



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION
ADOPTION CAUSE NO. 99 OF 2017 (OS)

IN THE MATTER OF THE CHILDREN ACT, 2001

AND

IN THE MATTER OF BABY SS

IN THE MATTER OF AN APPLICATION FOR ADOPTION

BY

THE ATTORNEY GENERAL OF KENYA.....APPLICANT

VERSUS

HWKS.....1ST RESPONDENT

CJHRS.....2ND RESPONDENT

RULING

1. The 1st respondent HWKS is a Kenyan citizen born on 26th June 1970 in Nairobi. She owns property in Kenya. The 2nd respondent CJHRS is a Dutch national. He was born in the Kingdom of Netherlands on 9th February 1962. The two got married on 5th September 2009 at the Registrar's office in Nairobi. They have set up their permanent home in Limuru in Kenya, but occasionally travel to Bahrain where they have a company. On 28th June 2017 they applied to be allowed to adopt Child SS.

2. Child SS was born at Moyale District Hospital on 3rd March 2016, and abandoned at the Hospital on 25th March 2016. The matter was reported at Moyale Police Station in OB No. [...]. Eventually, the child was committed by the Children Court at Moyale in **Care and Protection Cause No. [...]** to New Life Home Trust in Nyeri. Police efforts to trace the mother or relatives of the child were unsuccessful. The child was on 30th November 2016 declared free for adoption by KKPI Adoption Society who issued certificate No. xxx.

3. The respondents' application to adopt the child was declined by Justice W. Musyoka because of the Moratorium on inter country and resident adoptions that the Cabinet Secretary of the Ministry of Labour, Social Services and Protection Services had issued. The adoption had otherwise been recommended by the Director of Children Services and the KKPI Adoption Society.

4. The respondents appealed to the Court of Appeal. On 6th August 2019 the Court of Appeal allowed the appeal, and set aside the order declaring the adoption. The matter was remitted to this court for re-hearing. The Court of Appeal, in its judgment, stated as follows: -

“iii The High Court may at its discretion request the Attorney General or any other suitable person to be amicus curiae and produce documents evidencing the moratorium and make submissions on the current status of the moratorium.”

5. The Court of Appeal blamed the court for relying on the moratorium to disallow the adoption yet the moratorium itself had not been presented before it. It said as follows: -

“The question arises whether this court properly exercising its judicial function can embark on the interpretation of a moratorium which was not laid before the trial court, seeing that the contention of the appellants' counsel in the High Court was that it did not apply to the appellants. We think not, for it would be an abstract construction without any legal face.

Moreover, the legal arguments now being raised on the validity of the moratorium were not raised before the Judge and were therefore not considered. It is clear from the proceedings in the High Court that it was the application of the moratorium and not its validity that was in issue. We cannot entertain a new case at this stage.”

6. The adoption cause came before this court on 30th August 2019 for re-hearing. The respondents were represented by Mr. Mwenda. Ms. Atati (Children Officer) appeared for the Director of Children Services. The court asked Mr. Mwenda to serve the learned the Attorney General to appear as *Amicus Curiae* to address the court on the issue of foreign adoptions after filing a copy of the moratorium. On 28th November 2019 the matter came for hearing. Mr. Mwenda had served the Attorney General who did not attend. The moratorium had not been filed. Mr. Kimani was present for the Director of Children Services. It was clear that Mr. Mwenda had served the Attorney General and the Director of Children Services with a copy of the judgment of the Court of Appeal. Mr. Gichuru (a state counsel from the Attorney General Office) joined the proceedings. He addressed the court to state that although the Government had issued the notice to the general public on 29th January 2015 following a cabinet decision to deinstitutionalise children he had not himself seen a copy of the moratorium or a gazette notice in that regard. He stated that he was aware the **Children Act (No. 8 of 2001)** was being amended to deal with the issue. He informed the court that–

“This public notice is the only document we have.”

7. The court was left with a situation where there was no copy of the moratorium that had been filed, and there was no gazette notice shown. Following submissions by Mr. Mwenda, the court ultimately delivered a judgment on 27th February 2020 and found that, as long as the **Children Act** remained not amended and there being no other legal instrument in place, the respondents were entitled to adopt the child. This was because the adoption was going to serve the interests of the child under **section 4(3)** of the **Act** and **Article 53(2)** of the Constitution.

