



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI**

**ADOPTION CAUSE NO. 81 OF 2015**

**C M N ..... THE CHILD**

**BY**

**J N ..... 1<sup>ST</sup> APPLICANT**

**C I A O ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. The Originating Summons dated 18<sup>th</sup> March 2015 seeks three principal orders, namely-
  - a. **That the adoption order made on 10<sup>th</sup> September 2004 by the Subordinate Court of the First Class Holden at Lusaka, Zambia, be adopted and issued by this court as such;**
  - b. **That C M N, hereinafter referred to as M, be declared to be a Kenyan citizen by virtue of being adopted by a Kenyan citizen; and**
  - c. **That the Directorate of Immigration and Registration of Persons be authorised to issue the said M with a national identification card and passport.**
2. The applicants are the adoptive parents of the said M. The first applicant, J N, is his biological father. The second applicant is his step-mother. His biological mother was a wife of the first applicant and she died, whereupon the first applicant married the second applicant, after which the couple then adopted M.
3. The second applicant is a Kenyan citizen by birth, having been born in Nairobi on 14<sup>th</sup> December 1969 to Kenyan citizens called H O and M O. She holds a Kenyan national identity card being number [Particulars Withheld] issued on 6<sup>th</sup> July 1999. She married the first applicant in Nairobi on 6<sup>th</sup> July 2002.
4. The application dated 18<sup>th</sup> March 2015 is premised on Section 176 of the Children Act and Section 9 of the Civil Procedure Act.
5. Section 176 of the Children Act dwells on the effect of overseas adoptions. It provides as follows:-

**“176(1). Where a person has been adopted (whether before or after the commencement of this**

Act) in any place and the adoption is one to which this section applies, then, for the purposes of this Act and all other written laws, the adoption shall have the same effect as an adoption order validly made under this Act, and shall have no other effect.

(2) Subsection (1) shall apply to an adoption in any place outside Kenya, if-

(a) the adoption order was made by any court of law in

the Commonwealth and any court of competent jurisdiction in any other country.

(b) ...

(c) ...

(3) An adoption order made overseas in favour of an adoptor who is resident in Kenya shall be lodged in the court within the period and in the manner specified in the rules made by the Chief Justice.”

6. Section 9 of the Civil Procedure Act on the other hand provides-

“A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except-

- a. Where it has not been pronounced by a court of competent jurisdiction;
- b. Where it has not been given on the merits of the case;
- c. Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Kenya in cases in which such law is applicable;
- d. Where the proceedings in which the judgment was obtained and opposed to national justice;
- e. Where it has been obtained by fraud;
- f. Where it sustains a claim founded on a breach of any law in force in Kenya.”

7. As the proceedings herein concern the enforcement of a foreign judgment or decree, it would be relevant to mention the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya. That should be the primary law on enforcement of foreign judgments. By its preamble, it makes it clear that the enforcement of foreign judgments is subject to the principle of reciprocity, and Kenya grants reciprocal treatment only to judgments emanating from courts of countries that accord reciprocal treatment to Kenyan judgments.

8. The enforcement of a foreign adoption award should be tested against the provisions of the Foreign Judgments (Reciprocal Enforcement) Act. Section 176 of the Children Act, should be read against the provisions of the said statute.

9. My reading of Section 176 of the Children Act is that it provides a mechanism for recognition and enforcement of foreign adoption decrees outside the provisions of the Foreign Judgments (Reciprocal Enforcement) Act which would mean that a person seeking to rely on and enforce a foreign adoption decree need not rely on the Foreign Judgments (Reciprocal Enforcement) Act. Such foreign adoption decree can be adopted in Kenya through Section 176 of the children and

the rules of procedure made thereunder without recourse to the Foreign Judgments (Reciprocal Enforcement) Act.

