

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
MISC. CIVIL CAUSE NO. 124 OF 2004**

**IN THE MATTER OF ADOPTION ORDINANCE CAP 335
R.E. 2002**

AND

**IN THE MATTER OF ABHISHEK JAYPRAKASH JANI, an
Infant of Plot No. 229 Maweni Street Upanga**

AND

**IN THE MATTER OF PETITION FOR ADOPTION ORDER
BY**

SHAILESH AND CHETNA JOSHI.....PETITIONERS

AND

MRS VIOLET DEELIP PANDYA.....OBJECTOR

RULING

ORIYO,J.

The infant, Abhishek Jayprakash Jani, the subject matter of these adoption proceedings was born on 20 April 2004 of Mr. Jayprakash Jani and Mrs Kavitha Jani. Immediately after giving birth, Kavitha Jani died. The objector, Mrs Violet Deelip Pandya, who is the elder sister of the infant's mother took the infant into her custody on 21/4/2004, pending further arrangements. The infant is todate in the objector's custody.

The Petitioners, Shailesh and Chetna Joshi, jointly applied for the adoption of the infant in June, 2004. Mrs

Chetna Joshi, 45 years old, is the paternal aunt of the infant; she being the elder sister of Jayprakash Jani and Mr. Shailesh Joshi, 49 years old, is the husband of Chetna. Apparently, Shailesh and Chetna. Joshi were Tanzanians by birth but have since become Canadian citizens; and are holders of Canadian passports. They reside in Toronto, Canada, with their only girl child, Roshni Joshi, who is 6 years old. Through their petition, the petitioners undertook to provide the infant with love, education, medical care, clothing and all other necessities of life. They also stated that they had not received or agreed to receive any payment or reward in consideration of the adoption petition. These statements of the petitioners were confirmed by the report of the first Guardian "ad litem"; Mr. Hitesh Shah. According to his report filed in court, the petitioners are financially capable to provide for the infant in that Mr. Shailesh Joshi is an accountant by profession and has his own practice in Canada; and Mrs Chetna Joshi is a pharmacist and also has her own pharmacy in Canada. Mr. Hiteshi report also stated that the objector and her husband are both over 55 years of age with grown up children.

Due to the nature of the objection proceedings the court appointed a co-guardian "ad litem", Ms Farida A.Chilumba, a Social Welfare Officer, Ilala District Social

Welfare Office. In her report filed on 27 July 2005, she stated that she had made home visits to the infant's father and the objector's on 26 May, 2004 and had opportunity to talk at length with the parties and their families. Subsequently she also visited the objector's home as an escort of the infant's father to visit the infant on Sunday evenings from 10 April to 19 June, 2005; in compliance with a court order. She raised concern on the sour relationship between the objector's family and that of the infant's father to the extent that they do not talk to each other; even at visitation times. She stated that such a relationship was against the welfare of the infant principle. According to her opinion each of the two families were well placed to provide for the child in taking care and bringing him up.

The petition for the adoption of the infant by the petitioners was opposed by the objector for a number of reasons. She contended that the petitioners were not suitable people to adopt the infant because they were not Tanzanians and their marriage was allegedly unstable. She did not tender any tangible evidence in support of the latter allegation. On the other hand, she stated that it was not in the best interest of the infant for the court to issue an adoption order that would take the infant away from her custody. She further stated that she was capable

economically and was morally willing to provide the infant with the basic necessities of life.

In these proceedings the petitioners were represented by Ms. A Bade learned counsel of Bade and Co Attorneys and the objector was represented by Mr. Mkoba, learned counsel of Mkoba and Co. Advocates.

The primary issue for consideration in an application for adoption is whether the petitioner(s) has met all the requirements of the Adoption Ordinance, Cap 335, R.E. 2002. SECTION 7(1) OF THE Adoption Ordinance requires the court to be satisfied, before making an adoption order, on the following:-

- a) that the necessary consents have been obtained;
- b) that, if the order is made; it will be for the welfare of the infant;
- c) that the petitioner(s) has not received or agreed to receive any payment in consideration of the adoption order.

In these proceedings the consent of the father, Mr. Jayprakash Jani, was made in writing and filed in court in favour of the petitioners; thus satisfying subsection 1(a) above. The provisions of subsection 1(c) were also satisfied based on statements made in the petition and in the report of the Guardian "ad litem", Mr. Hitesh Shah.

The Adoption Ordinance imposes some restrictions on the Court in making an adoption order. Some of the restrictions as provided for under SECTION 4 of the Adoption Ordinance are contained in subsections (5) and (6) thereof, as follows:-

"(5) An adoption order shall not be made in favour of any applicant who is not resident in the territory;

(6) An adoption order shall not be made in respect of any infant unless the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the order."
(emphasis supplied).

As pointed out above, the petitioners are Canadian Citizens and residents in Toronto, Canada. They are not residents in Tanzania and they have not had the infant in their care and possession at all. Due to the unhealthy relationship between the infant's father and the objector who has custody of the infant and the nature of the objector's objections to the granting of an adoption order to the petitioners; it was highly unlikely that any attempts by the petitioners to have custody of the infant would have been successful. However, the law as it is leaves no discretion with the court ; the requirement of subsections (5) and (6) of Section 4 are mandatory in nature by the use of the word " shall"; it means strict compliance. These two subsections are different from subsection (2) of Section 4 of the Adoption Ordinance in their application. The subsection restricts adoption of female infants by sole male applicants unless there are special circumstances. It provides as hereunder:-

" An adoption order shall not be made in respect of an infant who is a female

in favour of a sole applicant who is a male, unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.

“(emphasis supplied).

Although the language used in subsection (2) is also mandatory by the use of the word “shall”; the law here gives the court a discretion to depart from the restriction where there are “special circumstances” to justify making of an adoption order in favour of a sole male adopter of a female infant. This court (Chipeta, J as he then was) exercised the discretion under Section 4(2) to grant an adoption order in favour of a sole male applicant, Alkarim Jalalu Ladak, to adopt a female infant, Sharmin Jalalu who was his young sister; and the parents were not in a position to provide for the full welfare of the infant. That is why this court’s decision in the case of:-

IN THE MATTER OF THE ADOPTION
ORDINANCE:

SUBJECT INFANT SHARMIN JALALU

[1986] TLR 218

is distinguishable from case at hand because the law leaves no discretion to this court under Section 4(5) and (6) of the Ordinance.

On the basis of the foregoing the Petitioners have not met all the requirements of the Adoption Ordinance, in particular, Section 4 (5) and (6) thereof.

The objector was joined in these proceedings because she had the actual custody of the infant. Her custody was not by virtue of any court order but by an arrangement based on "a gentleman's agreement". The objector did not cross-petition for an adoption order but merely objected to the grant of an adoption order in favour of the petitioners. Her wish was to have the infant remain in her custody. She did not state anything on the future of the infant either.

Under these circumstances, it is my considered opinion that the welfare of the infant principle dictates that the infant's custody be restored to his father, Mr. Jayprakash Jani who shall have the final decision on the future of his infant son. Both Guardian "ad litem" Mr. Hitesh Shah and Ms Farida Chilumba are to oversee a smooth handover and transition of custody of the infant from the Objector, Mrs Violet Deelip Pandya to the father of the infant.

Accordingly the petition is not granted. I make no order for costs in view of the peculiar circumstances.

K.K. ORIYO
JUDGE

31/1/2006

Coram: Lyimo – DR

FOR THE Applicant – Mndeme

For the Respondent

For the Objector – Kihio

C.C. Emmy

Order: Ruling delivered in open court this 31st day of January 2006 in presence of Mr. Mndeme of Mr. Mndeme for the petitioner and Mr. Kihio for the objector Respondent absent.

P.A. LYIMO
DISTRICT REGISTRAR
31/1/2006