



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ADOPTION CAUSE NO. 1 OF 2017

IN THE MATTER OF SECTIONS 176 OF THE CHILDREN'S ACT CAP 141 LAWS OF KENYA

AND

IN THE MATTER OF ARD (ISSUE)

AND

DRA 1ST APPLICANT

NRD 2ND APPLICANT

RULING

The petitioners have presented an *ex parte* originating summons application dated 20th January, 2017 brought under the provisions of Section 176 of the Children's Act, Order 37 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. They are seeking for orders that: -

(1) The Adoption judgement dated 18th April, 1994 and certificate dated 21st April, 1994 issued by the Bombay Civil Court at Bombay, India in Miscellaneous Petition No. 101 of 1994, be adopted and be made an order of this Honourable Court and be registered.

(2) The Adoption Order be entered into the Adoption Children Register.

(3) Costs in the cause

The application is premised on grounds on the face of the application. The application is supported by the affidavit of the 1st Applicant with the authority of the 2nd Applicant. They aver that they are Kenyan citizens born in year 1952 in Nairobi and year 1954 in Mombasa respectively. They got married in 1979 but were not blessed with any biological children of their own hence they opted for adoption in 1994. Their adoption petition was granted by the Bombay City Civil Court on 18th April, 1994 and 5 month old A, the subject, became their son. They raised the subject as their own child catering for all his needs including his educational needs until he has attained the age of majority and they are still catering for his educational needs as he pursues a second degree. They seek that the adoption orders from India be adopted in Kenya to give its effect and purpose in Kenya. They have annexed copies of relevant documents and a list of authorities they rely upon.

The certificate dated 21st April, 1994 annexed to the affidavit gives the date of birth of the subject as 1st

December, 1993 making him an adult. The certificate is as a consequence of the finding by the Judge in the Bombay matter mentioned before. The applicable law in adoption matters in Kenya is the Children Act.

Section 176 of the Children Act provides that: -

Where a person has been adopted (whether before or after the commencement of this Act) in any place and the adoption is one to which this section applies, then, for the purposes of this Act and all other written laws, the adoption shall have the same effect as an adoption order validly made under this Act, and shall have no other effect.

Subsection (1) shall apply to an adoption in any place outside Kenya, if—

(a) the adoption order was made by any court of law in the Commonwealth and any court of competent jurisdiction in any other country:

(b) in consequence of the adoption, according to the law of that country, a right superior to that of any natural parent of the adopted person in respect of the custody of the person; and

(c) in consequence of the adoption, the adopter had, immediately following the adoption, according to the law of that country, a right superior or equal to that of any natural parent in respect of any property of the adopted person which was capable of passing to the parent or any property of the person dying intestate without other next-of-kin, and domiciled in that place where the adoption was made and a national of the country which had jurisdiction in respect of that place, but not otherwise.

An adoption order made overseas in favour of an adopter who is resident in Kenya shall be lodged in the court within the period and in the manner specified by the rules made by the Chief Justice.

Section 176 (1) of the Children Act applies to persons already adopted. In considering the foreign adoption orders, the law of that foreign country gives the validity of the said order. The applicants obtained the adoption orders under Indian law and specifically under the Hindu Adoptions and Maintenance Act, 1956. Its Section 16 presumes that all conditions were met before the order was issued. It provides: -

Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

Section 176 (2) & (3) of the Children Act makes it clear that there are preliminary requirements before an adoption order takes effect. The India is a Commonwealth country and a court of law in India gave the adoption order.

The other conditions are fulfilled as Section 12 of the Hindu Adoptions and Maintenance Act, 1956 provides that: -

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

Section 176 (3) creates a further condition to be fulfilled but the same is beyond both the applicants and the court as the said rules have not been enacted. The rules would have addressed the procedural law

pertaining to recognition of adoptions covered under Section 176. However, as the substantive law is clear it is in my opinion that it is not rendered inoperative by the absence of the said rules. I am guided by the views of W.M. Musyoka, J in **RE JJTR (MINOR) [2013] EKLR** and besides Article 55 of the Constitution protects the rights of the youth which include the right to participate in social spheres of life and family is very much social.

The upshot of this is that the application is allowed and the Adoption judgement dated 18th April,1994 and certificate dated 21st April, 1994, from Bombay, India is recognised so as to take effect as per Section 176 of the Children Act. The adoption of the subject *Aditya* is duly registered. The costs shall be in the cause.

Dated, signed and delivered in Malindi this 2nd day of March, 2017.

S.J. CHITEMBWE

JUDGE