



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
ADOPTION CAUSE NO137 OF 2016
IN THE MATTER OF THE CHILDREN ACT 2001
AND IN THE MATTER OF BABY PM
IN THE MATTER OF AN APPLICATION FOR ADOPTION BY
SM 1ST APPLICANT
MC 2ND APPLICANT

J U D G M E N T

The Application

1. The Court has before it an application seeking an Order authorising the Applicants to adopt the child the subject of these proceedings. The Applicants are a married couple and they are making a joint application.

2. The Application is brought by an Originating Summons is dated and filed on 4th November 2016. It is seeking the prayers set out therein. It seeks the following prayers:

1. *“THAT the consent of the biological parents of Baby PM be and is hereby dispensed with since the infant was abandoned at birth by her biological mother*

2. *THAT the Applicant be and are hereby authorized to adopt BABY PM and the child be called TM henceforth*

3. *THAT the Registrar-General do make the appropriate entries in the Adopted Children’s Register in respect of BABY TM*

4. *THAT the court does issue such other orders as maybe necessary in the best interest of the child*

5. *THAT costs be in the cause”.*

The Applicants

6. The Applicants are a married couple who live in Nairobi. The First Applicant SM was born on 28th May 1971. He is employed by [particulars withheld] Kenya Ltd as the General Manager. The Second

Applicant, MC (the wife), was born on 19th March 1970 and is employed as a Consultant with [particulars withheld] Africa Solutions. They are both educated to the tertiary level and beyond. They were married on 21st November 2004. They are gainfully employed and have a standard of living that could be described as privileged. In the course of the investigations, they have demonstrated to the satisfaction of the Director of Children's Services that they value family life and education. It is also reported the prospective maternal grandmother has visited them and the Child while the investigations were on-going enabling wider inquiry.

7. The Applicants are Indian Nationals who have been resident in Kenya since Around 2009, from one report, or 2012 from another. They are said to intend to continue to live here for the foreseeable future. However, they have family and do own property in India. During the course of these proceedings their residence permits expired and were renewed. The First Applicant had previously lived and worked in Tanzania. As a consequence, they have lived in East Africa for a cumulative period of 13 years. At the time of the placement they lived in Mombasa but now reside in the Parklands area of Nairobi. They have no biological children of their own. They are said to have yearned for a child of their own but have opted for adoption. The Reports show that they have given great consideration to that decision. They asked to be placed preferably with a female child. They also asked to have a child who was either Asian or of mixed race placed with them so that there would not be too great a visual difference leading to the Child suffering adverse comment or treatment nor being stigmatised by their community. As a consequence it took longer than usual to find a suitable placement after being approved in 2013. The Applicants would like DB and PJ to be the legal guardians of the Child in the event that they are unable to care for him themselves and those persons have consented so to act. Their Statements of Consent to so act are exhibited and notarised. Once an adoption order is made the Applicants would wish for the Child to be known as TM

8. The Applicants were approved for Adoption by the Little Angels Network Adoption Agency on 7th August 2013. They both have clean records from the Directorate of Criminal Investigations in Kenya. The Reports do not elaborate whether such records have been sought or obtained from Tanzania and/or India. They possess National Identification Cards for Foreign Nationals and therefore their finger prints/biometric data are recorded on the system.

9. The Applicants applied several years ago to be considered as adopters and the Case Committee of Little Angels Network considered they were appropriate for adoption. The Case Committee made its decision on 7th August 2013 as recorded in the Report from Little Angels. They are considered to be of good health and are able to take care of the Child and take on parental responsibility.

10. The Originating Summons is supported by a joint Affidavit of the Applicants which Exhibits a number of documents to which reference will be made in the course of this Judgment. The Court also has before it the Chambers Summons filed on the same day (4th November 2016). It sought Orders for the Appointment of the Guardian ad Litem (GAL) and for Reports to be prepared. A differently constituted Court made those orders. The GAL was appointed and directions given for the filing of her Report and the Report from the Director of Children's Services within 45 days (Order of Hon L. Achode J of 10th November 2016).

