports by the Little Angels Network and by the Children's Department were severely criticized by applicants' counsel. In her view, the reports are shallow and do not take into account the best interests of the child. According to applicants' counsel, the child was abandoned by her parents and relatives at the age of 5 years; that she has no future here; and that it would be in the child's best interests to be adopted by the applicants who have shown willingness to educate her and even accord her inheritance rights to their property. Counsel pointed out that she interviewed the child's biological parents regarding the proposed adoption and that they understand its implications as does also the child who has also consented thereto and that the court should not shatter the child's dream of a better future by declining to authorize the adoption.

18. Applicants' counsel urged the court to grant the adoption application.

19. I have given due consideration to the arguments for and against the application.

20. As I understand it, applicants' principal contention is that the court can and should ignore the age requirements stipulated by section 158(1)(a) of the *Children Act* because in counsel's view it is not couched in mandatory terms, the operative word used there being 'may'. I would agree that the word 'may' is permissive but in the context of its usage in that section, it leads to a conclusion very different from the conclusion the applicants' counsel urges this court to draw. By employing the word 'may' in the manner it has done, the section is not permitting the court to ignore the age requirements but rather it is mandating the court to consider making an adoption order ifthe age requirements stipulated thereunder are met. The age requirements are not, of course, the sole criteria for the making of an adoption order, other criteria being such as the best interests of the child, etc, but the age requirements are among the starting points. Non-fulfilment of the age requirements gives the adoption a false start and in my view renders the adoption application incapable of standing. It is, of course, true that the child's best interests' are paramount, but such interests must be pursued within the law. That is not the case here.

21. Applicants' counsel argued passionately in favour of the application. It should be clear from my above analysis that I consider the application as a non-starter. It is incumbent upon children's homes which purport to assist children in need of protection and care to well acquaint themselves with the *Children Act, 2001* and ensure they comply with its provisions.

22. The child in question is not free to be adopted by the applicants herein according to our law and Little Angels Network did the correct thing not to declare the child free for adoption. Kenya's Children's

Department too did the correct thing not to recommend the proposed adoption. The court would not, in any event, be bound by any adoption recommendation made contrary to the law.

23. I have noted that the child in this case comes from a broken family, her parents, peasant farmers, having separated when she was about 5 years old. Her maternal uncle, WBM testified before me that the child's parents separated around 1997 – 1998. He was in Nairobi then and went home to find the child there with nobody to look after her. It is this maternal uncle,WBM then doing casual work at Homeless Children International who made arrangements for Homeless Children International to help her and they agreed to take the child and educate her from primary school, until she joined [particulars withheld] Girls (Boarding) High School, Nairobi, having scored 413 out of 500 marks in the Kenya Certificate of Primary Education examination. There is evidence to the effect that Homeless Children International had found a sponsor for the child's education at [particulars withheld] Girls (Boarding) High School but placed the child in the foster care of the applicants for purposes of her adoption by them. This entailed the child converting to day scholar, which [particulars withheld] (Boarding) High School would not permit. Apparently Homeless Children International, then arranged for the child's transfer to a day school of equivalent educational standard, ie [particulars withheld] Academy under sponsorship by the applicants. That is where the child is to date. The intention behind the child's transfer may have been good but it ran afoul of the law as the applicants are not eligible to adopt the child. The reported misconception of the child's biological parents regarding what the proposed adoption entails cannot also be ignored.

24. In view of the foregoing, it is my unpleasant duty to decline to authorize the applicants, CMB and KEB , to adopt RMM and their said application is hereby refused.

25. It is now the responsibility of Homeless Children International to make alternative arrangements for the remainder of the child's education. The court record shows that it was suggested by the Children's Department to the applicants that they consider alternative ways of helping in this matter, eg by uplifting the living standards of the child's family, but the applicants said their interest was only in helping this child. The applicants were entitled to take that stand though some may consider it selfish.

26. If the applicants truly love the child as stated to this court, no doubt they will liaise with Homeless Children International and continue to sponsor the child under new educational arrangements to be made by Homeless Children International notwithstanding the failure of the adoption application. There is also nothing here to stop the applicants from bequeathing property to the child. It must be emphasized that whether or not the applicants continue to sponsor the child's education, Homeless Children International has the responsibility to see to it that the child continues with her education as previously undertaken.

27. Orders accordingly.

**DELIVERED AT NAIROBI THIS 3RD DAY OF JULY, 2006.**

**B.P. KUBO**

**JUDGE**