



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ADOPTION CAUSE NO. 144 OF 2015 (OS)

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

AND

IN THE MATTER OF ADOPTION OF BABY FF Alias MW

BY

SM AND SG (APPLICANTS)

R U L I N G

1. The application for determination is the Chamber Summons dated 9th July 2015, where the applicants, **SM** and **SG**, 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 granted a hearing date on priority basis.
2. In his affidavit sworn on 9th July 2015, one of the Applicants **SM** avers that the two applicants applied to adopt the child herein after securing approvals from their home country and the Kenyan government. That the Director of Children Services has declined to receive the pleadings and to interview the applicants since being ordered to do so, citing the moratorium on foreign adoptions by the Cabinet.
3. The applicants' concern is that as a result of the inaction by the Director of Children Services Department, they are unable to proceed to hearing. They urge the court to dispense with the report of the said Director and allow the cause to be heard on priority basis.
4. The application was filed under Certificate of Urgency on 10th July 2015 and placed before the court on the same date. It was certified urgent and the applicants directed to serve it on the Director of Children Services and take a date for *inter partes* hearing. The matter was placed before the court for *inter partes* hearing on 25th September 2015. In attendance was Mr. Mwenda, advocate for the applicants, The Director of Children Services was absent.
5. In his oral arguments presented before the court on 25th September 2015, Counsel submitted that the Director Children's Services had been served with the orders of court granted on 26th June 2015 but had declined to prepare the report because of the moratorium issued on 20th November 2014 by the relevant Cabinet Secretary.
6. I have considered the pleadings filed herein by the applicants as well as the oral arguments by counsel. The genesis of the problem in these proceedings stems from an alleged Cabinet decision

- to put a moratorium on foreign adoptions. A copy of the decision was attached to the applicant's supporting affidavit but it is also a matter of common knowledge. The question for determination is therefore, whether the assessment by the Director of Children Services can be dispensed with in these adoption proceedings.
7. Justice Muigai on 26th June 2015 directed the Director of Children Services to assess the applicants on their suitability to adopt the child in question and file a report in court within forty five (45) days. He has not done so. The said order is still in force as it has not been varied, vacated or set aside and the 45 days given in the order have expired. There is therefore non-compliance with it which could expose the Director to contempt proceedings.
 8. The court was 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. The Directorate of Children Services is an office within the Executive, and the Director seems to be wary of appearing to insubordinate his superiors.
 9. The applicants started the process of adoption in 2013. The Kenya National Adoption Committee, where the Director of Children Services serves as Secretary, on 16th September, 2014 approved the applicants' application to adopt a child in Kenya. 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 21st October 2014, signed by, among others, the Director of Children Services.
 10. On the strength of the approval certificate, the applicants travelled to Kenya from Italy. On 6th March 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 then. At the expiry of the three (3) months, they filed the originating summons in court, and initiated the application. On an application dated 8th June 2015 they obtained orders for appointment of a guardian *ad litem* and for assessment of the applicants by the Director of Children Services.
 11. 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 and provisions have not been repealed, nor their application or operation suspended. Without the suspension of the said provisions, this court still has jurisdiction to hear and determine adoption causes.
 12. 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 and can therefore, only be taken away by Parliament through an amendment or suspension of the provisions of the Children Act. It cannot be taken away by fiat even if it emanates from a decision of the Cabinet. Such Cabinet decision would perhaps, only affect certain Executive organs and offices and not judicial functions and the jurisdiction conferred on this court by the Children Act, with respect to adoptions remains intact. I find therefore that this court has jurisdiction to hear and finally determine the adoption cause before it.
 13. The applicants have invited the court to dispense with the assessment by the Director of Children Services and thus vary the order made on 26th June 2015 directing the Director to assess the applicants. Their application is based on the events set out in the foregoing paragraphs.
 14. The office of the Director of Children Services is established under **Section 37** of the **Children Act** and his functions as set out in **Section 38** of the **Act**, are essentially to safeguard the welfare of children. **Section 38(2)(g)** of the Act provides that the Director shall:-

“make such enquiries 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.”

15. The provisions governing adoptions are to be found in **Sections 154 to 183** in **Part XII** of the **Children Act**, with **Sections 162** specifically providing for foreign or international adoptions. Nowhere in these provisions of the Act, do they provide that the Director of Children Services should assess the prospective adoptive parents for their suitability to adopt. Neither **Section 162** of the Act which deals with foreign adoptions, nor any other section of **Part XII** places such a demand on the Director of Children Services. 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*.
16. For abundance of caution the courts in proceedings relating to adoptions, have developed the practice of involving the Director of Children Services, by requiring him to assess the applicants and file a report in court on the applicants' suitability to adopt. This is however not demanded or required by the law. Adoptions are very sensitive as they touch on certain very fundamental rights of the child. They involve uprooting the child from one environment and installing him/her in another.
17. Adoptions also fundamentally change the circumstances of the child for ever, for better or for worse and are consequently a matter of public interest. The Director of Children's Services being a public officer, has hitherto represented that public interest. That is the reason the courts have made him a participant in the adoption process, purely so that he can protect public interest in the said cases. The state owes its children a duty to safeguard their interests.
18. The Director is said to have declined to play the public watchdog role when the orders of the court were served upon him. Court orders are made to be obeyed and the Director of Children Services cannot choose which ones to obey. The court has considered the circumstances of both the child, the subject matter of this adoption and the applicants herein. The applicants travelled to Kenya from their home country Italy for this adoption process. They stopped working and put their lives on hold for that purpose. They incurred considerable expenses in travel and accommodation while in Kenya in furtherance of the process.
19. The child was placed with the applicants and bonding has been on-going since the 6th March 2015. She has no doubt come to consider the applicants as her parents. **Section 4** of the **Children Act** and **Article 53(2)** of the Constitution of Kenya provide that the best interests of the child are of paramount importance when considering a matter concerning a child. It is my considered view that it is not in the best interest of the child for her to remain in limbo. That will be his status if these adoption proceedings are held in abeyance because the Director of Children Services refuses to comply with a court order.
20. In view of the foregoing the court finds merit in the application dated 9th July 2015, and allows in terms of prayers 2 and 3 thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd DAY OF October 2015.

L. A. Achode

JUDGE