The Child

11. The Child the subject of these proceedings is a male child. He is estimated to have been born on 17th December 2014. The reason that his date of birth being estimated is that he was an abandoned child according to the records. He is of mixed race. He was found by a member of staff of G4S on 23rd December 2014 near Casaurina Marine Park in Watamu, Malindi District. He was taken to Malindi Sub-County Hospital for medical treatment. At the hospital he was found to have a low birth weight and rashes on his body. He was treated with antibiotics and responded well. The Children's Officer was informed and when the Child was discharged from the Hospital he was released to the God Our Father Home for Needy Children for safe custody. It seems that the matter was not reported to the Police until 6th August 2015, a period of over 6 months later. That report was then given an Occurrence Book No of

69/6/8/2015. The Child remained at the home thereafter until his placement with the Applicants in June 2016 (1 ½ years). The Initial Letter from the Malindi Police Station is dated 10th August 2015. On 22nd September 2015, the Department of Children's Services obtained a Committal order and the Child was placed at the God Our Father Centre for Needy Children for care and protection under **Case No 3 of 2015**. The Final Letter from the Police informs the reader that reasonable investigations have been carried out and the Police Service in Malindi have not been able to locate the biological family of the Child. While at the Home the Child has received the recommended vaccinations and immunisations. The Child was not claimed for 6 months and therefore **Section 159(1)(a)(i)** of the **Children Act** applies. The Final Police Letter is dated 9th March 2016 and states that no-one has claimed the child and the whereabouts of his parents are still unknown.

12. By a further decision of the Case Committee of Little Angels Network on 17th June 2016, the Child was made available for adoption. The case Committee expressed the view that adoption was considered to be in the best interest of this Child. The Little Angels Network issued a Certificate No 001735 dated 17th June 2016 to declare the Child Free for Adoption. The Original Certificate is on the Court File.

13. The Child was placed with the Applicants on 27th June 2016 pursuant to a Care Agreement of that date and has remained with them throughout since then. The statutory period has lapsed so they brought their Application for Leave to Adopt. There are no concerns raised about their care for the Child. The Applicants have the support of family and friends in their decision to adopt. All the Reports before the Court inform the Court that the Child is happy and well cared for and that he has bonded with the Applicants.

14. The Child has attended Court with the Applicants and the Court was able to observe a healthy, happy and confident child.

Investigations and Inquiries

15. The Following investigations and inquiries have been conducted in relation to the Applicants and the Child:

- a. Police investigations to locate the biological family of the Child; They could not be located;
- b. Social Inquiry Report on the Child;
- c. Police investigations of the Applicants to verify whether or not either of them has a criminal record. The CID say they do not;
- d. Assessment of the Applicants for suitability to adopt by the Little Angels Network including medical and financial assessment;
- e. Assessment of the Child for suitability for adoption by the Little Angels Network;
- f. Assessment by the Guardian ad Litem;
- g. Assessment on behalf of the Director of Children's Services.

16. Each of those inquires and/or investigations and its findings are set out in the respective report. The Court therefore has before it the Reports of the Little Angels Network, the Guardian ad Litem and the Director of Children's Services as well as CID certificates and medical records. Not one of those Reports raises any concerns in relation to this adoption. Each report has stated that adoption rather than institutional care is in the best interests of the Child and has recommended that the Court make the Order.

- a. The Guardian ad Litem states;

“This couple is attached to their prospective adoptive child and live in a child friendly home.... It would be in the child’s best interest if an adoption order is given to S and his wife M....”

- b. The Report from the Little Angels Network which recommends adoption in no uncertain terms;
- c. The Report from the Director of Children’s Services also filed on 7th January 2017 recommends the order be made with qualifications. The Report states:

“Locally, the applicants have been found suitable by Little Angels Adoption Society....They have proved during the fostering period that they are capable of taking on the challenge of raising the child... the applicants also meet the social parameters considered important to their taking on parental responsibilities and custody of the child as would be conferred by an adoption order.”.

That Report goes on to say;

“The applicants have applied under local adoption provisions having been residents of Kenya since 2012. However they are Indian nationals holding Kenyan foreigner certificates....It is therefore the recommendation of the Director of Children Services that this Honourable Court gives direction on this matter following the Kenya Cabinet indefinite moratorium on inter-country adoption of Kenyan children to foreigners, declared on 27th November 2014. The discretion lies with this Honourable Court”. The Report is signed by the County Co-ordinator for Children’s Services.”.