8. It has to be borne in mind that the 1st respondent is a Kenyan national and has the right under the **Act** to adopt the child. **Article 27** of the Constitution protects that right. The fact that she is married, to a Kenyan or to a non-Kenyan, cannot take away that right. **Article 27** states as follows: -

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”

9. I am, however, mindful that because the respondents are a married couple, and although this is not an international adoption as both parties were not non-citizens, it is not legally feasible to consider the rights of the respondents separately. This is because the respondents made a joint application for the adoption of the child. I also considered that the Embassy of the Kingdom of Netherlands confirmed that, if the adoption is granted, the child will get a Dutch passport.

10. By notice of motion dated 4th May 2020, the Attorney General asked under **sections 1A, 1B and 3A** of the **Civil Procedure Act and Article 159** of the Constitution that the judgment delivered on 27th February 2020 and all consequential orders be set aside. The application was supported by the affidavit of Aprinah Shikoli. She stated that the Attorney General was not served with the orders of the court requiring him to appear as *Amicus Curiae*; he did not have information regarding the judgment of the Court of Appeal; the matter had proceeded without the input of the Attorney General when he had plausible grounds to raise at the trial; and that the public would suffer irreparable loss and judgment if the judgment was allowed to stay. Noah M.O. Sanganyi is the Director of Children Service. He swore that, in bid to protect children, the Cabinet on 26th November 2014 issued an indefinite moratorium on inter country and resident adoptions. The moratorium established a committee of experts to review the framework relating to adoption of children in Kenya. The committee was gazetted vide Gazette Notice No. 1092 of 20th February 2015. Following the moratorium, the **Children Act** was amended vide **Statute Law (Miscellaneous Amendments) Act 2017** through the Kenya Gazette Supplement No. 54, whose date of commencement was 4th May 2017. The amendment provided in **section 156(4)** as follows: -

“(4) The Cabinet Secretly may issue a moratorium, on intercountry and residents adoptions where there is sufficient evidence to support the opinion that such adoptions or processes leading to such adoptions are likely to be in contravention of the Constitution or any other law, or any international treaties or conventions to which Kenya is a party.”

There was a further amendment in Statute Law (**Miscellaneous Amendments) Act, 2018** to include **subsection 4A** to **section 156**, and

another amendment to **section 183**, as follows:-

“(4A) Notwithstanding any other provision of this Part, the moratorium issued before the enactment of subsection (4) shall be deemed to have been issued under this section.

183A. The Cabinet Secretary may, in writing, direct the Adoption Committee to decline registration or cancel the registration of an adoption society where it is stated that the operation of such adoption society is no longer necessary; or that the operations of such adoption society are in contravention of the Constitution or of other law or of international treaty or convention to which Kenya is a party.”

11. Mr. Joram Mwenda Guantai Advocate for the respondents, swore a replying affidavit to oppose the application. His case was that he had on 14th October 2019 served the Attorney General and the Director of Children Services with the Court of Appeal judgment, the originating summons in this cause, the Children Officer’s report in the application for adoption, the order of this court asking the Attorney General and the Director of Children services notifying them of the hearing date and asking the former to file an affidavit annexing a copy of the moratorium and to come and appear as *Amicus Curiae* in the matter. The documents were duly received and stamped by these offices. The moratorium was not produced. The Attorney General failed to attend to address the court as *Amicus Curiae*, but his representative Mr Gichuru attended to say that all that they had was a public notice on the moratorium.

12. Both Mr. Mwenda and Senior State Counsel Elizabeth Mutsoli filed written submissions on the notice of motion. I have considered them. Of great interest from the Attorney General’s side was the contention that the **Children Act** had been amended by the time of the judgment of this court, and therefore the respondents ought not to have been granted the child to adopt. The respondents asked the court to decide whether the Attorney General, who had been asked to appear as *Amicus Curiae*, could now file an application and to take sides with the Director of Children Services. Counsel asked the court to find that, all along the Attorney General and the Director of Children Services were aware of the court proceedings and had the opportunity to present evidence regarding the amended law.

13. It is also material to point out that, in the submission by the Attorney General, what was open to the respondents was for the 1st respondent to apply to adopt the child as a single parent, or for the respondents to make a joint application for grant of citizenship, or for the parties to wait until the moratorium had been lifted for them to apply to adopt the child.

