

IN THE HIGH COURT OF TANZANIA
AT IRINGA

MISCELLANEOUS CIVIL CAUSE NO. 1 OF 2014
AND

IN THE MATTER OF THE LAW OF THE CHILD ACT, 2009

IN THE MATTER OF AN APPLICATION FOR AN ADOPTION BY
FRANCESCA REGGIANI OF P. O. BOX 133, IRINGA-TANZANIA

IN THE MATTER OF DELFINA GEORGE LUNYALI OF
P. O. BOX 133, IRINGA – TANZANIA AN INFANT

06/11/2014 & 15/12/2014

RULING

Kihwelo J.

When this matter came for hearing the court faced two notable defects which I find it prudent to address them in this ruling.

In this matter Mr. Mwamgiga learned Advocate appeared for the petitioner while Mr. Mambo the Regional Social Welfare Officer appeared for the infant child.

Mr. Mwamgiga informed the court that the matter was coming for hearing but the court having failed to see any record whether the application was attended to and disposed directed the parties to address themselves to the application and once the application is disposed it is then the petition will be heard and determined.

However, Mr. Mwamgiga realizing that the application was made under a wrong provision of the law he requested that he be allowed to amend the Chamber Summons so that he can file a fresh application by citing the proper provisions of the law.

This court found on record that when the matter came for mention on 16/10/2014 parties who were in attendance were Mr. Mwamgiga for the Petitioner and Mr. Ismael Mambo for the Infant child. Again when this matter came on 6/11/2014 Mr. Mwamgiga appeared for the Petitioner while Mr. Ismael Mambo appeared for the Infant child and so was on 15/12/2014.

However, there is no record where Mr. Mambo was appointed by the court to be a *Guardian Ad Litem* and therefore represent the Infant child before the court.

The Chamber Summons which was filed by Mr. Mwamgiga had the following prayers *inter alia*;

- (a) That, this honourable court be pleased to appoint ISMAEL MAMBO, a Regional Social Welfare Officer at the Iringa Social

Welfare Office as a *Guardian Ad Litem* of the child DELFINA GEORGE LUNYALI.

(b) That, the petition be served upon the *Guardian Ad Litem* so appointed and a day be fixed for the hearing of the petition.

Similarly, the affidavit sworn by the Petitioner FRANCESCA REGGIANI at paragraph 8 stated as follows;

“ That I humbly recommend that ISMAEL MAMBO in the Department of Social Welfare at Iringa Office be appointed as a Guardian Ad Litem of DELFINA GEORGE LUNYALI on the strength of this affidavit and the petition so that he can prepare the registered report and submit the same to the court on the date of hearing.”

It is on the strength of the prayers in the Chamber Summons and the averment in the Affidavit by the petitioner I was amazed why Mr. Mambo not only appeared before the court three times but also had filed the Social Investigation Report without leave of the court and it is no wonder Mr. Mwamgiga sought to proceed with the hearing of the petition without desposing the application which he had filed and was still unattended to.

The letter and spirit of the law is very loud and clear. The law of the Child Act, 2009 [Cap 13] as well as the Adoption of a Child

Regulation, 2011 clearly stipulates the procedure on conducting such an application.

Rule 4 of the Adoption of the Child Regulations, 2011 requires that the Applicant shall make an Application in person or by an Advocate to a Judge or Magistrate sitting in chambers and the Judge or Magistrate shall give such directions as to service, appointment of *Guardian Ad Litem*, and any further consent as may be required.

Ordinarily the stage envisaged under Rule 4 is when the application like the one made by Mr. Mwamgiga is disposed and the prayers granted. At this juncture the Social Welfare Officer has no locus.

After the court gives directions under Rule 4 the Commissioner shall appoint a Social Welfare Officer to act as *Guardian Ad Litem* for the child and shall inform the court in writing of that appointment. This is by virtue of Rule 4(5).

It is upon getting that appointment in writing from the Commissioner under Rule 4(5) that the court will direct the appointed *Guardian Ad Litem* to prepare the Social Investigation Report in accordance with Section 75(2) (d) of the Law of the Child Act, 2009 [Cap 13] and Rule 11 of the Adoption of a Child Regulations, 2011 GN No. 197 of 2012 to assist the court to determine whether the adoption is in the best interest of the child.

It is upon fulfilling the above that the court by virtue of Rule 10 of the Adoption of a Child Regulations shall appoint a day for the hearing of the Petition for Adoption and give notice to all parties in the format set out in Form No. 5 appearing in the schedule to the regulations.

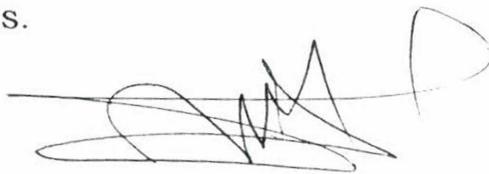
I must state at the outset that I have travelled this far not because I enjoy the ride but rather to assist the parties and the court in future to properly guide themselves in dealing with applications of this nature more in particular now that the Law of the Child Act, 2009 [Cap. 13] and the Adoption of a Child Regulations, 2011 GN No. 197 of 2012 are still very new and at their infancy stage.

I therefore find that the appearance by Mr. Mambo the Regional Social Welfare Officer and the submission of the Social Investigation Report without leave of the court was improper and misguided. However, the same does not occasion to any miscarriage of justice as it is a matter of procedural rules which should not defeat substantive justice.

On the other hand Mr. Mwamgiga prayed that he be allowed to amend the application as it was filed under a wrong provision of the law. The Chamber Summons was filed under rules 9, 13 and 23 of the Repealed Cap 355 R.E 2002 but retained by a saving provision under Section 160(2) (c) and (d) of the Law of the Child Act No. 21 of 2009.

It is surprising to note that Mr. Mwamgiga was not aware of the existence of the Adoption of a Child Regulations, 2011 GN No. 197 published on 1/6/2012 more than two years down the lane. Mr. Mwamgiga worse enough cited Section 160 of the Law of the Child Act, leaving behind the appropriate provisions namely Section 54(1) (a) and Section 55 (b) of the Law of the Child Act, 2009 which are the most appropriate for application for adoption.

In the circumstances above and in the light of the long settled principle of law that failure to cite the relevant provision of law makes the application incompetent this application is struck out but no order as to costs.

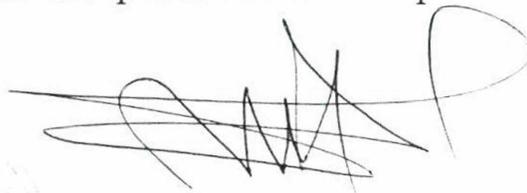


P.F. KIHWELO

JUDGE

15/12/2014

Ruling delivered in the presence of the parties and the infant child.



P.F. KIHWELO

JUDGE

15/12/2014

