



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & SICHALE, JJ. A)

CIVIL APPEAL NO. 188 OF 2018

BETWEEN

HWKS.....1<sup>ST</sup> APPELLANT

CJ H RS.....2<sup>ND</sup> APPELLANT

IN THE MATTER OF BABY SS

AND

IN THE MATTER OF AN APPLICATION FOR ADOPTION

**(Being an appeal from the Judgment/Decree of the High Court of Kenya (Family Division) at Nairobi (W. Musyoka, J.) delivered on 20<sup>th</sup> day of April, 2018**

in

**Adoption Cause No. 99 of 2017)**

\*\*\*\*\*

JUDGMENT OF THE COURT

[1] This is an *ex parte* appeal from the Judgment of the High court declining to grant an adoption order to the appellant in respect of baby *SS*.

[2.1] By an originating summons (OS) dated 28<sup>th</sup> June 2017, the appellants applied for an adoption order and other ancillary orders. The OS was brought under various provisions of the **Children Act, 2001, section 9** of the **Citizen and Immigration Act, No. 12 of 2011** and the **Interpretation and General Provisions Act**. It was supported by a joint affidavit of the appellant to which various documents were annexed. The affidavit and documents established the following facts, among others, which are not relevant to the appeal.

[2.2] The 1<sup>st</sup> appellant is a Kenya Citizen. She was born on 26<sup>th</sup> June, 1970 in Nairobi. According to the Certificate of Birth issued on 7<sup>th</sup> January, 2010, her parents are *KK* and *WW*. She owns some properties in Kenya including land title No. Kiambaa/Thimbigua/xxxx. The 2<sup>nd</sup> appellant is a Dutch Citizen born in the Kingdom of Netherlands on 9<sup>th</sup> February, 1962. The 1<sup>st</sup> and 2<sup>nd</sup> appellants got married in a Civil ceremony in Nairobi on 5<sup>th</sup> September, 2009. They stated in the affidavit that they reside in Limuru and intend to live in Kenya permanently, save that they will have occasional work travel to Bahrain where they have a company.

[2.3] The Police Report which was filed in the trial court show that baby *SS*, a girl aged 3 weeks old was left unattended at Moyale Sub-District Hospital on 25<sup>th</sup> March, 2016 and was committed by the Children's Court Moyale to New Life Home Trust, Nyeri and that there is no official report of any claim by any person. By an agreement dated 1<sup>st</sup> January, 2017, the New Life Home Trust committed the child to the care and custody of the appellants. The Certificate of Birth of the child show that she was born on 3<sup>rd</sup> March, 2016 at Moyale District Hospital. The Director of Children Services had recommended that the child be placed for adoption.

[3] In his report to the court dated 8<sup>th</sup> November 2017, **Maurice T. Tsuma** the Senior Assistant Director, Children's Services recommended thus:

**“We note that the male applicant in this matter is a Dutch National resident in Kenya. We further note that the Royal Embassy of Netherlands confirmed that the child will be accorded Dutch Citizenship once the legal process is completed. This matter has both local and international angles in the light of the Cabinet Moratoriums on inter-country adoptions in place. This matter is affected by the same. However, the Honourable Court in its direction can give orders in this matter.”**

In a brief one page judgment delivered on 20<sup>th</sup> April 2018, the High Court determined the application essentially thus:

**“3. It would appear to me, to the extent that the male applicant is a foreigner; that the application before me is one of those caught up in the moratorium declared by the State in 2015 over foreign and resident adoptions.”**

[4] The grounds of appeal fault the High Court for failing to consider the law on adoption; the right of the 1<sup>st</sup> appellant to adopt a child; the best interest of the child; the material placed before the court and in basing the decision on a Cabinet decision which has no basis in law. Ground 3 of the appeal in particular states that the learned Judge:

**“erred in basing his decision on a Cabinet Moratorium while the said moratorium has no basis in law, was not gazetted and or did not amount to an amendment of the Children’s Act.”**

**Mr. Mwenda Guantai**, learned counsel for the appellants filed written submissions and made oral submissions at the hearing of the appeal. As regards the rights of the 1<sup>st</sup> appellant as a child, counsel referred to various provisions of the Constitution and the Children Act and submitted that the fact that 1<sup>st</sup> appellant, a Kenyan is married to a foreigner should not bar her from adopting a child. Counsel further addressed the court on the law on the best interest of a child and cited authorities. As regards the 3<sup>rd</sup> ground quoted above, counsel cited the categories of the hierarchy of the laws and submitted partly thus:

**“The moratorium in the way it is expressed does not fall within any of those categories. There has never been a gazette notice or any other formal expression of the same. The executive announced it through a press release and thereafter it took effect.”**

He however, referred to the judgment of the High Court, **In the Matter of the Adoption of Baby Matilda alias Luisa – Adoption Cause No. 141 of 2016** dated 12<sup>th</sup> April, 2017 and a further ruling in the same cause dated 29<sup>th</sup> September, 2017 where an adoption order was first refused but later made in favour of a mixed married couple – a Kenyan and a Nigerian.