14. The first question is whether this court can set aside its own judgment under the cited provisions. I raise this issue because, it is under **section 80** of the **Civil Procedure Act** and **Order 45 rules 1** and **2** of the **Civil Procedure Rules** that a party who is aggrieved by a decree or order can seek its review and setting aside. **Section 80** of the **Act** provides as follows:-

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 rules 1 and 2 of the Rules states as follows:-

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be

heard by any other judge who is attached to that court at the time the application comes for hearing.”

15. Now that there are clear provisions under the **Civil Procedure Act** and **Rules** under which the Attorney General could have invoked the court’s jurisdiction to review and set aside the judgment, it is not clear why the application was brought under the cited provisions. It is trite that where there is an express provision in the **Civil Procedure Act** and/or the **Civil Procedure Rules** under which the applicant should approach the court in a matter or application the jurisdiction of the court should be invoked under those provisions, and not resort to the inherent jurisdiction under **section 3A** of the **Act**. The inherent jurisdiction is not a substitute for the jurisdiction conferred upon the court under the Constitution or statute (**Industrial & Commercial Development Corporation –v- Otachi [1977]KLR 101; Kenya Power & Lighting Co. Ltd –v- Benzene Holdings Ltd t/a Wylo Paints [2016]eKLR**). I, however, appreciate that, in appropriate cases, the court may draw on its inherent powers, a residual power, to prevent an abuse of the process of the court. I am also mindful that under **Order 50 rule 10** of the **Civil Procedure Rules** this court is minded to consider the substance of the application.

16. Assuming that I have a proper application before me, and that the jurisdiction of this court has been properly invoked, is the application merited?

17. Where the respondents say that the Attorney General and the Director of Children Services were served with the documents in question and the hearing date, and the Attorney General says that he was not served, the legal option was for the Attorney General to request for the cross examination of the process server (Jane Wanjiku Matenguri) on the issue of service. The process server on 27th November 2019 filed a return of service to say that she had on 14th October 2019 served the Attorney General and Director of Children Services with certified copies of the hearing notice, order of the court of 7th October 2019, Children Officer’s report dated 8th November 2017, originating summons dated 28th June 2017, and the Court of Appeal judgment in **Civil Appeal No. 188 of 2018**. There are acknowledgment stamps and signatures on record.

18. It is on record that the Director of Children Services was represented during the hearing before this court. There is also record to show that the Attorney General sent Mr. Gichuru from his office. The allegation that the Attorney General was unaware of the proceedings that led to the judgment that is sought to be set aside is without basis, and is dismissed. I find that both the Attorney General and the Director of Children Services had the opportunity to inform the court of the said amendments to the **Children Act**, but did not.

19. The question is whether the Attorney General and the Director of Children Services were at the time of the hearing aware of the said amendments to the **Act**. I say this because, if the amendments were in 2017 and 2018, both officials were aware of them and under obligation to bring them to the attention of the court at the time of hearing.

20. It must be the contention by the Attorney General and the Director of Children Services that the court ought to have been aware of the amendments, and therefore ought to have applied them to reach the decision that the adoption could not be granted. Quite unfortunately, where the court has either misapplied the law or has failed to take into consideration an existing law, what is open to a party aggrieved is to appeal the decision, and to seek its review and setting aside (**Francis Origo and Another –v- Jacob Kumali Mungala, Civil Appeal No. 149 of 2001 (CAK)**).

21. Mr. Mwenda asked the court to determine whether an *Amicus Curiae* can make an application in the same proceedings and take a partisan position. It is now trite the role of an *Amicus Curiae* is to assist the court to effectively provide and protect the rights enshrined in the Constitution (**Trusted Society of Human rights Alliance –v- Mumo Matemu & Others [2015]eKLR**). He cannot be allowed to be both an *Amicus Curiae* and a party to file an application in the same matter. He cannot be allowed to be partial. The Attorney General failed to file an *Amicus Curiae* brief when he was served. He cannot now be allowed to act in a manner prejudicial to the interests of the respondents. It is on this basis that I find the notice of motion to be beyond what the Attorney General was invited to do as *Amicus Curiae*.

22. Let me also point out that in the affidavits sworn to support the application, neither the Attorney General nor the Director of Children Services alluded to any evidence to show that the applicants had in their application to adopt the child offended the Constitution or statute or treaty or convention to which Kenya was a party.

23. I hope I have said enough to show that the application before the court is incompetent, misconceived and lacking in merits. It is dismissed with costs.

DATED and DELIVERED at NAIROBI this 17TH day of JUNE 2021.

A.O. MUCHELULE

JUDGE