REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE MATTER OF DCA

AND

EM …… OBJECTOR/APPLICANT

VERSUS

KCA & JMA ……..……. RESPONDENTS

R U L I N G

This Notice of Motion dated 30th January 2001 was filed by the Objector also referred to as the Applicant, EM praying for orders.

" 1. THAT the orders made by this … court on 26th October 2000 be reviewed with a view to canceling an entry in the children Register made on the 5th day of November 2000.

2. THAT the said orders be reviewed to conform to the Law of Adoption Act (Cap. 143 Laws of Kenya).

3. THAT the said orders be reviewed to avoid illegality."

The application brought under Order XLIV Rules (1) and (2) of the Civil Procedure Rules and Sections 3 A and 80 of the Civil Procedure Act (Cap. 21 Laws of Kenya), is based on the grounds:

" 1. THAT the consent of the infant's father was never sought.

2. THAT the mandatory report by the guardian ad litem was never filed in this … court.

3. THAT the mandatory provisions of the Adoption Act Cap.143 Laws of Kenya were not complied with.

4. THAT the execution of the said orders Made on 26/10/2000 will strip off the Objector of his parental obligation over the INFANT."

The Application is supported by the affidavit of EM dated 30th January 2001 and opposed by the two Respondents who have filed a replying affidavit dated 14th March 2001 and sworn by KCA, the first Respondent. The second Respondent is Joyce Masitsa Amalemba.

I should explain that this Adoption Cause No. 110 of 2000 was filed under the repealed Adoption Act (Cap. 143 Laws of Kenya) and although the current Act, the Children Act, 2001, has no saving provisions, the case is still being handled under the repealed Act by virtue of Section 23 of the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya).

From what has been brought to my attention during the hearing of this Notice of Motion, there is no dispute that the two Respondents are maternal grand parents of the infant DCA who was formerly known as DV and that the mother of the infant was known as JK who died on 25th December 1997 while living with the Applicant, EM, as wife and husband. There is no dispute that the Applicant and JK started living together in 1993 before the infant was born in November 1994 and that the said JK was the daughter of the Respondents. There is no dispute that during the stay of the Applicant and JK as husband and wife, the Applicant never paid dowry and that no marriage between the two was formally solemnized under customary law or any statute. There is no dispute that following the death of JKi some dispute arose between the Applicant and the Respondents over the right to bury the deceased and that that dispute was subsequently resolved by elders from both sides when they decided that the Applicant be allowed to bury the deceased and that he would thereafter pay dowry to the Respondents It is not disputed that up to the time the infant was adopted by the Respondents, the Applicant had not paid the dowry to them.

Although the Respondent's case suggests that during the period the Applicant lived with JK(the deceased), the Applicant and his father did not look at the deceased as married to the Applicant, there is evidence that the Applicant and his father indeed looked at the deceased as married to the Applicant who in many cases referred to her as his wife and the Applicant's father referred to the deceased as his daughter in law. There is sufficient evidence to show that the deceased who fell sick while living with the Applicant and was being treated under the care of the Applicant and his father, went to Nairobi for treatment under the care of the Respondents, not because the Applicant and his father did not want her and had rejected her or refused to struggle to have her treated, but because both families thought the deceased could get better treatment at Nairobi and it was felt that both families should assist and even the doctor then treating the deceased when at the home of the Applicant recommended such co-operation between the two families. In the end the Respondents found themselves having incurred a number of expenses without participation by the Applicant's family but I do not find that to have changed the relationship that had existed between the two families before the deceased was taken to Nairobi for further treatment as that non participation was not as a result of a refusal to pay but was because of the distance between the two families and the magnanimity of the Respondents towards their sick daughter.

The deceased having been buried by the Applicant, the said Applicant stayed with the infant at Chekalini in Lugari District, Western Province where the infant was attending a nursery school when on 9th October 2000, as the said infant was returning home from school, was taken away by the First Respondent without the consent and knowledge of the Applicant. The first Respondent having come with the infant to Nairobi, filed this adoption cause number 110 of 2000 under a certificate of urgency on 26th October 2000 by an originating summons dated 6th October 2000 having two prayers, first, that Joyce Buluku be appointed Guardian Ad Litem and second that the two Respondents be granted an adoption order with respect to the infant whose name was to change to be DCA. They claimed that the infant had been in their possession since 1997 and that their daughter the mother of the infant had not been married.

That application by Originating summons was on the very day it was filed, 26th October 2000, fully granted as prayed.

That means although by virtue of prayer number one, Joyce Buluku was appointed a guardian ad litem on 26th October 2000, the adoption order was granted to the Applicants on that same day before the guardian ad litem filed her report in this matter and none was filed. Further, nothing was said about consent of the father or other relatives of the infant, the Applicant not having even attempted to satisfy the court that the infant had no father or other relatives like paternal grandparents or paternal uncles or that the child was abandoned or indeed that there was no need for such a consent. The proceedings were completely quiet on the issue of consent and it is only before me in this application that it has been stated that the respondents were the only persons lawfully liable to contribute to the infant's maintenance following his mother's death and that the Respondents were not under any obligation to obtain the Applicant's consent as there was no subsisting marriage between him and the deceased. While it may be doubtful to say that there having been no marriage between the Applicant and the deceased, the Respondents were not obliged to obtain the Applicant's consent, it is definitely not correct to say that the Respondents were the only persons lawfully liable to contribute to the maintenance of the infant.