17. The Officer who attended Court for the Hearing was of the view that the Child had bonded so well with the Applicants that his removal would cause him trauma.

18. Before dealing with the legal analysis of an “indefinite moratorium” and its implications - which demand special consideration, it must be borne in mind that this Court has a constitutional duty to adjudicate on the Application which is before the Court. The Applicants have the right to be heard and to have a decision rendered. The Applicants have been resident in Kenya since 2009 (2012 according to Children’s Services). If they were Kenyan Nationals there would be no need to question their Application any further. They were assessed and found suitable and the clear recommendation is for adoption in the best interests of the child. The Applicants have applied under local adoption principles. They satisfy the requirements for what is termed a local adoption.

19. Unfortunately for this Child, the Applicants and prospective parents with whom he has been placed are foreign nationals subject to immigration control. At the time of writing the Reports their visas were imminently to expire. However, the Court was informed they were confident they would be granted extensions and those extensions were in fact granted. All the Agencies involved are more than satisfied that these Applicants would provide the Child with a good home and the Child has bonded well with them. The professionals consider firstly that adoption and secondly that adoption with these Applicants is in his best interest. The alternative put forward for this Child is a life in institutional care. He is of mixed race and it is not clear whether that affected the treatment he received, but he has already spent 1/3 of his life span in an institution where there is no record of his whereabouts or care. A repeat of that cannot be considered to be in his best interests. Having come to that conclusion the proceedings are in abeyance due to the “*indefinite moratorium*”.

20. The origin and the genesis of the moratorium seems to suggest that it is a direction from the Cabinet Secretary for Labour Social Security and Services to the Director of Children’s Services dated 26th November 2014 or thereabouts. Thereafter it is referred to the Adoption Societies in the form of a Letter signed by Hon Samwel K. Kambi Cabinet Secretary in the Ministry of Labour Social Security and Services. That letter referring to it is entitled “***Moratorium on inter-country and resident adoption***”. That terminology is different from “foreign adoption” which has become the terminology in popular parlance. The Moratorium and the way it was expressed raises several issues as follows:

- a. What is a foreign adoption? Does that refer to persons of foreign nationality or all persons of “foreign origin” regardless of nationality?
- b. What is meant by “in the pipeline”? Does the pipeline start with approval of the prospective parents or with placement of the Child?
- c. Under **Article 47 of the Constitution** what is the specific procedure for obtaining approval from the Committee apart from lodging all applications with the Ministry?
- d. The “further instructions” that the Ministry was to issue have not materialised. How is that void to be filled in the best interests of this Child?

21. There was no time frame given for the duration of the moratorium. Therefore in view of the expressed indefinite nature of the Moratorium, there may be time to resolve those issues in the fullness of time. However, the facts of this case raise issues for the Court that required resolution sooner rather than later in the interests of the Child. How must the Moratorium be applied to this case?

22. The Moratorium was imposed in November 2014. At present there have been no amendments to the Children Act proposed, or passed by Parliament relating to the issue. There has been no dialogue between the Family Division (Judges and Practitioners) and the Ministries concerned or even the Attorney General’s Department on the real issue of protection of children and vulnerable persons from human trafficking. There have been no laws put before Parliament nor passed aimed at stopping human trafficking in all its guises. The Courts are therefore left to recognise the risks and apply the laws that currently exist. It is noteworthy too that the Moratorium does not apply to guardianship orders at all. They are not even mentioned. However, that must be a venue for the exploitation of impoverished families and their children.

23. Any analysis must consider the Law and apply the hierarchy of law starting with the Constitution. The Law is what this Court applies. The power and duties of the Court are set out in **Article 165 (3) of the Constitution of Kenya** which provides;

165. (1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and (b) shall be organised and administered in the manner prescribed by an Act of Parliament...

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified.....”

