



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Adoption Cause 195 & 196 of 2005**  
**IN THE MATTER OF THE CHILDREN ACT, 2001**  
**AND**  
**IN THE MATTER OF JA (A CHILD)**  
**CONSOLIDATED WITH**  
**IN THE HIGH COURT OF KENYA**  
**NAIROBI**  
**ADOPTION CAUSE NO.196 OF 2005**  
**IN THE MATTER OF THE CHILDREN ACT, 2001**  
**AND**  
**IN THE MATTER OF DNM (A CHILD)**  
**JUDGMENT**

On 22.12.05 GMM filed two identical originating summonses dated 21.12.05 applying to be authorized to adopt JA a boy born on 27.02.98 now aged about 8 years and his sister DNM, a girl born on 20.01.92 now aged about 14 years. The applicant is a widow born on 01.10.57 now aged about 49 years. She works as a Personnel Officer with United Nations Truce Supervision Organization based in Israel. The applicant has two grown up biological daughters.

The applications were brought under sections 154, 156, 157 and 160 of the Children Act, No.8 of 2001.

As the applicant is the same in the two causes particularized above while the children in question are siblings and the *guardian ad litem* is the same for both, the two applications were consolidated for consideration together.

The salient facts pertaining to the applications may be summarized as under.

The applicant is a cousin of both children whose mother is the applicant's maternal aunt. Both the applicant and the children are Kenyans of the African race and profess the Christian religion.

At the hearing of the actual adoption application on 06.10.06 the applicant was represented by learned counsel, Mrs R.A. Murithi. Among other things, applicant's counsel informed this court that the biological parents run *Simu ya Jamii* business, i.e. a public telephone bureau, which is not doing so well; that they live in a single room in Dandora, Nairobi where there isn't much space for the children's growth; and that she (counsel) relied on Nairobi High Court Adoption Cause No.139 of 2003 relating to the adoption of Denis Njuki in which the High Court (Koome, J) authorized a single female applicant to adopt a boy on the ground that the child would enjoy certain opportunities and privileges if adopted by the applicant therein. For the record, the child in Adoption Cause No.139 of 2003 was a nephew of the applicant who had won a green card that enabled her to go and live in the U.S.A. for an unlimited period of time and the applicant wanted to adopt the child and apparently go to live with him in the U.S.A. so that the child could enjoy certain opportunities the applicant would be entitled to as an U.S. citizen. Applicant's counsel in the present proceedings argued strenuously that the two adoptions herein are in the children's best interests as the applicant's employer, i.e. the United Nations, would meet a percentage of the children's educational and medical expenses if the children are adopted by the applicant.

Applicant's counsel also submitted that there are special circumstances in the present cases to justify the applicant's adoption of the boy, JA since she (applicant) would simultaneously also be adopting the boy's elder sister, DNM. It was applicant's counsel's contention that if the female applicant was authorized to adopt only the female child, Nereah, her brother, J, would be psychologically affected adversely by being left out. Counsel submitted that the fact of the applicant being a single female should, therefore, be no bar to her adopting the boy, J. In counsel's view, the requirements of section 158 (2) of the Children Act relating to special circumstances have been met with regard to the proposed adoption of the boy, J.

Applicant's counsel urged the court to authorize the applicant to adopt both children.

Reports dated 17.05.06 and filed on 27.09.06 by Kenya Christian Homes, a registered adoption society in Kenya, have declared the children free for adoption under section 156 (1) of the Children Act. According to the society, the adoptions would be in the children's best interests.

The children's *guardian ad litem*, Joyce Moraa Orina filed her reports on 15.06.06 recommending the proposed adoptions which she too thinks would be in the children's best interests.

The children's parents, who are alive, gave their written consent dated 21.12.05 to the proposed adoptions, subject to the applicant complying with the requirements of the Children Act. They assigned no reason for consenting to the proposed adoptions. The child DNM, being 14 years of age has filed written consent to be adopted by the applicant pursuant to section 158 (4) (f) of the Children Act. She too gave no reason for her proposed adoption.

