



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

Misc Civ Cause 45 of 2004

A.A.R.E.....A CHILD

And

F.A.S.....APPLICANT

RULING

Father A.S. moved this court, by way of an Originating Summons, which was brought under the provisions of Section 4 of the Children Act 2001, Rule 3 of the Guardianship of Children (Practice and Procedure) Rules 2002 and Rule 1 of the Children Act General Rules and Regulations 2002. The application was filed on 8th July 2004 and he sought for orders that:

1. That this court be pleased to determine and hold that the applicant herein be allowed to institute adoption proceedings in respect of A.R.E. (a male child born on 24th April 2000)
2. Secondly that this court do give further directions and/or orders as it may deem fit and proper in the circumstances.

This application is premised on the grounds that, the Children Act 2001 does not allow adoption by a **sole foreign male applicant**. The Act also does not define a **foreign male applicant** for the purpose of the Act. The applicant has been a resident of Kenya since 1997 to date and therefore he cannot be a foreigner. The applicant has been staying with the child since October 2002 taking care of his needs.

The applicant also relied on his supporting affidavit whereby he has deposed to the following facts;

He is a catholic priest with the Missionary Community of St. Paul and he was ordained as a priest in London where he worked from 1992 until 1997 when he moved to Lokitaung Catholic Mission in Turkana District. He is a citizen of Spain and was born in 1959 in Barcelona Spain. Before he was formally posted in Kenya he used to travel to this country here frequently and in the process, they established a Missionary in Turkana. He holds a resident permit and carries on pastoral duties and uses his engineering skills to develop the water resources and other community projects in Turkana.

It is in the course of his work that he met the child in this matter who was ailing, he organized for his treatment and it became necessary for the applicant to stay with the child while undergoing treatment. He took the child in the priest's house in October 2002 where there are two other priests and six male missionary students.

The father of the infant was killed in September 2002 and his mother has duly given her consent to this adoption as she has difficulties in bringing up three other children.

According to the applicant the child has bonded well with him and refers to him as his father and therefore it will be in the best interest of the child if leave for him to seek the order of adoption is allowed.

When the matter first came up for hearing, I directed that the application be served upon, the State Law Office, the Director of Children's Services and the Child Welfare Society due to the nature of the orders sought, which in my view, raise fundamental issues of public interest.

All the parties were represented and they made submissions. Counsel for the applicant sought an interpretation of "a sole foreign male applicant" which is envisaged under Section 158 (3) (e) of the Children Act 2001. The Act does not define who is a foreigner which gives this court an opportunity to distinguish the applicant who has been a resident in Kenya for the last 7 years. Counsel referred to **A concise Law Dictionary by P.G. Osborn** which defines a "**foreign**" **outside the jurisdiction**. This does not apply to a resident who is domiciled in the Republic of Kenya. The mischief rule that was meant to be cured by the provision of Section 158 (3) (e) was to stop the applicant from leaving the jurisdiction of this court. She urged the court to adopt the mischief rule to find out the purpose and what mischief the rule under Section 158 (3)(e) was designed to prevent.

The application was opposed by the State Law Office who filed grounds of opposition on points of law. Counsel relied on the provisions of the Act which prohibits the court from granting an adoption order to a **sole foreign male applicant**.

The applicant has not acquired citizenship for the last seven (7) years and according to counsel for State there is nothing that would stop him from leaving the jurisdiction of this court. This is precisely the mischief that Parliament intended to cure.

Counsel further argued that the intended adoption order would not be in the best interest of a minor considering that the applicant is a Catholic priest who has been traveling all over the world. Since the orders of adoption extinguishes all the parental responsibilities what would happen to the child if anything happened to the applicant. A Family has a community network of relatives which may not be available in a church.

The issue of the welfare of a child is paramount as well as being very subjective. I therefore allowed Mrs. Ndungu a Social Worker with the Director of Children's Services to address this court together with Miss Linet Ouna of the Child Welfare Society.

They both opposed the application. In addition to the issues raised by the state, they were concerned about the welfare of a child and the institution of a family which is the best environment for a child to grow and the applicant would not be able to provide, further, before the court can grant leave to the applicant the court should ascertain whether the child's mother understood the implications of an order of adoption.

I have given very careful consideration to this application and all the material that was placed before me either by way of pleadings or submissions.

I am satisfied that the provisions of Section 158 (3) (e) was meant to protect children from being adopted by **sole male or female foreigners** who were likely to take them out of the court's jurisdiction. A further mischief by the same rule was to protect children from being adopted by a single foreigner who has no family. And of course the most important is the welfare of the child which includes many aspects including a family environment in which to grow.

I have no doubt and there is no reason for me to doubt the generosity of the applicant and indeed I do commend him for his compassion and desire to wish to share what he has and help some of our less fortunate members of the society. The welfare of a child is very subjective and that is why it is important

to analyse many factors before a decision is made that may be detrimental to the child.

Acceptability, love and guidance is very crucial to a child especially by a family and community. A family set up is an integral part of a child's well being, although at the stage of this application for leave I need not say much, save to say that, perhaps this is meant to be over looked due to the abject poverty that the child would face with his poor mother and 3 siblings, one could argue that he is better off in a kind of an institution where he can get food and shelter and live with grown up men. Even if this application seeks only for leave, I have a duty to find out whether the applicant has a good case that warrants the granting of leave.

The other issue regards the applicants status as a resident, there was no evidence provided to show that the applicant has applied for Kenya Citizenship. When one is a resident they can obviously leave the jurisdiction and in this regard I would agree with the counsel for the State that the definition of a male foreign applicant is plain and needs no other definition.

As I stated earlier, I need not dumpen the applicants spirit of sharing which he can continue doing, and which should not at all be prejudiced by the provisions of the Act if his intention is to remain within Kenya. Indeed if he were to leave the jurisdiction that is when he would have needed the order of adoption in order to be able to leave the country with the child.

Since he stated that he intends to continue living in Kenya, the law has other avenues which he can apply such as guardianship of the child.

In this regard therefore I decline to grant the orders sought. I also make no order as to costs.

It is so ordered.

Ruling read and signed on 4th February 2005.

MARTHA KOOME

JUDGE