24. The subject matter of the Application is the Child. **Article 53(2) of the Constitution of Kenya 2010** provides that “A child’s best interests are of paramount importance in every matter concerning the child.”. Preceding that is **Article 53(1)(e)** which provides: **53. (1) Every child has the right....(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;**”. That would suggest that once the Court decides what is in the best interests of the Child, the Constitution requires that outcome unless there is a very good , and lawful, reason for not doing so. The Constitution also leans in favour of the Child having a family. The **Children Act 2001** was enacted to give effect to the principles of **the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child**. It has provisions for various aspects of the care , welfare and protection of children. **Sections 4(2) and (3) of the Act** provide that” *in all actions concerning children all public and private bodies, courts of law and legislative authorities, when exercising powers under the Act, shall treat the interest of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to (a) safeguard and promote the rights and welfare of the child; (b) conserve and promote the welfare of the child, and (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.*” (In **Re of Baby KR [2015] eKLR 2015** per A.O. Muchelule J.

25. Article 45 of the Constitution provides; (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition economic and social rights..... Part XII of the Children Act deals with the power of the High Court to make adoption orders. Under **Section 157(1)**, a report by a registered adoption society in Kenya is required before an adoption order can be made. Under **Section 160(2)** a report of a guardian *ad litem* is required, and, for international adoptions, **section 162(c)** provides that *a report of competent government authority or a court of competent jurisdiction in the country where the applicants expect to reside immediately after the making of the adoption order is required.* (Emphasis added). In this case the Parties intend to continue living in Kenya so that should be the end of the Matter. However, certainty for the long term is in the interests of the Child.

26. However, on 27th November 2014 the Cabinet was stated to have issued a “Moratorium” on all foreign adoptions. That decision was informed by the The Global Report on Trafficking in Persons which cited Kenya as a source, transit and destination county in human trafficking. The country is also ranker at Tier 2 watch list for non-compliance with minimum standards for elimination of human trafficking based on the 2014 United States, State Department report on trafficking in persons. As a consequence, the Courts have repeatedly been presented with the argument that : **“In order to address this problem, the Cabinet approved an indefinite Moratorium on inter-country adoption of Kenyan children by foreigners and also revoked all licenses to conduct inter-country adoptions in Kenya”**. However, the exact wording of the Moratorium varies from source to source;

(1) According to the first Letter to the Children’s Director (reported in **Adoption Cause 145 of 2015**) it was suggested that the Moratorium was put in place pending the promulgation of laws, rules and regulations both within the Children Act but also criminal legislation to guard against trafficking of children as well as to sanction such conduct. In addition to the Moratorium there were to be other measures put in place, namely that, *The Government has therefore put in place the following measures:*

- i. A moratorium on inter-country adoptions
- ii. Review of the Children Act and other related laws;
- iii. Counter Trafficking in persons Advisory Committee[1]

(2) The Moratorium was first expressed in a Ministerial directive. The directive reads as follows;

“As you are aware, on 27th November 2014, the cabinet declared an indefinite Moratorium on Inter-Country Adoption of Kenyan Children to foreigners.

You will also recall that our ministry was tasked with developing a paper with detailed policy, institutional and legal framework to streamline child adoption process in this country, an exercise which is to be undertaken through the Committee of Experts which was recently gazette by the then Cabinet Secretary.

The purpose of this letter is to reiterate that the Moratorium is still in force and will continue to be so until such time that the afore-mentioned issues have been adequately addressed and we have been directed accordingly.

You are required to ensure full compliance with this Moratorium by ensuring that no inter-country adoption takes place and that the correct information in this regard is communicated to stakeholders at all times.

Please bring the contents of this letter to the attention of all staff in the Department of Children’s Services.

