



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Adoption Case 8 of 2005**

**IN THE MATTER OF C.C. (INFANT)**

**AND**

**IN THE MATTER OF ADOPTION ACT 2001**

**R U L I N G**

T.E.M. and H.C.M. hereinafter referred to as “*the applicants*” have made an application to this court seeking to adopt C.C., hereinafter referred to as “*the child*”. The child’s mother, B.C. passed away on 17th February, 2005 and the child’s grandmother, N.S., has since been taking care of her. The second applicant, H.C.M. is a sister to the late B.C.

The applicants reside and work for gain in Georgia, United States of America and they got married on 15th February, 2003.

The guardian of the said child, her grandmother, had one of her legs amputated and is said to be due for a major operation and the applicants kindly offered to adopt the said child who is about 10 years old.

The applicants have complied with all the pre-requisites for adoption as set out in the Children act, 2001 except the requirements stated in the proviso to Section 157(1) of the said Act which reads as follows:-

*“157(1) Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan Citizen, or was or was not born in Kenya:*

*Provided that no application for an adoption order, shall be made in respect of a child unless the child concerned has been in continuous care and control of the applicant within the Republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants as the case may be evaluated and assessed by a registered adoption society in Kenya.” (Emphasis supplied).*

Counsel for the applicants admits that the applicants have not been having continuous care and control of the child within the Republic for a period of three consecutive months preceding the filing of this application. The applicants indeed travelled to Kenya purposely for this application. While I appreciate the kindness and concern of the applicants shown towards the child in their manifested wish to adopt her, the provision of Section 157(1) as quoted above are express and mandatory in nature and must be complied with.

The use of the words “*no application for adoption order shall be made*”.....unless the requirements as set out thereunder have been complied with clearly implies that the court has no discretion to exercise in a

matter which has been made in contravention of the law.

The applicant's counsel urged the court to waive the aforesaid mandatory provisions of the law as above quoted in view of the special circumstances of this case. She implored the court to exercise its inherent powers as stipulated under Section 3A of the Civil Procedure Act. She cited the case of IMMACULATE WANGARI AND BABRA NG'ENDO (INFANTS) Adoption Cause No. 2 of 2005 wherein I waived the requirements of Section 157(1) of the Children Act and allowed the uncle of the said infants to adopt them. Mrs Wanderi was acting for the applicants in that matter, just as in this Adoption Cause.

All I can say with regard to the above cited case is that I now believe that I should not have waived a mandatory provision of the law because the legislature must have had a proper objective in using such strong language in wording the said Section. The legislature further emphasised the need for strict compliance with the said provisions of Section 157(1) by stating in subsection (2) thereof that:-

*“Any person who contravenes the provision of subsection (1) of this Section shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding twenty thousand shillings or to both such imprisonment and such fine.”*

Section 3A of the Civil Procedure Act has no application in so far as this matter is concerned because it clearly states that:-

*“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

I must therefore decline to grant the adoption order as sought. But for the said compulsory pre-requisite for adoption as stated in the proviso to Section 157(1) this is a deserving case for making an adoption order and I sincerely hope that the applicants will find a way of complying with the aforesaid provisions of the law and thereafter re-apply.

DATED, SIGNED AND DELIVERED this 8th day of September, 2005.

**D. MUSINGA**

**JUDGE**

8/9/2005