10. The Originating Summons before me in principle seeks a declaration that M is a Kenyan citizen by virtue of having been adopted by a Kenyan citizen. The other prayers are secondary, the prayer for adoption of the decision of the Zambian court and that seeking that the Directorate of Immigration and Registration of Persons be directed to issue M with a national identification card and passport. Whether I can grant these prayers will depend largely on whether the main prayer can be properly granted on an application founded on Section 176 of the Children Act.
11. The law on citizenship in Kenya is governed by the Constitution of Kenya, 2010, and the Kenya Citizenship and Immigration Act, Cap 172, Laws of Kenya.
12. The whole Chapter Three of the Constitution deals with citizenship. M is not a Kenyan citizen, he is asking to be declared one. He was not born in Kenya nor was he born of Kenyan parents, therefore Article 14 of the Constitution dealing with citizenship by birth does not apply to him. The provision which applies to his case is Article 15 of the Constitution, which governs citizenship by registration. The most relevant provision is Article 15(3) which states-

**“A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.”**

13. The Kenya Citizenship and Immigration Act draws its life from Article 18 of the Constitution which provides, and for our purposes we are limited to its paragraph (a), as follows-

**“Parliament shall enact legislation-**

**a. Prescribing procedures by which a person may become a citizen ...”**

14. The said legislation was enacted after the promulgation of the Constitution of Kenya, 2010. It commenced on 30<sup>th</sup> August 2011. It deals with acquisition of citizenship by adopted children at Section 14, which mirrors Article 15(3) of the Constitution, where it provides as follows-

**“A child who is not a citizen, but is adopted by a citizen, is entitled on application in the prescribed manner by the adopting or legal guardian, to be registered as a citizen upon-**

- a. The production of proof of the Kenyan citizenship of the adopting parent;**
- b. The production of a valid adoption certificate issued in a reciprocating state or other jurisdiction whose orders, decrees are recognised in Kenya; and**
- c. Proof of lawful residence of the child in Kenya.”**

15. From the wording of Article 15(3) of the Constitution and Section 14 of the Kenyan Citizenship and Immigration Act, a non-citizen child adopted by a Kenyan citizen does not become a Kenyan citizen automatically. An application ought to be made for registration of such child as a Kenyan citizen. Such application shall then be evaluated on the basis of the criteria set out in Section 14(a)(b) and (c) of the Kenya Citizenship and Immigration Act.
16. The application for citizenship by registration is governed by Regulation 10 of the Kenya Citizenship and Immigration Regulations, 2012, which, for avoidance of doubt, states as follows-

**“(1) A person who wishes to be registered as a citizen of Kenya**

**under Sections 10, 11, 12, 13, 14, 15, 16, 17 or 18 of the Act shall apply to the Cabinet Secretary, in Form 8, 9, 10, 11, 12, 13, 14 or 15 set out in the First Schedule, whichever is applicable, to be registered as a citizen of Kenya.**

**(2) Every application made to the Cabinet Secretary under the Sections referred to in paragraph (1) shall be-**

**(a) accompanied by a prescribed non-refundable application**

**fee, where applicable;**

**(b) supported by such documentary or other evidence of the**

**facts stated therein, in such other manner as the Cabinet**

**Secretary may require; and**

**(c) verified by a declaration made before a magistrate,**

**commissioner for oaths or notary public.**

**(3) ...**

**(4) ...”**

17. The registration as a citizen of a foreign child adopted by a Kenyan citizen is thus governed by the very detailed provisions of the Kenya Citizenship and Immigration Act. There is nothing in the Children Act which gives the adoption court jurisdiction to declare such child a Kenyan citizen. The child's registration as Kenyan citizen must follow the process laid down in the Kenya Citizenship and Immigration Act and the rules made under it. Certainly, Section 176 of the Children Act does not enable me to make the sort of declarations that are sought in the Originating Summons before me, and there is therefore no basis for using the provisions of the Children Act on adoptions to achieve that which is governed by the Kenya Citizenship and Immigration Act. The parties ought to exhaust the processes set out in Regulation 10 of the Kenya Citizenship and Immigration Regulation before resorting to court action.