Signed

Principal Secretary”

3. The announcement/directive was followed by a Gazette Notice in February 2015 (Gazette Notice No 1092 of 2015). The Gazette Notice (“GN”) did not announce the Moratorium. It did however confirm that the Cabinet Secretary had established an Expert Committee and appointed its members. The GN set out the mandate and terms of reference of the Committee. In the terms of this Child it is the Mandate that is important. It provides as follows:

The mandate of the Committee is to—

(a) develop simplified guidelines for the review of resident and inter-country adoption applications that had been initiated, before the issuance of the moratorium on both resident and inter country adoptions;

(b) review and make decisions on all applications for resident and inter country adoptions that had been initiated before the issuance of the moratorium;

(c) recommend for investigations and prosecution of any person(s) or agencies found to have been involved in illegal practices in adoption;

*(d) regulate and provide quality assurance of adoption activities **during the transitional period**; to develop standard practice guidelines so as to streamline the adoption practice and ensure quality assurance;*

(e) oversee or undertake the review of legal and policy framework of adoption practice in the country; and

(f) review the structures and mechanisms of implementation of child adoption in Kenya, including those related to adoption such as family tracing and reunification, institutional care, foster care, guardianship and kinship care. (Emphasis added to assist analysis)

The Expert Committee was also to provide guidelines for review and give direction on matters which were ongoing expressed thus:

Deliverables

(a) the committee shall develop guidelines for review of pending resident and international adoption applications initiated before the moratorium was issued;

(b) the Transition Expert Committee is expected to use the developed guidelines to give direction and address or handle the resident and international adoption applications that had been initiated before the moratorium was issued but not finalized by the courts;

(c) the direction will be, among others:

(i) review of all the declaration reports and documentation for the children placed in international and resident adoption;

(ii) tracing of families for children who have been placed in international adoption and resident adoption;

(iii) allow the finalization of cases whereby placement of children happens only after family tracing has been exhausted and only if it is in the best interest of the child or;

(iv) withdraw children who had been placed in international or resident adoption only if it is in their best interest;

(v) identified children (who had initially been placed in resident or international adoption and whose families have been traced) are referred for psychosocial support;

(vi) discontinue or cancel international adoption applications that had not been placed with children;

(vii) identify applications that have not followed the necessary steps for international or resident adoption and make recommendations for legal action to be taken against all parties involved in the irregular process;

(viii) make relevant decisions and interventions or actions in the best interest of children through family tracing and reunification and other alternative family care placement such as guardianship, kinship care and foster care;

(d) the committee shall bring out the gaps that are identified in the adoption process and also identify interventions that can help support family preservation by strengthening other forms of alternative family care such as foster care, kinship care and guardianship;

(e) the committee shall give recommendations for penalty or action to be taken on persons or agencies found to have been involved in illegal adoption practices which may include jail term, fines, cancellation of registration for practitioners (i.e. adoption societies, CCIs, law firms, judges in person)

(f) the committee shall recommend for a professionally structured government body to co-ordinate adoption activities;

(g) *distinction and clarification of roles and responsibilities of adoption societies, CCIs, law firms (if necessary), court, registrar, children's office or department as well as adoptive parents (regarding legal self-representation in court);*

(h) *the committee shall give recommendations on policy, legal framework and structures and mechanism of implementation of child adoption in Kenya within the child right framework.*

The Director of Children's Services has not presented before the Court any guidelines that the Committee produced during its short tenure. Had it been working that Committee could have provided the administrative framework required by **Article 47 CoK**.

4. It had been suggested in earlier cases, that the issue would be resolved on 22nd September 2015. However, at some stage the Moratorium on "inter-country adoptions" became indefinite which this Court interprets as meaning "permanent". Gazette Notice No 1092 of February 2015 was revoked by Gazette Notice No 8902 of 4th December 2015. Therefore although the Expert Committee no longer exists, what of its and its role in finalising cases already in the system? It has not been replaced by an alternative.

28. It cannot go without comment that Gazette Notice No 17 of February 2015 makes a personal threat toward judges dealing with these issues who are in effect the Judges of the Family Division notwithstanding that their jurisdiction to adjudicate these matters comes from **Article 162** of the Constitution and the **Children Act 2001**, that is jurisdiction provided and defined by Statute. There seems to be no limitation expressed in the **Constitution** that such jurisdiction once given can be taken away by Executive Order. There are some scholars who would argue that such an action would be an infringement on the independence of the judiciary.

29. The Hierarchy of Laws as commonly understood in order of importance is:

1. The Constitution
2. Statute Law passed by Parliament
3. Subsidiary Legislation through Statutory Instrument
4. Subsidiary Legislation in the form of Practice Directions

In addition **Article 2 CoK** provides;

2 (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.....

