



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ADOPTION CAUSES NOS. 2, 3 AND 4 OF 2019

IN THE MATTERS OF APPLICATIONS FOR ADOPTION OF EIK, SAO AND LKMA, CHILDREN

JUDGMENT

1. Kakamega High Court adoption causes numbers 2, 3 and 4 of 2019 were initiated by the applicant herein, JMA, who holds dual citizenships of Kenya and the United States of America, seeking to do adopt three children of her late brother, JBOA, to be referred to as the deceased. The children, the subject of the proceedings, are EIA, SAO and LKMA. AWN is the biological mother of the children and the widow of JBOA.
2. The children were born within wedlock on 24th November 2009, 28th March 2006 and 16th March 2011, respectively, to their mother and deceased, in Nairobi. They were raised in Nairobi, where they go to school at [Particulars Withheld] Junior School.
3. The father of the children, JBOA, died on 25th June 2018. It would appear that it was the said demise that prompted the instant proceedings. The mother of the children is said to be unemployed, and, therefore, unable to provide for the children. She has consented to the proposed adoption, and understands that that would amount to giving up her parental rights over the children.
4. The matter was placed before me on 26th June 2019, under certificate of urgency, as the applicant was said to be set to travel back to the United States of America where she is based. I appointed NKL, guardian *ad litem* for the purpose of the proceedings and directed both the Children's Officer for Vihiga County and the guardian *ad litem* to assess the applicant of her suitability to adopt the children in question. There has been compliance with the directions. The guardian *ad litem* filed her reports and so has the County Children's Officer.
5. The originating summons was heard orally on 24th September 2018. I heard presentations from the advocate for the applicant, Mr. Kamenju, a representative from the adoption agency arranging the adoptions, Change Trust, Ms. K, the guardian *ad litem*, the children and their mother. I heard from the Sabatia Children's Officer, Vihiga County, Ms. Wambua too.
6. The adoption sought is within the family, as it is an aunt of the children seeking to adopt her late brother's children. All appear well, save for a concern that the children's officer raised, which I need to consider. She stated that the children were born and raised in Nairobi, and, therefore, she could get little on their background after her visits to the rural home where their father hailed from. She said that she could only get information on the applicant, which was generally positive, although limited in the sense that the applicant was a resident of the United States of America. She was forced to delegate the assessment of the children to the Children's office at Nairobi where the children were. That was done, and a report was sent back to her. It was noted that the mother of the children was not employed and never worked. Their late father lived at their grandmother's house at Buru Buru. As the mother needed to move on with her life, she approached another of the deceased's sisters, VAA, based at Kakamega, who was unfortunately not in a position to take care of the children, hence the idea to have them adopted by the applicant.
7. Ms. Wambua submitted that the children's office had no problem with the adoption of the older child, since he mature enough to give his consent under the relevant provisions of the Children Act, No. 8 of 2001, and he had given his consent already. With regard to the other children, she submitted that the court could give an order to require the Director of Children Services to give a written consent. She stated that she was cognisant of the fact that the applicant held a dual citizenship, and opined that only the Director of Children Services could formalise international adoptions.
8. In response, Mr. Kamenju submitted that the applicant was aware of the moratorium on international adoptions, and it was for that reason that she applied as a Kenyan citizen, and did not invoke her United States of America citizenship. He urged that the application should be viewed as a local, as opposed to a foreign adoption application. He stated that the intention of the applicant was, if possible, to have the children relocate to the United States of America, subject to the approval of the government of the United States of America. He submitted that if the government of the United States of America did not approve of the relocation, then the current arrangements would prevail, where the applicant would meet the physical needs of the children, while her sister retained physical custody of the children.
9. One practical difficulty with this matter is that the applicant is a dual citizen of Kenya and the United States of America. She resides and works in the United States of America, and is more of a visitor in Kenya. The role of the guardian *ad litem* in these proceedings is to assess suitability of the applicant with regard to her adoption of the subject children. She was expected to visit the applicant where she was staying with the children, to evaluate the suitability of the quarters where they were living and of the nature of interaction between them. To be in a

position to make a reasonable assessment or evaluation, it would be important for the guardian *ad litem* to make several visits before submitting her report.

10. I have read through the reports of the guardian *ad litem*, all dated 23rd September 2019. The reports are silent on whether the guardian *ad litem* ever made any visits to the residence where the applicant was living or staying with the children, if such visits were made, how many of them, and where, and what were the conditions of the quarters and the nature of the interactions. It is such background that then informs the conclusions that are made in the report. The authenticity of the reports is, therefore, open to question. More so as the applicant was in Kenya for the sole purpose of the adoption proceedings. It should have been disclosed when, if at all, the visits happened. The guardian *ad litem* hails from Vihiga County, the children lived in Nairobi, and it should have been made clear whether the visits happened in Vihiga or Nairobi. I do not think that I can give much importance to the said reports.

11. The issues raised by the children's officer are also pertinent. The officer faced difficulty in carrying out her duties because the persons she was required to assess were not within her jurisdiction. So she had to seek the assistance of her colleagues in Nairobi. That by itself is adequate indication that the matter ought not to have been filed at the High court at Kakamega, the most suitable place for it was Nairobi, where the principal players were. Even when the officer in Nairobi took up the matter, he still expressed difficulty in that he never got to interview the applicant.

12. Adoption proceedings are principally about the person seeking to adopt a child and the child himself. The focus is usually on the applicant, since the life of a child is to be placed in his or her hands, and the court has to be satisfied that the applicant has the wherewithal to take care of the child, both in material and emotional terms. The physical circumstances of the applicant are critical, where he or she lives, and how she lives, the general environment, would have an impact on whether the child would be comfortable in that environment or not, and whether the same would be suitable for him or her. It is for that reason that an independent report on the applicant and his or her circumstances is critical. Independent in the sense of information being dug out and placed before the court by a person other than the applicant herself. As it is, the report by the guardian *ad litem* is wanting in that regard. She did not say where the applicant lived in Kenya, how that environment is like, among others. The reports by the children's officers are very clear, that there is not adequate information about the applicant, since they never got to meet her, yet she is the principal player in these proceedings.

13. The fact that the applicant is a citizen of the United States of America was underplayed. I was told that she applies as a Kenyan rather than an American. Yet, she resides, not in Kenya but in America, which made the fact of her being American the more important. It is where she lives in America and how she lives that is critical, for I was told she hoped to eventually move the children to America. A social enquiry report from authorities within her area of residence in America would have been critical. The American authorities would probably have better records on the kind and type of person that the applicant is than the Kenyan authorities can be expected to have.

14. I am being asked to approve adoption of children in Kenya by a person who resides in the United States of America. She would like to take over parental responsibility of the children from their only surviving parent, their mother. The children are not American citizens. Upon adoption, they would not be able to join their adoptive mother in the United States of America, yet their biological mother would have lost her parental rights over them. They would be left in Kenya, according to what I was told, not with their biological mother, but with one of their other paternal aunts. I am not persuaded that that state of affairs is in the best interests of the children. Two of them are of tender or near tender years, they need a mother figure around them, either the biological mother or the adoptive mother. Am told none of them would be available to the children after I make the orders; so what would be the purpose of making the orders.

15. In the end, I am not persuaded to make the orders sought in the originating summonses dated 19th June 2019, and I hereby dismiss them. There shall be no order as to costs. Any party aggrieved has twenty-eight (28) days to move the Court of Appeal, appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE