REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 164 OF 2014

REPUBLIC .....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF

LABOUR, SOCIAL SECURITY & SERVICES.....2ND RESPONDENT

AND

LAW SOCIETY OF KENYA .....1ST INTERESTED PARTY

KENYAN TO KENYANS PEACE

INITIATIVE ADOPTION SOCIETY .....2ND INTERESTED PARTY

LITTLE ANGELS NETWORK.....3RD INTERESTED PARTY

KENYA CHILDREN'S HOME

ADOPTION SOCIETY.....4TH INTERESTED PARTY

BUCKNER KENYA ADOPTION SERVICES.....5TH INTERESTED PARTY

CHILD WELFARE SOCIETY OF KENYA .....6TH INTERESTED PARTY

BENEAH OTIENO ONYANGO.....7TH INTERESTED PARTY

JENNIFER WANJIKU KANUSU.....8TH INTERESTED PARTY

ANNE NUNGARI THAIRU.....9TH INTERESTED PARTY

BABY J & 219 OTHERS (Suing through

TITUS NYORO as next friend) .....10TH INTERESTED PARTY

Ex-parte

CHILD IN FAMILY FOCUS

RULING

1. When the notice of motion application dated 19th December, 2014 came up for hearing on 25th February, 2015 counsel for the Applicant (Child Welfare Society of Kenya) the 6th Interested Party in the substantive judicial review application, informed this Court that the 3rd prayer in the application is the only prayer that remains for the Court's determination. For avoidance of confusion I will henceforth refer to the Applicant as the 6th Interested Party.
2. Through the said notice of motion brought under Section 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and all enabling powers and provisions of the law, the 6th Interested Party in the third prayer asks for an order:

   "THAT pending the filing and hearing of the intended Appeal herein, there be a stay of the judgement/orders of this Honourable Court given on 25th September, 2014."

The application is supported by the grounds on its face and the affidavit of Irene Mureithi, the 6th Interested Party's Executive Director, sworn on 19th December, 2014. It is also supported by a further affidavit sworn by the same Irene Mureithi on 4th February, 2015.

3. At the hearing of the application, it emerged that the Attorney General and the Cabinet Secretary in charge of the Ministry of Labour, Social Security and Services who are the 1st Respondent and 2nd Respondent in the substantive judicial review proceedings are in support of the application. The application was also supported by Beneah Otieno Onyango, the 7th Interested Party; Jennifer Wanjiku Kanusu, the 8th Interested Party; Anne Nungari Thairu, the 9th Interested Party; and Baby J and 219 others (suing through Titus Nyoro as a next friend), the 10th Interested Party.
4. The parties opposed to the application are Child in Family Focus-Kenya, the ex-parte Applicant; the Law Society of Kenya, the 1st Interested Party; Kenyans to Kenyans Peace Initiative Adoption Society, the 2nd Interested Party; Little Angels Network, the 3rd Interested Party; Kenya Children's Home Adoption Society, the 4th Interested Party; and Buckner Kenya Adoption Services, the 5th Interested Party.
5. In summary, the 6th Interested Party's case is that it has filed an appeal against the judgement delivered by this Court on 25th September, 2014 and if the implementation of the judgement is not stayed the appeal would be rendered nugatory. Through the supporting affidavit of Irene Mureithi it is revealed that a Notice of Appeal has been filed and the advocate for the 6th Interested Party was in the process of complying with the other necessary processes for the appeal. She also revealed through her further affidavit that the Record of Appeal had been filed and served on the other parties.
6. Ms Irene Mureithi has in her affidavit stated at length the grounds upon which the appeal is likely to succeed. It is her argument that unless the judgement of the Court is stayed, the 6th Interested Party will be automatically barred from making any arrangements for adoption or dealing with adoption matters. She avers that the 6th Interested Party has for over 45 years carried out adoptions of vulnerable and needy children in Kenya and has never been involved in any cases of child abuse. She argues that the enforcement of the judgement would deny the children whose adoptions are pending and being facilitated by the 6th Interested Party their rights as enshrined under Article 53 of the Constitution of Kenya. She deposes that if the order is enforced it will lead to closure of several children homes and jeopardize the professions of over 500 employees.
7. In support of the application the 2nd Respondent avers that he has also filed an appeal against the judgement of this Court. He deposes that the 6th Interested Party is the only national adoption society which provides free adoption services to parents and children and facilitates adoptions free

of charge. It also provides free training of adoptive parents and training in self representation in court thus making adoptions available to local parents.

8. The Cabinet Secretary avers that the appeal was not lodged immediately as there was delay in obtaining the typed proceedings of the Court. It is his case that since the 90 days suspension granted by the Court had lapsed the enforcement of the judgement would result in untold suffering, trauma and injustice to the vulnerable children in various stages of the adoption process.
9. The Cabinet Secretary avers that the Court orders will affect over 1000 children who are in various stages of the adoption process. He avers that it would be in the best interests of the child if this application is allowed. He reveals that the Government has heavily invested funds, in terms of infrastructure and human capital, in the 6th Interested Party in order to ensure the welfare of the needy and vulnerable children is well taken care of and failing to grant stay would therefore result in a waste of public funds.
10. Mr. Samwel Kazungu Kambi disposes that this Court has jurisdiction to grant the orders sought and that the appeal is arguable as it raises serious matters of law. He avers that he had been advised by the state counsel that a stay order will not prejudice any of the interested parties nor the ex-parte Applicant.
11. Through the affidavit sworn by the 9th Interested Party and filed in Court on 20th January, 2015, the 7th, 8th and 9th interested parties reveal that they have filed in the High Court at Nairobi adoption petition numbers 102 of 2000 and 300 of 2013. They aver that the 6th Interested Party does not charge fees for its services and the welfare of the children will be compromised if a stay is not granted. They depose that halting the adoption process at this stage will highly prejudice the minors who are under the care of the proposed adoptive parents who have used their time, energy and finances to give life to the minors rescued from devastating conditions. They also state that they support the 6th Interested Party's proposed appeal.
12. The 10th Interested Party, Titus Nyoro suing as the next friend of Baby J and 219 others avers that the children on whose behalf he joined these proceedings are at various stages of the adoption process through the 6th Interested Party. He deposes that being dissatisfied with the decision of this Court he had asked his advocate to lodge an appeal. He states that some of the babies had been rescued on the verge of death by the 6th Interested Party and were now with adoptive parents. He deposes that if stay is not granted drastic steps may be taken against the 6th Interested Party without due regard to the welfare of the children who had bonded with their respective adoptive parents. It is his case that a denial of a stay will compromise the children's constitutional rights.
13. Leading opposition to the application is the ex-parte Applicant. Peter Kamau Muthui the Director of the ex-parte Applicant swore a replying affidavit dated 6th January, 2015. In the first place the ex-parte Applicant's Director avers that the 6th Interested Party seeks an extension of the Court's order suspending the judgment and yet the Court had indicated that the suspension of the judgment for 90 days was to enable it to renew its licence with the Adoption Committee. It is the ex-parte Applicant's case that the 6th Interested Party has not shown any reason for extension of the suspension period and has also failed to comply with the Court's judgment. The ex-parte Applicant's director deposes that for stay to be granted, an applicant should demonstrate that it stands to suffer substantial loss if stay if not granted. The application for stay should also be made without unreasonable delay. It is his case that the 6th Interested Party delayed the filing of this matter and has not demonstrated that it would suffer substantial loss if a stay is not granted thus failing the test for grant of stay orders.

14. The 1st ex-parte Applicant's director avers that in view of the purpose for which the suspension of the judgment was given, this application is frivolous, vexations and an abuse of the court process. Further, that the grounds of appeal as enumerated by the 6th Interested Party in the affidavit in support of the application are of no consequence since the suspension orders had not been issued so as to facilitate an appeal but rather so as to facilitate the proper registration of the 6th Interested Party for the benefit of the children under its care. He accuses the 6th Interested Party of dishonesty when it asserts that the enforcement of the judgment may lead to the closure of its children homes saying that Gazette Notice No. 206 of 2013 which was quashed by this Court only

relates to and affects adoptions.

15. On the 6th Interested Party's assertion that enforcement of the judgment may lead to loss of jobs for its employees, the ex-parte Applicant responds that compliance with the Court's judgment is a sure antidote to such catastrophe. On the claim that the adoption cases of the children that are being handled by the 6th Interested Party will stall midstream, the ex-parte Applicant proposes that those cases can be transferred to other adoption agencies as provided by Section 163(2) (b) of the Children Act, 2001. The ex-parte Applicant therefore prays for the dismissal of the application with costs.

16. The 1st Interested Party's grounds of opposition dated 20th January, 2015 are:

> **"1. THAT the application is misconceived, mischievous and an abuse of the court process.**
>
> **2. THAT the applicant having been given sufficient time to comply with the law, no prejudice, substantial loss may result if stay is not granted.**
>
> **3. THAT if the stay is granted the same will offend the express previsions of the Children Act and the Children (Adoption) Regulations 2005.**
>
> **4. THAT the orders sought will offend the national values and principles of governance as provided under Article 10 of the constitution 2010."**

17. The 2nd and 4th interested parties' grounds of opposition dated 3rd February, 2015 are the same with those of the 1st Interested Party and it is therefore not necessary to reproduce them in this ruling.

18. The 3rd Interested Party's grounds of opposition are:

> **"1) THAT application is an abuse of the courts process as a stay of execution of 90 days was already granted when the order was first issued on the 25th of September, 2004 and thus it would be unprocedural to seek further extension.**
>
> 2. **THAT the Applicant has failed to show any compliance with the court orders dated 25th September 2014 by failing to show any progress with regard to their registration as required by the Children Act.**
>
> 3. **THAT if the extension of the stay order is granted, the same will be in direct contravention of the provisions of section 177 (1) of the Children Act.**
>
> 4. **THAT the Applicant did not adhere to the High Court Vacation Rules by not applying for leave of court for the application to be heard during court vacation."**

19. Dickson Masindano, the 5th Interested Party's Chief Executive Officer swore an affidavit dated 22nd January, 2015 in opposition to the application. The 5th Interested Party's argument is that the 6th Interested Party was given sufficient time to regularize its position and the application before this Court was filed late in the day. To show that the 6th Interested Party did not move this Court in good time, the 5th Interested Party asserts that the Court registry had the proceedings and judgment ready for certification by 4th December, 2015 but the 6th Interested Party decided to move the Court for stay fifteen days later. The 5th Interested Party also cites the fact that the 6th Interested Party approached this Court six days to the lapse of the suspension period, to support its assertion that the 6th Interested Party was not keen on implementing the Court judgement. It is the 5th Interested Party's case that the 6th Interested Party has not demonstrated that it would suffer any substantial loss if stay is not granted.

20. On the 6th Interested Party's assertion that it may be forced to close down its children homes if the

judgment is implemented, the 5th Interested Party dismisses this as false since the 6th Interested Party had operated normally prior to being granted an exemption by the 2nd Respondent in October, 2013. Further, that the cases for the children whose adoption processes are being handled by the 6th Interested Party can be transferred to other adoption agencies as has been the practice in the industry.

21. It is the 5th Interested Party's argument that all adoption agencies are treated equally and the application by the 6th Interested Party is meant to water down the order of the Court which was meant to enforce the rule of law. The 5th Interested Party wonders why the 6th Interested Party cannot comply with the law yet its reach is like that of the 5th Interested Party which has fully complied with the law. In the 5th Interested Party's view, rejecting the application will serve the best interests of the child as dictated by Article 53 of the Constitution.