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

30. The moratorium in the way it is expressed does not fall within any of those categories. It has not been gazetted per se. There has been no public participation and no engagement with the professionals already involved in Child Protection. In the circumstances, at best the moratorium can only be an executive directive. There have been threats of references by litigants to the Constitutional Court but none have been forthcoming. The Gazetted Notice following the Moratorium provides for obtaining permission from the Expert Committee. Would that be a judicial or administrative act? If it is an administrative act, it is subject to **Article 47** of the Constitution and The Fair Administrative Action Act. If it is quasi-judicial it would be subject to the supervisory jurisdiction of this Court. In any event it no longer exists and lends no assistance for the case currently before this Court.

31. It is unarguable that it is necessary for the various agencies, including the Courts, Children's Services

and other agencies to co-ordinate their resources and chart a long term solution to this impasse, that legal argument does not help this Child. In addition, given the current speed of resolution, it is clear that decisions will not be made in timescales that put the interest of this Child first. In the circumstances, this Court must find a solution, to both the risk of Child trafficking and also the Constitutional Stalemate caused by the Moratorium.

32. For the purposes of ensuring the interests of the Child and according him protection, this Court therefore directed the filing of an Opinion from an Advocate from India on the status of adopted children in India. That Opinion sets out the obligations of the putative parents as well as the rights of the child. They are consistent with the Law in Kenya.

33. From the written opinion of Adiwitiya Das a Partner in Augustus Law Chambers the Court is satisfied that the Child will be accorded the same protection in law in India as in Kenya. The Court is satisfied that any orders should be made by this Court as it is seized of all the facts and matters. The Court is satisfied that the Adoption Order and its effect will be recognised in Indian law. Further the Court is satisfied that the Child will continue to enjoy the citizenship of his birth but also be entitled to joint citizenship should the need arise. Nevertheless he will be entitled to obtain a visa and if necessary immigration clearance from the Indian High Commission. The Child will be recognised in Indian Law as a Child of the Applicants.

34. In addition, this Court directed the filing of a Supplemental Report from the Little Angels Agency. The applicability if any of the moratorium to the facts of this case. The Conclusion of that Report is that the current application is not an inter-country adoption but a local adoption. However, that conclusion is reached taking one interpretation of the moratorium, that is, a moratorium on “inter-country adoption”. This is not an “inter-country adoption” because the Child will remain in Kenya. However, the earlier wording of the Moratorium used different wording [2]. It used the phrase “moratorium on adoption by a foreigner”. In the only sensible interpretation of that phrase can be that in Kenya foreign nationals cannot adopt Kenyan Children. Leaving aside the question of discrimination, that is an interpretation that this Court also must grapple with before coming to any final order. A further, inescapable anomaly is that the Moratorium does not impact on guardianship orders in any way whatsoever. That provides a means for the trafficking of children from impoverished families without any limitation or regulation by the courts or any other authority The Moratorium expressly applies to adoption, it does not apply to guardianship orders or any other arrangements. Potentially those care place a child at far greater risk of abuse in the scheme of international child trafficking. Following a guardianship order where the family are complicit, a Court can have no control over the child and there is no-one to track the whereabouts of the Child. In this case, where it is about an abandoned child who is adopted, the Adoption Agencies and the Courts can carry out thorough investigations of which records are kept. Also any order can be made conditional on compliance with directions for the protection of the Child. The Court has not had placed before it any evidence or even suggestion that the adoption process did not follow the correct procedures.

35. The Chief Executive Officer (Susan Otuoma) and the Legal Officer (Luciana Natasha) also filed a Third Report on 27th April 2017. It dealt with the issue of the Moratorium. The Report states that, “*The Applicants residence in Kenya for more than three years has the effect of taking the applicant’s adoption out of the category of International Adoptions under Section 162 of the Children Act.*”. However, what of the risk of removal from the jurisdiction? The Recommendations of the Report are that the Court “*grants the adoption orders in favour of the Applicants herein. The adoption is in the best interest(s) of the child*” The Moratorium was originally to be temporary. It was communicated by a Letter of the Adoption Committee of the Ministry of Labour, Social Security and Services, Department of Children’s Services. It sets out the Cabinet decisions on the issue to be:

“1. All individual applications earlier approved by the Adoption Committee up to the month of November, 2014, applicants already placed with children and those undergoing the court process should proceed to conclusion....

