REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Adoption Cause 75 of 2005

IN THE MATTER OF THE CHILDREN ACT, 2001

AND

IN THE MATTER OF EO (A CHILD)

JUDGMENT

On 6th June, 2005 PP – LND and JAO of P.O. Box ***[particulars witheld]***, Nairobi in the Republic of Kenya filed originating summons applying, *inter alia*, for the following substantive order, namely:-

That PP – LND adopt EO who shall be known as EOD.

The application is stated to be brought under sections 154, 156 (1), 158 (1) (c), (4) (a) & (d), 159 (2), (4) & (7), 160 (1), (2) & (4), 163 (1) (b), (c) & (f) and 170 of the Children Act, No.8 of 2001 and section 22 of the Interpretation and General Provisions Act, Cap.2 Laws of Kenya.

The cause came up for hearing before me on 22nd September, 2006 whereat the applicants were represented by learned counsel, Mrs A.W. Maina.

The salient facts surrounding the application may be summarized as under.

The first applicant, PP-LND is a French national living and working for gain as an accountant at the French School at Yaya Centre, Nairobi. He was born on 28th January, 1968 and is about 38 years old. The second applicant, JAO is a Kenyan national and works as a Lecturer at the Kenya Institute of Administration, Nairobi. She was born on 20th April, 1977 and is about 29 years old. The applicants got married on 24th December, 2004 at the Consolata Shrine Catholic Church, Nairobi. This is their first marriage. They profess the Christian faith. The child sought to be adopted, EO is the biological son of the second applicant JAO. The child was born on 27th May, 1998 out of wedlock and the biological father has not assumed any responsibility over the child, who is about 8 years old. Section 158 (1) (a) of the Children Act provides that for the first applicant to qualify as an adoptive parent, he has to have attained the age of 25 years and be at least 21 years older than the child but should not have attained the age of 65 years. The age requirement is not in this case.

One of the subsidiary prayers in the application is that the consent of the biological father of the child be dispensed with. The evidence availed is to the effect that the said biological father denied responsibility and has never featured in the child's life, so much so that the space for father's name in the child's birth certificate has been left blank. I hereby dispense with the child's biological father's consent to the proposed adoption.

The second applicant as the biological mother of the child has consented to the child's adoption by the first applicant, to whom the second applicant has been married for about 1¾ years now. A technical problem arises from the fact of the marriage being under 3 years old but I shall address it later in this judgment.

Both applicants are employed here in Kenya and are reported to have a total net income of Kshs.170,000/- per month. They live in spacious accommodation, own a Peugeot 307 car and are in the process of acquiring a flat around Kilimani area of Nairobi. They told the representative of Kenya's Director of Children's Services who was inquiring into the proposed adoption that they may relocate abroad. The applicants have reasonable financial means for taking care of the child's needs. The child is reported to have bonded well with the first applicant.

The Child Welfare Society of Kenya, a registered adoption society, has declared the child free for adoption. The guardian *ad litem*, FOO who is a maternal uncle to the child recommends the proposed adoption. He has also consented to being legal guardian of the child in the event of death or other incapacity of the applicants before the child attains majority age and self reliance.

The Director, Children's Services while acknowledging the technical problem arising from the fact of the marriage being less than 3 years old nevertheless recommends the proposed adoption, it being partly a family adoption and also being considered to be in the best interests of the child.

The sum total of the evidence on record is that it all goes heavily in favour of the proposed adoption of the child by the first applicant, save for the fact that the marriage of the applicants has so far clocked only about 1¾ years. The latter is the technical problem I alluded to earlier in this judgment and to which I now revert.

Regulation 19 (d) of the Children (Adoption) Regulations, 2005 provides as follows:

'**19. No child shall be delivered into the care and possession of an adopter by or on behalf of an adoption society until –**

(d) the adopters, in the case of joint applicants, have been married for at least three years prior to the date of commencement of adoption arrangements.'

The situation at hand is that whereas the joint application is for the first applicant, PP– LND to adopt the child, the said first applicant has been married to the second applicant, JAO for under 3 years. However, the second applicant is the biological mother of the child and she has had custody and care of the child since the child was born. As I see it, regulation 19 (d) was intended to cover a situation where the marital union in question is that of persons who are strangers to the child and the concern of the framers of the regulation must have focused on the question whether the union has stabilized so as to give some assurance that the strange child is landing in a secure environment. In the present case, the child is already in the familiar and protective hands of his biological mother and will continue to be in such custody and care. The only stranger is the first applicant but the latter has embraced the child as his on account of the fact that he has married the child's mother and now wishes to formalize that embrace by adopting the child as his own, to formally assume responsibility as the child's father and to be officially recognized as such. That is something positive which the court ought to encourage and as there is evidence of good bonding between the first applicant and the child, I am persuaded that this is a fit case where the adoption sought should be authorized. The proposed adoption straddles the boundary between local and international adoption. The applicants live and work for gain in Kenya, although they may in due course relocate abroad. I shall treat this as a case of local adoption. Accordingly, I hereby make an adoption order under section 154 (1) of the Children Act, 2001 authorizing the applicants PP – LND and JAO as a married couple jointly to adopt the child EO who shall henceforth be known as EOD. The Registrar-General in the Republic of Kenya is directed to make appropriate entries in the Adopted Children Register in accordance with the law.

Orders accordingly.

Delivered at Nairobi this 13th day of October, 2006.

B.P. KUBO

JUDGE