The applicant testified before me at the hearing of her applications on 06.10.06. She told the court that she works with the UN Truce Supervision Organization in Jerusalem, Israel. Her earnings are around US \$ 6,300 net per month. She gave the exchange rate between the Kenyan Shilling and the US Dollar as about Kshs.70/= or Kshs.71/= to the US \$. Her earnings work out at approximately Kshs.447,300/= net per month. She is reported to own three houses in Nairobi: one in Westlands, one in Parklands and one in Buruburu. The house in Westlands fetches rent of Kshs.60,000/= per month; the house in Parklands fetches rent of Kshs.30,000/= per month; while the house at Buruburu is occupied by her aunt, Mary Aseka Otiende who is sister to the subject children. The said Mary Aseka Otiende looks after the house and the subject children. The applicant initially told this court that the children moved to her Buruburu house since August, 2005 but later said the children moved to the house in late July, 2005. She also told the court that she stayed with the children in her Buruburu house from late July until October, 2005 before she returned to Israel, leaving the children at the Buruburu house with Mary Aseka Otiende. It was the applicant's evidence that the children's parents live in Dandora, Nairobi.

In the applicant's statements dated 21.12.05 in support of her applications, she stated vide paragraph 11 in each statement that the subject children have been dependent on her since January, 2004; that on various occasions they have lived with her; and that she lived with the children for 3 (three) consecutive months during the months of July, August and September, 2005. Each statement then refers to annexure

'GMM 2' which is identical in both files, save for the particulars of the child in each case. The annexure comprises Immigration Officer's rubber stamp impressions. Two such impressions are for J K I A Nairobi Immigration Officer and are highlighted in yellow. One bears the date '27.7.2005'. Parts of it are faint and it is not clear whether it is an entry or exit stamp. The other similarly highlighted stamp impression is clearly indicated as an exit stamp and bears the date '02.9.2005'. I take the stamp bearing the date '27.7.2005' to be the entry stamp and the one bearing the date '2.9.2005' to be the corresponding exit stamp. The duration of stay in Kenya established by the two immigration stamps works out at 1 month and 1 week, which is far less than the 3 (three) months stipulated under section 157 (1) of the Children Act. In other words, the applicant has not established that the children were in her continuous care and control within the Republic of Kenya for a period of 3 (three) consecutive months preceding the filing (on 22.12.05) of the adoption applications. Section 157 (1) of the Children Act has, therefore, not been complied with.

The applicant also told this court in her evidence that if authorized to adopt the children, she would like them to remain in Kenya due to their cultural background and tender age. She added that she would like to take them outside Kenya when they reach the level of University education as according to her they cannot be confused at that age. The applicant intends to leave the children to continue staying in her Buruburu house with their sister, Mary Aseka Otiende who does hair salon business next to the Buruburu house while she, applicant continues to live and work in Israel until the children reach the age of entry into university. According to the applicant, if she is authorized to adopt the children, her employer the UN will meet up to 70% of their educational and medical expenses, leaving her to pay only the balance of 30%. She added that after adoption she can spend more time with the children during their school holidays which she said is not possible now as they are not her legal dependants and the UN will not authorize Visas for them, which means she always has to come to Kenya and see them.

The Director, Children's Services investigated the suitability or otherwise of the applicant to adopt the children in question and filed reports dated 05.07.06 on 06.07.06 regarding the matter. The Director records that the applicant has been taking care of the children's material needs for two years and her adoption of the children would ensure continuity of the applicant's assistance to them and that when viewed from that perspective, the children would stand to benefit if adopted by the applicant. Having so opined, the Director proceeded to record reservations about the proposed adoption of each child in the following terms:

'However, there are issues that make adoption in this case an unviable option. The applicant has no intentions of taking the child with her to Israel if the adoption order is granted. The child will still remain with the maternal aunt (sic) she has been living with for the past six years and her parents who live nearby. This brings in the question of physical parenting? Adoption is a process of permanently transferring parental rights over a child from biological parent(s) to the adoptive one(s). In this case apart from provision of the child's materials, will the applicant, given the distance, provide for the child's (D) emotional needs (the child is at an age when she needs a lot of this)? The child will still remain in her biological parents' jurisdiction. This in our opinion will confuse her. (Similar sentiments expressed about the boy, J). A legal guardian is already active in the child's life, further complicating the care arrangements.