36. The Cabinet Secretary has also communicated with the Hon the Chief Justice of the Republic with a view to clarifying the issue for the Judges of the Family Division. It is clear from those communications

that the Moratorium is still in existence. The promised guidelines are not. Nevertheless, the main issue of concern is to protect children from the risk of trafficking in persons and other exploitative and abusive practices. The Letter dated 14th February 2017 states; *“In order to address this problem, the Cabinet approved an indefinite Moratorium on inter country adoption of Kenya children by foreigners and also revoked any licences to conduct inter-country adoptions in Kenya.”*. The Country Coordinator of Children’s Services also conscious of the difficulty presented in relation to foreign nationals who are have been resident in Kenya for a significant period, has asked this Court to give direction on the matter. The terms of the Moratorium and the GNs that followed give no direction whatsoever, on how that anomaly should be resolved.

37. As a consequence, and unfortunately, for this family, the Moratorium means that the Order of this may not be enforceable because it must be approved by the Committee for approval and recommendation. Although, that Committee was disbanded and replaced with a “Steering Committee” there must be someone in the Ministry who has been charged with the decision making process. The Court therefore Orders that a copy of this Judgment be served upon the Cabinet Secretary responsible for the Children’s Services Department whether it is known as the Ministry for Labour and Social Security and Services or the Ministry of East African Community, Labour and Social Protection or any other name. The Committee charged with the responsibility for assessment and approval, if such exists also to be served.

38. The Court having been satisfied that all the legal requirements for a local adoption under the **Children Act (Cap 141)** have been met. The Court is satisfied that Adoption is in the best interests of this Child. The Court is satisfied that the Applicants will provide the Child with the appropriate care and they understand that adoption is permanent and the Child will inherit from them. The Court is satisfied that there are safeguards in place to protect the Child in the long term.

39. This Court is satisfied that it has jurisdiction to make an adoption Order and the facts of the Case justify the making of an adoption order. The Court is therefore minded to make the Order that:

- a. The Applicants SM and MC be and are hereby authorised to adopt Baby PM aka Baby P and the Child will henceforth be known TM
- b. The Registrar-General be and is hereby ordered to make the appropriate entries in the Adopted Children’s Register in respect of Baby PM/TM
- c. Baby PM/TM was born in Kenya and is presumed to be a Kenyan Citizen by birth, and he is entitled to a Kenyan Passport.
- d. The Order is Stayed pending a Decision from the Cabinet Secretary for Labour etc and the Committee and/or Task Force Under him.

IT IS FURTHER ORDERED that:

- e) The Applicant’s shall take all necessary steps to ensure that this Adoption Order is registered in the High Court in India so that the judgment is recognised and the Child is given his rights under the law of that Country;
- f) The Applicants are forbidden from removing the Child from the Jurisdiction Without the express leave of this Court. Leave will be granted on application with supporting evidence.
- g) Until a definitive answer has been received from the Cabinet Secretary, the Applicants are forbidden from removing the Child from the Jurisdiction of this Court without the express leave of the Court. This requirement to have a penal notice applied.
- h) The CID are directed to liaise with the appropriate authorities in India and Tanzania t and obtain a report on the Applicants to confirm whether they have a criminal record in either of those two jurisdictions.

i) Leave to Appeal is granted, if necessary. This Matter is certified as being of general public importance.

j) In the event that the Ministry and/or Committee does not respond to the Applicants within 90 days of service, this File is to be referred to the Constitutional Division for an advisory opinion on the validity and constitutionality of an indefinite moratorium on adoption by “foreigners”.

k) The Applicants be and are hereby granted liberty to apply for the matter to be referred to the Constitutional Court and/or for further consideration.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered, signed and dated this 21st day of July 2107

In the Presence of:

Patrick Mwangi

Mr Odhiambo Counsel for the Applicants

[\[1\]](#) Letter dated 14th February from Ministry of East African Community Labour and Social Protection

[\[2\]](#) Letter to Children Services 27 November 2014