The Applicant was a person who had acknowledged and accepted paternity and was in fact maintaining the infant and in possession of the infant at the time when the First Respondent abducted the infant and the Applicant had to use the Police and other personnel to trace the infant.

The Respondents claim the infant is not the biological child of the Applicant and argue that by the time the infant's mother started living with the Applicant the deceased was three months pregnant and gave birth to the infant six months latter. That claim is not backed with dates and evidence to establish it the Respondents trying only to cast aspersion upon the certificate of birth of the infant produced by the Applicant, by asserting that the certificate is not genuine and claiming that it is available because the Applicant's father was a secretary of Vokoli Yearly Meeting of Friends Church. But in the absence of better evidence to the contrary, I do not see how I can reject the said certificate of birth which has the infant's date of birth as 22nd November 1994 almost the same as the date 26th November 1994 the date of birth of the infant as given by the Respondents in their statement in support of their application for adoption order.

That certificate of birth marked EM I annexture to the Applicant's supporting affidavit, shows, not only the infant's date of birth but also the people the Applicant says are the infant's parents.

If the infant was born six months after his mother started living with the Applicant as wife and husband, the November 1994 dates given by either side would generously take us back to March 1994. The Respondents are not giving the court any such a date. The Applicant is better because although he does not give a specific date, he says they started living together in 1993. I find no better evidence. That being the position I find it difficult to accept the Respondent's claim that the deceased started living with the Applicant as husband and wife when the deceased was three months pregnant and that therefore the infant in question here is not a biological or natural child of the Applicant.

I am however reminded that the relationship which existed between the deceased and the Applicant could only produce illegitimate children and that the infant in question here was an illegitimate child even if the child's biological father was the Applicant and that therefore for the purpose of consent under section 4 (6) of the Adoption Act, Section 2 of the same Act comes in to say that the term parent

"does not include the natural father of an illegitimate infant,"

That is perfectly correct but that is a definition of the term "parent" only. Under the same Section 2 a father remains a father and "in relation to an illegitimate infant" father; "means the natural father."

That natural father is the biological father. In terms of Section 4 (6) (b) of the Adoption Act therefore "an adoption order shall not be made:

(b) in the case of an illegitimate infant whose paternity has been acknowledged and to whose maintenance contributions are being made by the father of the infant, except with the consent of the father."

From the facts and evidence before me, the Applicant is covered by the definition of the term "father" in Section 2 as well as the provisions of Section 4 (6) (b) of the Adoption Act. The Applicant was therefore entitled and had the right to give consent to the adoption order and it is not correct to say he had no such right. In any case, consent under Section 4 (6) of the Adoption Act (now repealed) was a mandatory requirement and therefore even where it was felt that consent is not necessary, there ought to have been a specific court order to that effect for the purpose of compliance with that mandatory provision of the law as read with Section 5. The same is the position under the present law Section 158 (4) as read with Section 159 of the Children's Act, 2001.

Proceeding to make an adoption order without making a specific order on the issue of consent under Section 4 (6) as read with Section 5 does not only suggest non compliance with Section 4 (6), but also encourages the ignoring, by applicants, of that mandatory requirement of the law as the applicants play down the importance of that legal requirement under the feeling that the requirement is an unpleasant obstacle along their otherwise smooth path to an easy acquisition of an adoption order, and where an

application for a certificate of urgency may, if granted, result into the ignoring of important or necessary requirements of the law such as the requirement for consent under Section 4 (6) of the Adoption Act, the application for a certificate of urgency should be refused.

I should add that on 31st July 2001 my learned brother Kasanga Mulwa J. held that although under Section 11 of the Adoption Act there is a right to appeal, an application to review an order granting or refusing to grant an adoption order was also available to an aggrieved party under order XLIV of the Civil Procedure Rules. There was no appeal against that ruling dated 31st July 2001. Hence the hearing of this Notice of Motion dated 30th January 2001 now before me.

From what I have been discussing above therefore I find that even if the Applicant was not entitled to give or refuse to give consent to the adoption order in this matter, the orders made by this court on 26th October 2000 were bad on the ground of some mistake or error apparent on the face of the record in that:

Firstly, no report of the guardian ad litem was filed;

Secondly, the Respondents misled the court by saying that they had been in possession of the infant since 1997, when in fact they had been in possession of the infant for hardly one month before the adoption and therefore the court made a mistake of thinking that the mandatory requirement of Section 4 (5) of the Adoption Act requiring continuous Possession and care for at least three Months had been complied with.

Thirdly, there was no specific order made As to consent to meet the requirements of Section 4 (6) as read with Section 5 of the Adoption Act. But I have also found that the Applicant was, in law, entitled and had the right to give or refuse to give his consent to the adoption order. Such a consent not having been sought by the Respondents, the fourth ground upon which the orders dated 26th October 2000 were bad because of mistake or error is therefore that the Respondents having wrongly failed to seek the consent of the father of the infant as required under Section 4 (6) (b) of the Adoption Act, it was a fatal mistake or error for the court to have agreed with them.

It follows from the foregoing that the Notice of Motion dated 30th January 2001 be and is hereby granted as prayed with costs to the Applicant.

Dated this 24th day of May 2002.

J.M. KHAMONI

JUDGE