- The purpose of this adoption appears solely to facilitate the applicant's employer provide for the child's educational and medical expenses. This raises queries requiring moral justification. Is the adoption process being used as a system to access resources? Is this ethical? Supposing the applicant by bad luck loses her job, would the adoption still be viable?
- The applicant in our opinion is a person of immense financial means. If she really wants to support the child, she can still do so without necessarily resorting to the ultimate process of adopting her (D – similar sentiments expressed regarding J) from her biological parents who are still alive and still have much say in how the child is to be brought up.
- It is apparent that the requisite parental bonding is yet to be established between the child and the applicant. This is not surprising considering that she has not been in the applicant's continuous care and

control and will not be in the near future.

Your Lordship/Ladyship, the issues raised above makes (sic) the office of the Director Children Services extremely reluctant to recommend this adoption, as they were not sufficiently addressed to make adoption the only viable option through which the best interests of the child in this case can be met.’

As indicated earlier, similar sentiments were expressed by the Director, Children’s Service in his report on the boy, JA.

Now, the Director, Children’s Services, Kenya is by virtue of section 38 (1) of the Children Act given general statutory mandate to safeguard the welfare of children. He would, therefore, in the ordinary course of events be expected to be the first person to support a proposed adoption and I have noticed his inclination in that direction in most cases coming before court. I surmise that the present applications must have caused a big dilemma in his mind for him to come up with such strong reservations thereon.

Submissions made in support of the applications repeatedly emphasized that the children’s best interests are a primary consideration in applications such as those now under consideration. Among other things, applicant’s counsel told the court that the applicant has nothing to gain from adopting the two children moneytarywise. This statement cannot be accurate bearing in mind that the applicant herself is on record as saying she has been giving material assistance to the children for two years and that if she is authorized to adopt the children, she will be able to off-load 70% of their educational and medical expenses on to her employer. Isn’t that a form of moneytary gain?

Section 4 (3) (c) of the Children Act provides, *inter alia*, as under:

‘4. (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –

(c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.’

And section 23 of the Children Act provides, *inter alia*, as follows:

‘23. (1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.

(2) The duties referred to in subsection

(1) include in particular –

(a) The duty to maintain the child and in particular to provide him with –

(v) education and guidance.’

How will the applicant be able to guide the two children in their formative years from far away Israel? It should be noted with regard to the requirement for a parent to provide a child with education that education is not a preserve of the classroom. Regular interaction between parent and child is a form of education and a practical form at that. A lot of learning gets acquired by children through interaction with their parents, and that is where role models play an important part. The reports of the Director, Children’s Services are, instructively, to the effect that no parent-child relationship seems to have been established between the applicant and the children. Yet this is a condition precedent. How will it ever take place, given the distance involved?

Applicant's counsel also drew this court's attention to Nairobi High Court Adoption Cause No.139 of 2003 (supra), as a persuasive but not binding authority. All I want to say about it is that it is distinguishable from the cases before me as in that case the applicant wanted to take the child along with her to the U.S.A and live with the child there. The present cases seem to be ones of technical adoptions, otherwise the children will continue to live in Kenya under the custody, care and control of someone other than the applicant while the applicant basically carries on with her normal life in Israel. This sounds like a new adoption concept.

The cases under consideration raise serious issues of adoption policy as well as ethical issues and Kenya's Director of Children's Services was justified in withholding recommending the proposed adoptions. This is not to say the Director's recommendations are binding on the court – far from it. They are merely persuasive. However, the concerns emerging from the two applications are too serious to be ignored.

In view of the foregoing, it is my unpleasant duty to decline to authorize the adoption applications under consideration and the same are hereby dismissed.

Orders accordingly.

Delivered at Nairobi this 17<sup>th</sup> day of November, 2006.

B.P. KUBO

**JUDGE**