REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

ADOPTION CAUSE NO. 123 OF 2015 (OS)

IN THE MATTER OF THE CHILDREN ACT NO. 8 OF 2001

AND

IN THE MATTER OF BABY K.R.

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION BY

K E R

AND

C D R

RULING

1. The applicants K E R and C D R are a married couple who are Swedish citizens. They have applied to adopt baby K.R. On 5th June 2015 this Court gave an order appointing B O to be guardian *ad litem* of the Baby. It was directed that both the guardian *ad litem* and the Director of Children's Services do each file a report within 45 days on the suitability of the applicants as adoptive parents. Rose Mbanya, counsel for the applicants, extracted the order and when she went to serve the Director of Children's Services he refused to receive it. He cited, as reason for refusing to accept service, a directive from the Principal Secretary of the Ministry of Labour, Social Security and Services ("R.M.2") that was communicating a **"Moratorium on Inter-Country Adoption of Kenya Children"** that was declared on 27th November 2014 by the Cabinet. The Cabinet approved an indefinite moratorium on inter-country adoption of Kenya children by foreigners, and also revoked all licences to conduct adoptions in Kenya with immediate effect. The decision was informed by:-

   > **"Kenya's ranking by the Global Report on Trafficking in Persons 2014 that cited Kenya as a source, transit and destination country in human trafficking."**

2. Following the moratorium, the Cabinet Secretary for Labour, Social Security and Services published Gazette Notice No. 1092 of 20th February 2015 establishing and appointing an Expert

Committee to Review and Develop a Detailed Policy and Legal Framework to Regulate and Manage Child Adoptions in Kenya. The Notice revoked the appointment of the National Adoption Committee.

3. Counsel swore a supporting affidavit to state that on 18th November 2014 the National Adoption Committee approved the applicants as being suitable prospective parents to adopt one child aged 12 months and above at the time of placement ("R.M.3"). The Committee issued a certificate (it is annexed) to the effect. The Director of Children's Services (who is the Secretary of the Committee) informed Kenya Children Home (The Adoption Society) that was processing the applicants request to adopt the child. The applicants, based on the approval, left Sweden and their place of work and came to Kenya where they have been fostering the child for the last five months. The child has bonded with them and looks at them as its parents. In granting the approval, counsel went on to state, the Committee considered the reports about the applicants from the Family Affairs Unit, City of Stockholm, Sweden. The applicants' case is that, by refusing to provide the directed report, the Director of Children Services has made it difficult for the process of adoption to continue to conclusion; and that it is unfair and unjust, both to the child and to the applicants, to stop this process midstream. Counsel went on that, what the Director of Children's Services is doing is causing hardship, economic strain and visa complications to the applicants, and that the failure to process the report is not in the best interests of the child. It was emphasised that under the **Children Act**, the requirement for the report is not mandatory. It is only a discretionary requirement that has since become the practice of the court conducting an adoption request. It is because of these difficulties that the applicants seek that the demand for the filing of the report be dispensed with to enable the adoption process proceed to the next level.

4. I have considered this application anxiously. 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. Under **section 4(2)** and **(3)** of the **Act** it is provided 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 interests 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."

5. Further, under **Article 53 (2)** of the Constitution f Kenya 2010:-

> **"A child's best interests are of paramount importance in every matter concerning the child**."

6. In **HZ (Tanzania)(FC) –v- Secretary of State for the Home Department(2011) UKSC 4**, the Supreme Court of England was dealing with the question of what it should consider as constituting the best interest of the child where it is claimed that it is a primary consideration. It stated as follows:-

> **".....Where the interests of the child favour a certain course, the course should be followed unless countervailing reasons of considerable force displace them....."**

7. **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 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. The **Act** does not specifically provide for the report that the court sought from the Director of Children's Services in the order subject of this application. However, there has been a long-standing practice that before an international adoption order is made the Director will conduct an inquiry regarding the suitability of the applicant to adopt and file a report. This is really superfluous, in view of the approval by the Adoption Committee which is housed in this Ministry, and the fact that the Director is the Secretary to the Committee. But this has been found to be necessary precaution given that under **section 38** of the **Act** the Director is the one charged with the function of safeguarding the welfare of children. **Section 38(2)(g)** provides that the Director shall:-

> **"make such inquiries and investigations and provide such reports and assessments as may be required by any court or for the enforcement of any order made by a court under this Act."**

So that, once the court issued an order to the Director to inquire into the suitability of this adoption this became a statutory obligation from which he was not going to resile. It was not open to the Director to hide behind the cabinet moratorium, or the Gazette Notice. These two were certainly inferior to the order which had a statutory basis. Secondly, the Government of Kenya had through the Director of Children's Services and the National Adoption Committee committed itself to this adoption. It had made representation to the applicants and the child that it was supporting this adoption. It had cleared and approved the applicants. It had allowed the applicants to come to Kenya from Sweden to stay and bond with this child. It cannot, without reasons that are based on the **Children Act 2001**, resile from this commitment. The best interests of the child would not be served by this kind of conduct.

8. These are the reasons why I allow the application dated 24th June 2015. I order that the report by the Director of Children's Services be dispensed with.

DATED and DELIVERED at NAIROBI this 15th July 2015.

A.O. MUCHELULE

JUDGE