



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

ADOPTION CAUSE NO. 88 OF 2015

BABY SN alias BABY J THE CHILD

BY

RHJT..... 1ST APPLICANT

AND

SIT..... 2ND APPLICANT

RULING

1. The application for determination is the Chamber Summons dated 29th June 2015, where the applicants, RHJT and SIT, seek two principal orders – that the assessment by the Director of Children Services, Ministry of Labour Social Security and Services be dispensed with and that the Originating Summons be certified ready for hearing.

2. In their joint affidavit sworn on 29th June 2015, the applicants aver that the guardian *ad litem* and the Director of Children Services had been ordered on 8th May 2015 to investigate them and thereafter file reports. The guardian *ad litem* is said to have complied with the order, but not so the Director of Children Services, who has declined to accept service of the order citing the moratorium on foreign adoptions by the Cabinet. The applicants concern is that the delay in having the assessment done by the Children's Services Department is likely to expose them to hardship. They state that the assessment by the Director is not even a mandatory requirement, being a matter at the discretion of the court. They urge the court in the spirit of the principle of the best interests of the child to dispense with the assessment by the Director.

3. To that affidavit they have attached an affidavit of service in respect of the service of the order on the Director. The deponent of the affidavit is a process server called Paul Maina Kairu. He swore the affidavit on 29th June 2015. He depones that he collected the formal order from the court's registry, it was signed by the registrar on 27th May 2015, on 5th June 2015. When he visited the offices of the Directorate of Children Services he found them locked and he was not able to access them until 16th June 2015 when he found a Children's Officer who declined to accept service on the basis of the ban by the Cabinet on foreign adoptions.

4. The application was filed under Certificate of Urgency on 1st July 2015. It was placed before Muchelule J. on 3rd July 2015, who certified it urgent, directed its service on the Director of Children Services and fixed it for *inter partes* hearing on 10th July 2015.

5. The matter was placed before me on 10th July 2015. In attendance before me were Mr. Kamenju, advocate for the applicants, the applicants themselves, the child the subject of the proceedings, and the guardian *ad litem*, Sabina Mutuku. The Director of Children Services was absent, despite service. There is an affidavit of service on record, sworn on 6th July 2015, and filed herein on 4th July 2015. The deponent is Mr. Kamenju, he deposes that he served the application on the 6th day of July 2015 on the Director of Children Services, who, through a receptionist at his office, accepted service and duly stamped a copy of the application duly returned to court.

6. Counsel for the applicants filed skeleton submissions on 1st July 2015, dated 29th June 2015, although unsolicited. The oral arguments he presented before me on 10th July 2015 were essentially highlights of the said skeleton submissions.

7. I have considered the papers filed herein by the applicants as well as the skeleton submissions and the oral arguments by counsel. The problem that has beset these proceedings stems from an alleged Cabinet decision to put a moratorium on foreign adoptions. A copy of the decision has not been placed before the court, but the same is a matter of common knowledge. The issue for me to determine is whether such a Cabinet decision can stop the court from proceeding with a matter that has been placed before it.

8. I had directed the Director of Children Services to assess the applicants on their suitability to adopt the child in question. He was to do so within forty five (45) days. He has not done so, yet the order is still in force as it has not been varied, vacated or set aside. The 45 days given in the order have expired. There is obviously non-compliance with it. The circumstances no doubt expose the Director to citation for contempt of court.

9. I am told that the Director's reluctance to comply with the order has something to do with a Cabinet decision to ban foreign adoptions or at any rate to suspend them for the time being. As indicated elsewhere a copy of the said decision has not been placed before me; but it is a matter that has come to my knowledge in the ordinary course of my judicial duties. The Directorate of Children Services is an office within the Executive, and it would seem the Director is wary of appearing to be disobeying orders and directions from his superiors.

10. Be that as it may. The applicants had stated the process of adoption in 2013. The Kenya National Adoption Committee, where the Director of Children Services serves as Secretary, on 22nd July 2014 approved the applicants' application to adopt a child in Kenya. The decision of the committee was communicated to the Kenya Children's home by the Director of Children Services *vide* a letter dated 1st August 2014. The decision conveyed was that the committee had found the applicants to be suitable prospective adoptive parents. A certificate of approval was duly issued to them, dated 19th August 2014, signed by, among others, the Director of Children Services.

11. Armed with the approval dated 19th August 2014, the applicants travelled to Kenya from Europe. On 1st January 2015 they received the child the subject of these proceedings for the mandatory three (3) months bonding period. They have been with the child since. When three (3) months expired, they came to court, on 6th April 2015, and initiated the present cause. On an application dated 13th April 2015 they obtained orders for appointment of a guardian *ad litem* and for assessment of the applicants by the Director of Children Services.

12. Adoptions in Kenya are carried out on the basis of the legal framework provided by the Children Act. The provisions of the said Act relating to adoptions, both local and foreign, are still in force. The provisions have not been repealed nor their application or operation suspended. At least no material has been placed before me to the effect that the alleged Cabinet moratorium had that effect. Without the suspension of the said provisions, this court still has jurisdiction to hear and determine adoption causes.

13. The jurisdiction exercisable by the High Court with regard to adoptions is conferred by Section 154 of the Children Act. It does not derive from a Cabinet paper or instrument. Such jurisdiction can only be

taken away by Parliament through an amendment or suspension of the provisions of the Children Act, it cannot be taken away by a decision of the Cabinet. Such Cabinet decision perhaps only affects certain Executive organs and offices. The said moratorium in issue does not affect judicial functions and the jurisdiction conferred on this court by the Children Act with respect to adoptions remains intact. This court therefore has jurisdiction to hear and finally determine the adoption cause before it.

14. The application before me invites me to dispense with the assessment by the Director of Children Services. This is really an invitation to vary the order made on 8th May 2015 directing the Director to assess the applicants. The application is no doubt informed by the events that I have alluded to in the foregoing paragraphs. The question then is whether the assessment by the Director can be dispensed with.

15. The office of the Director of Children Services is established under Section 37 of the Children Act. He is principally assisted by the Children Officers envisaged in the same provision. His functions are set out in Section 38 of the Act, essentially to safeguard the welfare of children.

16. The provisions governing adoptions are in Part XII of the Children Act, running from Sections 154 to 183 of the Act. The provisions specific to foreign or international adoptions are in Sections 162. Under the entire Part XII of the Act, there is no requirement that the Director of Children Services should assess the prospective adoptive parents of their suitability to adopt. Specifically, there is no such requirement under Section 162 of the Act which deals with foreign adoptions. The only assessment that is made mandatory under the provisions of the Act, specifically by Section 160 thereof, is that by the guardian *ad litem*.

17. The court in proceedings relating to adoptions has made it a practice to involve the Director of Children Services, by requiring him to assess the applicants and thereafter appraise the court on the applicants' suitability to adopt. This the court does without it being demanded or required by the law. Adoptions are very sensitive. They touch the very core of the life and existence of the child involved. They touch on certain very fundamental rights of the child as it involves the uprooting the child from one environment and planting him in another. They fundamentally change the circumstances of the child for ever, for better or for worse. Consequently, adoptions ought to be a matter of public interest. The Director of Children's Service is a public officer, and that being the case, he represents public interest. The courts therefore drag him into the adoption process purely so that he can protect public interest in the said cases, which for all practical purposes are matters in the realm of private law.

18. In the present case the Director has ostensibly refused to play the public watchdog role that the court has assigned him. Yet, there is a child involved. He is stuck with the applicants, and bonding must no doubt happen for as long as he continues to live with them. The circumstances of the applicants also merit consideration. They came to Kenya from their home country in Europe for this adoption process. They stopped working and put their lives on hold for that purpose. They are here incurring considerable expense just so that they can see the process through. Should they be held at ransom over an assessment that is not even mandatory?

19. Section 4 of the Children Act enjoins me to act in the best interests of the child, so does the fundamental law, the Constitution of Kenya at Article 53(2). It is not in the best interests of the child for him to be in a limbo – to be stuck in adoption proceedings that are in abeyance because the Director of Children Services has refused to comply with a court order.

20. In view of everything that I have said, I do find merit in the application dated 29th June 2015. I do allow the same in terms of prayers 1 and 2 thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 8TH DAY OF SEPTEMBER, 2015.

W MUSYOKA

JUDGE

In the presence of.....advocate for the applicants.