22. In response to the arguments of those opposed to the application, Irene Mureithi, the Executive Director of the 6th Interested Party swore a further affidavit on 4th February, 2015. She avers that the 6th Interested Party was dissatisfied with the entire judgment and that is why it had opted to exercise its right of appeal as provided in the Constitution of Kenya and this has nothing to do with the suspension of the orders by the Court. She deposes that failure to comply with the judgement of the Court does not disentitle the 6th Interested Party to the right of appeal as suggested by the ex-parte Applicant. She avers that the 6th Interested Party filed a Notice of Appeal on 2nd October, 2014 and requested for certified copies of proceedings and related documents on 6th October, 2014. On 5th December, 2014, the Court wrote to the 6th Interested Party indicating that the proceedings were ready for collection and a certificate of delay was subsequently issued on 17th December, 2014. She reveals that the Record of Appeal was duly filed on 30th January, 2015 and this shows that the 6th Interested Party was diligent in pursuing the appeal. It is her case therefore the process of appeal was commenced without undue delay.

23. On the ex-parte Applicant's assertion that her organization delayed in seeking an extension the suspension order, Irene Mureithi avers that an application for extension of the suspension order could not have been made before the expiry of the order and that the application was made in good time as it was made six days prior to the lapse of the order.

24. On the suggestion by the ex-parte Applicant and the 5th Interested Party that no harm will be occasioned to the children whose adoptions are being handled by the 6th Interested Party as their cases can be transferred to other adoption societies, Irene Mureithi asserts that the suggestion is not practical given the number of children involved and further that such action would traumatize the children which would not be in their best interests. She wraps up the 6th Interested Party's case by asserting that the opponents of the application will not suffer any prejudice if stay is granted but the 6th Interested Party would suffer substantial loss as its right of access to justice will be irreparably hampered if a stay is not granted.

25. The parties also filed written submissions to buttress their positions. I need not restate the arguments in the submissions as I will consider them in the process of making my decision.

26. The 3rd Interested Party submitted that this Court has no jurisdiction to stay an order of mandamus. It is the 3rd Interested Party's case that such an order can only be issued by the Court of Appeal. On the part of the 6th Interested Party it was, however, argued that an order of stay pending appeal is available in judicial review proceedings. In support of the 6th Interested Party's position, the decision of G.V. Odunga, J in **Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji [2014] eKLR** was cited. In that case the learned Judge opined at paragraphs 34 and 35 that:

> **"34. It was contended that by virtue of sections 8 and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya, once the Court finally determines the application for judicial review, the only option available is that of appeal and the Court cannot revisit the said matter by way of a stay of the decision as that would amount to reversal of the final decision. With respect, this position in my view is nolonger tenable. In Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011], the Court of Appeal held that**

the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the *Civil Procedure Act* which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same. In Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675 it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. This was the position in Equity Bank Limited vs. West Link Mbo Limited [2013] KLR in which Musinga, JA held that inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate and that inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.

35. **In my view the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers. It is therefore my view that where the orders granted by the High Court be it in judicial review proceedings or civil proceedings are capable of being executed, the same are amenable to stay of execution. I gather support for this position from the decision of the Court of Appeal in Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 (CAK) [2002] 2 EA 572, where the Court of Appeal granted a stay in respect of a matter that arose from a judicial review application. In that case the High Court ordered the University to "*convene the necessary Disciplinary Committees where the students concerned shall be tried, paying attention to the matters raised in this ruling*." The Court of Appeal noted that there was no prayer before the Court for an order of mandamus to warrant the grant of the said order. The Court recognised that whereas the High Court could properly quash the decision of the University whether it could direct the University in the manner of proceedings thereafter was an arguable point and unless the stay was granted the students risked being expelled or suspended at the hands of the University acting in obedience to the said order. It is therefore my view that where the order being appealed from is capable of being executed over and above the order for costs, stay of execution may be granted."**

I agree with the learned Judge that this Court has inherent jurisdiction to do that which is just including issuing an order staying its judgement pending appeal. The 6th Interested Party seeks stay of execution of a judgement that is likely to affect its operations and as pointed out by G. V. Odunga, J, this Court has the authority to grant appropriate relief. The argument of the 3rd Interested Party that this Court has no jurisdiction to grant a stay of its judgment pending appeal therefore fails.