[5] In the aforesaid judgment date 12<sup>th</sup> April, 2017, the High court observed in part:

**“Though the Children’s Act 2001 provides for international adoptions, a moratorium on inter country Adoptions of Kenyan Children to foreigners was declared on 27<sup>th</sup> November 2014 by the Cabinet that restricts inter-country adoptions. The Ministry of Labour, Social Security and Services issued a directive to all Adoption Societies on 22<sup>nd</sup> December, 2014 that they were not to accept any new applications on inter-country and resident applications.”**

Recently, official communication from the Ministry of East-African Community, Labour and Social Protection of 14<sup>th</sup> February, 2017 on inter country adoptions indicated that the moratorium arose from:

**“...the decision was informed by Global Report on Trafficking persons (UNODC) that cited Kenya as a source, transit and destination country on human trafficking. The move was also a response to concerns about increased child trafficking through abuse of Kenya’s adoption processes by foreigners due to existing loopholes and to a 2014 US State Department report on trafficking in persons, which ranked Kenya at tier 2 watch list for noncompliance with minimum standards of elimination of human trafficking.”**

[6] The record of the proceedings show that the High court directed the Director of Children’s Services to file a report and **Maurice M. Tsuma** filed the report referred to in paragraph [3] above dated 8<sup>th</sup> November, 2017, in which he stated that the matter is affected by the Cabinet Moratorium on inter-country adoptions. The proceedings in the High court also show that the appellants’ counsel replied thus:

**“The Director raises issues regarding the moratorium. Moratorium does not apply hence the principal applicant is a Kenyan. The fact that she is married to a Dutch does not bar her.”**

The appellants’ counsel referred to **section 162** of the **Children Act** and suggested that it does not apply as the 1<sup>st</sup> appellant is a Kenyan. The said section deals with international adoptions and provides in part:

**“An adoption order may be made in respect of a child upon the joint application of two spouses who are not Kenya citizens and not resident in Kenya (in this Act referred to as an ‘international adoption’) if they: ...”**

It seems that the applicants have treated their application for an adoption as an international adoption for they have, in compliance with section 162(b) and section 164(1), obtained a letter dated 22<sup>nd</sup> October, 2013 from the Embassy of the Kingdom of Netherlands confirming that if adoption is completed the child will be granted a Dutch passport and a Dutch citizenship subject to complying with all rules and also a confirmation from AS of Netherlands that he is willing to be appointed guardian of the child. Indeed, the appellants pray that the said prospective guardian be appointed. It is not legally feasible to sever or consider the right of the 1<sup>st</sup> appellant, a Kenyan separately from the

right of the 2<sup>nd</sup> appellant a foreigner to adopt the child, as suggested because for both local and foreign adoptions, an adoption order cannot be made unless by a joint application of two spouses. The appellants are married to each other (**Section 158(3)(d) and 162**). Further, upon the making of an adoption order, the couple exercises joint parental responsibility for the child.

[7] Contrary to the submission of the appellants' counsel, that no formal expression of the moratorium exists, the High court in judgment dated 12<sup>th</sup> April, 2017 (supra) quoted various dates on which the moratorium was expressly stated and rationale for it given. The Director of Children services acknowledges that the moratorium exists but did not regretfully, assist the High court by providing the formal documents. **Section 155(1)** of the Children Act establishes an Adoption Committee which is responsible, *inter alia*, for formulating the governing policy in matters of adoption and by Ninth Schedule to the Act, the Attorney General is a member. The Attorney General sits in the Cabinet from where the moratorium originated and is the Principal Legal Adviser to the Government. Had the court requested the Attorney General to be an *amicus curiae* and file documents expressing the moratorium, there is no doubt that he would have greatly assisted the court. In the absence of documents expressing the Cabinet Moratorium, the court was denied essential documentary material upon which it could properly make a judicial decision.

[8] The learned Judge used the phrase "**it would appear to me**" that the application was caught up by the moratorium which indicates that he was not absolutely certain about the tenor of the moratorium. He did not in fact see any document. The question arises whether this Court properly exercising its judicial function can embark on the interpretation of a moratorium which was not laid before the trial court, seeing that the contention of the appellants' counsel in the High court was that it did not apply to the appellants. We think not, for it would be an abstract construction without any legal force. Moreover, the legal arguments now being raised on the validity of the moratorium were not raised before the Judge and were not therefore considered. It is clear from the proceedings in the High court that it was the application of the moratorium and not its validity that was in issue. We cannot entertain a new case at this stage.

[9] As regards the merits of the application for an adoption order, the appellants ask the Court to make an adoption order. However, the High court did not consider the merits of the application and did not make a finding whether the conditions stipulated in section 163(1) of the Act were satisfied. Section 154(1) of the Act confers original jurisdiction to the High court to make adoption orders. The power to impose terms and conditions and to appoint *guardian ad litem* are also given to the High court. It would be usurpation of jurisdiction for this Court to exercise the powers that the trial court did not exercise. The remedy is for the Court to exercise its powers under **Rule 31** of the **Court of Appeal Rules, 2010**, and remit the proceedings to the High Court with appropriate directions.

[10] For the above reasons, the appropriate order in the circumstances of this case is to set aside the order of the trial Judge and remit the proceedings to the High Court for a fresh determination.

Accordingly;

**(i) the appeal is allowed to the extent that the order declining to grant adoption orders is set aside.**

**(ii) the originating summon is remitted to the High Court for re-hearing by a different Judge of the Family Division of the High Court.**

**(iii) The High Court may at its discretion request the Attorney General or any other suitable person to be amicus curiae and produce documents evidencing the moratorium and make submissions on the current status of the moratorium.**

**(iv) We make no orders as to costs of the appeal.**

Dated and delivered at Nairobi this 6<sup>th</sup> day of August, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR