



**In re DN (Child) (Miscellaneous Application 96 of 2015)
[2015] KEHC 6959 (KLR) (Family) (15 October 2015) (Ruling)**

In re D N (Child) [2015] eKLR

Neutral citation: [2015] KEHC 6959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION 96 OF 2015
AO MUCHELULE, J
OCTOBER 15, 2015
N THE MATTER OF THE CHILDREN ACT NO. 8 OF 2001
AND
IN THE MATTER OF CHILD D.N.
AND
IN THE MATTER OF AN APPLICATION BY**

IN THE MATTER OF

MMN 1ST APPLICANT

MMK 2ND APPLICANT

An adoption order is permanent and irrevocable

The birth parents of a child who had been adopted and an adoptive order issued sought to reverse/revoke the adoption order. In the alternative they sought orders for guardianship of the child should the adoption order not be reversed or revoked. The court held that an adoption order was permanent and irrevocable, except where there was proved fraud, material procedural irregularity or the existence of exceptional reason. On guardianship, the court held that a guardian only assumed parental responsibility for the child upon the death of the parent. In the case of adoption, the court had the power to appoint a guardian for the child, in the case where the adoptive parents died or became incapacitated before the child was of full age

Reported by John Ribia

Children Law – adoption – adoption order – reversal or revocation of an adoption order - whether an adoption order could be reversed - what were the circumstances under which an adoption order could be reversed or revoked -, sections 168 and 171; (repealed).



Children Law – adoption – adoption order – guardianship – application for guardianship by a child’s birth parents where the court had already issued an adoptive order to adoptive parents - whether a guardianship order can be granted on top of an existing adoption order - when would a guardian assume parental responsibility for an adopted - , section 103.

Brief facts

The birth mother of a child gave up her child for adoption by the child’s grandmother. Later on the birth mother wedded and together with the spouse they sought to relocate from Kenya to the United Kingdom. They sought to travel with the child. They applied for the court to revoke or reverse the earlier issued adoption orders or in the alternative to grant them guardianship over the child.

Issues

- i. Whether an adoption order could be reversed.
- ii. What were the circumstances under which an adoption order could be reversed or revoked?
- iii. Whether a guardianship order can be granted on top of an existing adoption order
- iv. When would a guardian assume parental responsibility for an adopted?

Held

1. The effect of section 171 of the was that upon an adoption order being made all rights, duties, obligations and liabilities of the biological parents as concerns the child were extinguished. All those rights, duties, obligations and liabilities were placed in the hands of the adoptive parents who shall deal with the child as if it was born to them.
2. Section 168 of the provided for amendment of the adoption order made under the (repealed) to correct a defect in the particulars contained therein, to insert the country of birth of the adoption person, to insert the adopted persons date of birth or to cancel an entry in the Register of Births and an entry in the Adopted Children Register where an adoption order was quashed or an appeal against the adoption order was allowed. There was otherwise no provision for the reversal or revocation of an adoption order.
3. An adoption order was permanent and irrevocable, except where there was proved fraud, material procedural irregularity or the existence of exceptional reason. No fraud, material procedural irregularity or exceptional reasons had been proved in the instant case. The 2nd applicant had not claimed that she did not consent to the adoption, or that she did not understand the nature and effect of the adoption order. She was not saying that she did not understand or appreciate the fact that the order was permanent and irrevocable.
4. Under section 103 of the where one parent died, the surviving parent shall be the guardian of the child either alone or jointly with the guardian appointed by the court. Under section 164 the court would, following adoption, appoint a guardian to take care of the child in the event that the adopter died or became incapacitated before the child was of full age.
5. A guardian only assumed parental responsibility for the child upon the death of the parent. In the case of adoption, the court had the power to appoint a guardian for the child, in the case where the adoptive parents died or became incapacitated before the child was of full age. The appointment of a guardian made under section 164 could be revoked at any time before the child was of full age, and another guardian appointed. In the instant case a guardianship could not be granted on top of the adoption order.

Application dismissed.

Citations

Cases

United Kingdom

1. *In re B (Adoption: Jurisdiction to Set Aside)* [1995] FAM 239, CA; [1995] EWCA Civ J0317-3 - (Explained)



2. *In re M (A minor) (Adoption)* [1991] 1 FLR 458, CA - (Explained)

Australia

Re Susan [2009] NSWSC 592 - (Explained)

Texts

Lowe, NV., Douglas, G., (Eds) (2005), *Bromley's Family Law* Oxford: Oxford University Press 10th Edn

Statutes

Kenya

1. Adoption Act (Repealed) (cap 143) In general - (Cited)
2. Children Act, 2001 (Repealed) (Act No 8 of 2001) section 171- (Interpreted)
3. Children Act, 2022 (Act No 29 of 2022) section 102, 103, 164, 168- (Interpreted)

United Kingdom

Adoption and Children Act, 2002 In general - (Cited)

Australia

Adoption Act, 2000 section 93(4)(b)- (Interpreted)

Advocates

None mentioned

RULING

1. On June 8, 2001 in the Chief Magistrate's Court at Nairobi Adoption Cause No 13 of 2001 the child DN was adopted by her grandmother VK. The adoption was issued under the [Adoption Act](#), cap 143 (now repealed). The child's mother MMK (2nd applicant) gave consent to that adoption. She is the daughter of VK. On August 29, 2012 the 2nd applicant got married to MMN (1st applicant) at the Registrar of Marriages office in Machakos. The couple resides in the United Kingdom. They are Kenyans. They want to take the child to the UK to stay with her. They state that for them to relocate the child to the UK they would require a guardianship order from the court. This is why on December 18, 2014 they applied in the Children's Court to be appointed the legal guardians of the child. The court asked them to come before this court for the court to interpret:-

“if a guardianship order can be granted on top of an adoption order, and to address the issue as to whether or not the adoption order can be reversed/revoked, given the circumstances of this case.”

2. Mr Onyango appeared before me with the child, the applicants and the child's adoptive mother. I have considered his submissions.
3. The first question is whether an adoption order can be reversed/revoked. Section 171 of the [Children Act](#) No 8 of 2001 is clear on the effect of an adoption order. It provides that:-

“(i) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child, including all rights to appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the child were a



child born to the adopter inside marriage and in respect of the matters aforesaid the child shall stand to the adopter as a child inside marriage.”

4. In *Bromley’s Family Law*, 10th Edition, at page 817 adoption is referred to as:-

“ the process by which a child’s legal parentage is entirely and irrevocably transferred from one set of adults, usually the birth parents, and vested in other adults, namely adoptive parents. It involves the complete severance of the legal relationship between parents and the child and the establishment of a new one between the child and the adoptive parent.”

5. The effect of the *Children Act* and the definition in the text is that, upon an adoption order being made all rights, duties, obligations and liabilities of the biological parents as concerns the child are extinguished. All these rights, duties, obligations and liabilities are placed in the hands of the adoptive parents who shall deal with the child as if it was born to them.

6. In the United Kingdom, the relevant law is the *Adoption and Children Act 2002*. Under the Act, the court has no power to set aside the adoption order upon any ground except procedural irregularity, for instance, where the consent of the natural parent had not been obtained. *In re M (a minor) (Adoption)* [1991] 1 FLR 458, CA a court set aside an adoption order where a father agreed to an adoption of his child by his former wife and her new husband in ignorance of the fact that she was terminally ill. The adoption orders were set aside on the ground that the father’s ignorance vitiated his consent. Otherwise, the courts have stated that, except in truly exceptional cases, there is no general power to set aside adoption orders. *In re B (adoption: Jurisdiction to set aside)* [1995] FAM 239, CA, the Court of Appeal made it clear that there is no general inherent power to set aside an adoption order and in the absence of the procedural irregularities or mistakes, no power exists to revoke the order. In the case, Swinton Thomas LJ stated as follows:-

“to invalidate an otherwise properly made adoption order would, in my view, undermine the whole basis upon which adoption orders are made, namely that they are final and for life as regards the adopter, the natural parents and the child.....it would gravely damage the lifelong commitment of adopters to their adoptive children if there is a possibility of the child, or indeed the parents, subsequently challenging the validity of the order.”

7. In Australia, section 93(4)(b) of the *Adoption Act 2000* (NSW) empowers the court to discharge an adoption order if it is satisfied that there is some “exceptional reason” for so doing. In the case of *Susan, Re* (2009) NSWSC 592 (26 June 2009) an adoption order was discharged upon the application of the applicant where it was found that the applicant had repeatedly been sexually abused by the adoptive father as a young child.

8. Back to Kenya, section 168 of the *Children Act* provides for amendment of the adoption order made under the *Adoption Act* (Repealed) to correct a defect in the particulars contained therein, to insert the country of birth of the adoption person, to insert the adopted persons date of birth or to cancel an entry in the Register of Births and an entry in the Adopted Children Register where an adoption order is quashed or an appeal against the adoption order is allowed. There is otherwise no provision for the reversal or revocation of an adoption order.

9. An adoption order, I find, is permanent and irrevocable, except where there is proved fraud, material procedural irregularity or the existence of exceptional reason. No fraud, material procedural irregularity or exceptional reasons have been proved in this case. The 2nd applicant has not claimed that she did not consent to the adoption, or that she did not understand the nature and effect of the



adoption order. She is not saying that she did not understand or appreciate the fact that the order was permanent and irrevocable.

10. On whether a guardianship order can be granted on top of the existing adoption order, sections 102, 103 and 164 of the Act are material. Under section 102(1) a guardian is defined as:-

“..... a person appointed by will or deed by a parent of the child or by any order of the court to assume parental responsibility for the child upon the death of the parent of the child either alone or in conjunction with the surviving parent of the child or the father of a child born out of wedlock who has acquired parental responsibility for the child in accordance with the provisions of this Act.”

Section 103 provides that where one parent dies, the surviving parent shall be the guardian of the child either alone or jointly with the guardian appointed by the court. Under section 164 the court will, following adoption, appoint a guardian to take care of the child in the event that the adopter dies or becomes incapacitated before the child is of full age.

11. It appears clear that a guardian only assumes parental responsibility for the child upon the death of the parent. In the case of adoption, the court has the power to appoint a guardian for the child, in the case where the adoptive parents die or become incapacitated before the child is of full age. The appointment of a guardian made under section 164 can be revoked at any time before the child is of full age, and another guardian appointed.
12. In conclusion, and to answer the questions asked by the subordinate court, I find that, in the circumstances of this case, a guardianship cannot be granted on top of the adoption order. Secondly, the adoption order that was granted in this case cannot be reversed and/or revoked.

DATED AND DELIVERED THIS 15TH DAY OF OCTOBER 2015

A.O. MUCHELULE

JUDGE