18. Perhaps the applicants in this case perhaps had Section 9 of the Kenya Citizenship and Immigration Act in mind when they made their application. The said provision empowers a court, in the circumstances to which that provision applies, to issue an order directing that a child be presumed to be a citizen by birth. That provision is limited to cases where the child is found abandoned or lost within Kenyan borders. The making of a presumption that the child is a Kenyan citizen by birth should be made after the steps set out in Section 9(1), (2), (3), (4) and (5) of the Act have been taken.

19. The Kenya Citizenship and Immigration Act does not have a provision that parallels Section 9 thereof with regard to foreign children adopted by Kenyan citizens. There is no provision in that law that would allow a court seized of a matter of such nature to declare that such child is a Kenyan citizen by adoption. In the absence of such provision the parties have to resort to

Section 14 of the Act and Regulation 10 of the Regulations.

20. The reference to "on application" in Article 15(3) of the Constitution and Section 14 of the Kenya Citizenship and Immigration Act, to my mind, means the application envisaged by Regulation 10 of the Kenya Citizenship and Immigration Act. It does not refer to an application to be made in court under Section 176 of the Children Act. Needless to say, the provisions of the Children Act do not provide a route for the registration of a person as a citizen without passing through the mechanism provided by the Kenya Citizenship and Immigration Act.
21. The provision in Section 176 of the Children Act only provides for adoption of an adoption order made by a foreign court. Where a Kenyan court eventually adopts such an order under Section 176 of the Children Act, such adoption would not have the effect of automatically making the adopted foreign child a Kenyan citizen. Such child will still have to comply with the requirements of Article 15(3) of the Constitution, Section 14 of the Kenyan Citizenship and Immigration Act and Regulation 10 of the Kenya Citizenship and Immigration Regulations. The adoption of the foreign adoption decree by the Kenya court only avails to the applicant additional documentation that they may present to the Cabinet Secretary as required by Regulation 10.
22. In view of what I have said so far, I am unable to grant the orders sought in prayers 2 and 3 of the Originating Summons dated 18<sup>th</sup> March 2015.
23. With regard to prayer 1 of the application, I have to contend with Section 176(3) of the Children Act, which requires that the foreign adoption decree ought to be lodged in court within such a period and in such manner as may be specified in rules to be made by the Chief Justice. Apparently, the rules contemplated to be made by the Chief Justice to operationalise Section 176 of the Children Act have not been made. As it is there is no framework under the said Act for entertaining applications under Section 176 of the Children Act.
24. What is the effect of the absence of such rules" Does it mean that Section 176 of the Children Act is therefore inoperative and should remain so until such rules are made" I do not think so. The substantive law has conferred a right under Section 176. The enjoyment of that right should not be hampered or frustrated by the omission by the Chief Justice to legislate rules to facilitate enjoyment thereof. This court has inherent jurisdiction to do justice in such circumstances as those in the present case. The application in prayer 1 is one that this court can entertain in exercise of its inherent powers.
25. The adoption order in question was made by a court of law in Zambia. I take judicial notice of the fact that Zambia is a Commonwealth country and adoption orders made by competent courts of that country are among those envisaged in Section 176 of the Children Act. I have noted that one of the adoptors is a Kenyan citizen by birth. There is no evidence that she lost her citizenship after she married a Zambian citizen. She holds a Kenya national identity card issued in 1999. I am satisfied that prayer 1 of the application is available for granting.
26. In the end, I allow the application by way of the Originating Summons dated 18<sup>th</sup> March 2015 in terms prayer 1 thereof, prayers 2 and 3 thereof are dismissed. The applicants shall bear their own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>TH</sup> DAY OF NOVEMBER, 2015.**

**W MUSYOKA**

## **JUDGE**



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