27. The legal field is flooded with decisions giving guidance on the question of stay pending appeal. The advocates in this matter generously provided the Court with decisions by other courts. I will quote a few of those decisions for purpose of record. In **Kenya Shell Limited v Kibiru & another [1986] KLR 415,** the Court of Appeal (Platt, Ag JA) commenting on the importance of establishing that substantial loss will be suffered if stay is not granted, opined at page 416 that:

"It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."

28. F. Gikonyo, J emphasized this point when he stated at paragraph 10 in **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR** that:

"The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of ''the appeal will be rendered nugatory'', the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process. That is why I stated in BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER v AGNES NALIAKA CHESETO that:

''The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...''

In line with the observation of F. Gikonyo, J I would hold that an applicant would suffer substantial or irreparable loss if upon succeeding on appeal, the decision of the appellate court can no longer be implemented as the judgment appealed from was executed and the execution is irreversible.

29. It is no longer enough in a case involving a monetary decree to hold that a respondent is fiscally sound and can refund the money if the judgment is reversed on appeal. The difficulty that an applicant will suffer if the judgment is executed should also be taken into account. That was the opinion of the Court of Appeal in **Oraro & Rachier Advocates v Co-operative Bank of Kenya Limited [2000] eKLR** when it stated that the claims of both sides must be weighed and where the balance of convenience favours an applicant then stay ought to be granted even if the liquidity of the respondent is not in doubt. The decision in **Oraro & Rachier Advocates (supra)** was restated by the Court of Appeal in **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227** where the Court stated that the factors that could render the success of an appeal nugatory had to be considered within the circumstances of each particular case.
30. Coming back to the case before me, I do not find it appropriate to consider whether the 6th Interested Party has an arguable appeal. In the papers filed in Court, the 6th Interested Party argues that it has an arguable appeal. The other parties supporting the application were of the opinion that there is indeed an arguable appeal against the judgement of this Court. The parties who are opposed to the application did not directly, and in my view correctly so, comment on whether the 6th Interested Party's appeal is arguable. It is difficult for me to gauge whether there is an arguable appeal from a decision that I came up with after a full engagement of my legal mind. On the other hand, no judicial officer should consider his or her legal opinions infallible. The best person to make a decision on this issue is the one tasked with hearing the appeal. In this regard G. V. Odunga, J stated at paragraph 42 in **ex-parte Diamond Hashim Lalji (supra)** that:

"It was however argued that since the applicants have not shown that their appeal is arguable this Court ought not to grant the orders sought. On this issue I agree with the applicants' view that under Order 42 rule 6 aforesaid it is not a condition for grant of stay that the applicant satisfies the Court that its appeal or intended appeal has chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so."

Whether or not the 6th Interested Party has a strong appeal will not be the deciding factor in this matter.

31. Before I proceed to make my decision on the application, I must comment on the arguments of the ex-parte Applicant and 1st to 5th interested parties to the effect that allowing the application would allow the 6th Interested Party to operate outside the law. They also argue that the 6th Interested Party is seeking to extend the suspension of the judgment instead of seeking registration with the Adoption Committee as directed by the Court. In my view, these arguments are fully answered by the fact that the 6th Interested Party does not seek to extend the suspension of the judgement but is asking for a stay of judgement pending appeal.
32. Secondly, the 6th Interested Party has correctly pointed out that the right of appeal is a constitutional and statutory right and it cannot therefore be criticised for exercising that right and neither can it be made to feel guilty for not seeking renewal of its adoption licence. I find that the 6th Interested Party has correctly exercised its right of appeal and an order of stay of judgment is available to it, if deserved. The 6th Interested Party seeks a stay of a judgment and the application for stay is not premised on the contents of the judgement but will solely be decided based on the arguments of the parties as to whether a stay ought to be granted. The fact that the Court held that the Cabinet Secretary erred in excluding the 6th Interested Party from certain provisions of the Children Act does not mean that this Court cannot stay that decision. Denying stay on such footing would mean that the Court has decided that its decision cannot be appealed from.
33. I will now move to the application proper. One of the grounds in opposition to the application is that there was delay in filing the application. In my view, what amounts to undue delay would depend on the circumstances of each case. The evidence placed before this Court shows that the 6th Interested Party filed a Notice of Appeal and applied for certified copies of proceedings almost immediately the judgment was delivered. This application was filed almost three months after the judgement had been delivered. I agree with Mr. Mwenda for the 1st Interested Party that in considering whether there was a delay in filing the application, the Court should compute time from the date of the delivery of judgement on 25th September, 2014. The question would therefore be whether filing this application close to three months after the delivery of the judgment amounts to undue delay. I do not think so.
34. The 6th Interested Party had done all it was required to do in so far as its appeal was concerned. The judgment had been suspended and it was not suffering any harm. The ex-parte Applicant and the 1st to 5th interested parties were not prejudiced by that state of affairs. I therefore find that, in the circumstances of this case, the application was brought within a reasonable time.
35. The next question is whether if stay is not granted the 6th Interested Party will suffer irreparable loss. In my view the 6th Interested Party will not suffer any irreparable loss if stay is not granted. The ex-parte Applicant and the 1st to 5th interested parties will also not suffer any irreparable loss. In public interest litigation, like the one before this Court, the underlying presumption is that the proceedings are commenced in utmost good faith for the benefit of the public at large. It is assumed that the ex-parte Applicant commenced this matter as a missionary of justice keen on the maintenance of the rule of law. If that be so, then the ex-parte Applicant will not suffer any prejudice if the application for stay is allowed. The application will therefore not be decided on the issue of substantial loss. As correctly pointed out by the opponents of the application, the 6th Interested Party does other things apart from adoptions and it will not fold up tomorrow if it is locked out of the adoption arena. It prides itself in doing great things for children and it can continue doing those things as it pursues its appeal. Even the 1st and 2nd respondents will not gain or lose anything whichever way this application goes.
36. In this case the issue of provision of security is not required. This case does not involve a monetary decree and neither was costs awarded to any of the parties.
37. In this case, however, there some important parties whose voices may be drowned by the cacophony of legal arguments. The 7th, 8th and 9th interested parties can speak for themselves. They can wait for the outcome of the appeal or ask the Court to allow them to conclude the adoption process using other adoption agencies. However, Baby J and the 219 other children do

not have such luxury and this Court in deciding where the balance of convenience tilts must have these children in mind.

38. The evidence presented to the Court is that the children whose adoptions are being handled by the 6th Interested Party will greatly suffer if the judgement of this Court is not stayed. The parties opposed to this application argue that the cases of these children can be transferred to other adoption agencies. The 6th Interested Party, the 2nd Respondent and the 7th to 10th interested parties all submitted that the 6th Interested Party does adoptions for free. This submission was not rebutted. It would therefore be expensive and even traumatic to transfer all the children whose adoptions are being handled by the 6th Interested Party to other adoption agencies. In considering whether or not to stay the judgement the Court must take into account what is best for these children. In the case before me, I agree with the 6th Interested Party that the interests of these children will be best taken care of if they are left undisturbed.

39. Counsel for the ex-parte Applicant urged, that if I am to grant stay, then I should impose conditions. He suggested that one of the conditions should be to bar the 6th Interested Party from taking up new adoption matters. This sounds like a reasonable condition but on reflection, I think that it should not be imposed. If Baby J and the other children whose adoptions were being handling by the 6th Interested Party can benefit from a stay of this Court's judgement, then I do not see why any other child or adoptive parent should not benefit from the services of the 6th Interested Party. I will therefore not impose any conditions on the stay.

40. At this point, it should be clear to all that the balance of convenience is in favour of granting a stay of the Court's judgement. Consequently, the third prayer of the 6th Interested Party's application dated 19th December, 2014 is allowed as prayed. As I did not award any costs in the main proceedings, I will also not award any party any costs in respect of this application. Each party will therefore meet their own costs in regard to the application.

Dated, signed and delivered at Nairobi this 6th day of March , 2015

W. KORIR,

JUDGE OF THE HIGH COURT