



GOVERNMENT OF MALAWI  
JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
ADOPTION CAUSE No. 2 OF 2017  
(eCMS 6333 of 2017)

IN THE MATTER OF THE ADOPTION OF CHILDREN ACT  
and  
IN THE MATTER OF AB (a male minor) OF THE REPUBLIC OF MALAWI  
and  
IN THE MATTER OF THE PETITION BY DS  
FOR THE ADOPTION OF THE SAID AB

*Between:*

DS<sup>1</sup>  
and  
AB (a male minor)

PETITIONER  
  
RESPONDENT

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RULING

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*nyaKaunda Kamanga, J.,*

On Tuesday the 20<sup>th</sup> June 2017 the petitioner, through his legal practitioners Messrs Nyambo & Co, filed in the High Court Principal Registry a petition for the adoption of AB,<sup>2</sup> the respondent, which is indicated as having been prepared under 'Form number 3 rule 9 of the Adoption of Children (Subordinate Courts) Rules'. The petition is verified by an affidavit that is sworn by the petitioner himself, DS, in which he produces and exhibits 19 documents. The other documents that were filed together with the petition are a notice of appointment of legal practitioners and a notice of hearing the petition. On the same date that the petitioner was filed, the legal practitioners for the petitioner also presented to

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<sup>1</sup> this petition being a family matter and in compliance with international best practices the full names of both the petitioner and respondent will not be disclosed in the ruling.

<sup>2</sup> a minor whose particulars will not be disclosed.

the court a confidential guardian *ad litem* report dated 21<sup>st</sup> May 2017 which was prepared for the High Court Principal Registry Adoption Cause no. 2 of 2017.

Two days after the filing of the petition, on Thursday the 22<sup>nd</sup> June 2017, Messrs Nyambo & Co filed with this court a certificate of urgency stating that ‘the petition for adoption herein is of urgency since the petitioner is travelling to France for a period of three months on official duties’. The petitioner also filed an *ex parte* summons for abridgement of time within which to hear the application for adoption which is taken under Order 3 rule 5 of the Rules of Supreme Court. The said summons is supported by the affidavit of counsel Julius Nyambo and he avers as follows from paragraph 5 of his deposition:

5. ‘The Petitioner is due to travel and work in France for a period of three (3) months. His departure date is Monday the 26<sup>th</sup> day of June 2017.
6. The Petitioner having been the Foster Parent/Guardian and Care Giver for [AB] is desirous that before he leaves for France he should be granted an order of adoption of the said [AB] so that he should begin to be accorded full benefits as a child of the Petitioner.
7. The Petitioner has no intention to travel with the said [AB] since he is in form two at [...] Boarding School and will be sitting for examinations from Tuesday the 27<sup>th</sup> June 2017 but currently in Blantyre for the sake of the application before the court.’

Having careful read all the documents that have been lodged in this petition, including the *ex parte* summons for abridgement of time within which to hear application for adoption, this court notes and makes the following findings:

1. First, that the petition and affidavit filed in support of the petition are irregular as they are indicated as being prepared under ‘Form number 3 rule 9 of the Adoption of Children (Subordinate Courts) Rules’. The petition having been filed in the High Court, the legal practitioner for the petitioner ought to have known that the High Court is not a subordinate court and that section 9 of the Adoption of Children Act has provided for the Adoption of Children (High Court) Rules to be applied in the High Court.
2. Secondly, that the petition having been filed on 20<sup>th</sup> June 2017, it was irregular for the petitioner or his legal practitioners to lodge the guardian *ad litem* report together with the petition as the court had not yet considered the petition and could not have been in a position to make an order for the appointment of guardian *ad litem*. Apart from the guardian *ad litem* complying with the recently issued *Guardian ad litem Report Guidelines* in performing his duties it is important that every report must provide specific reference to the court order that appointed such person or institution as guardian *ad litem* and prompted them to compile the report.

The order must appear as an attachment to the report. Otherwise on perusing this matter, there initially did not seem to have been any legal basis for lodging the report until a reading of the report revealed other information that will be discussed below.

3. Thirdly, that an examination of the guardian *ad litem* report itself indicates that it was issued by the guardian *ad litem* who is an employee of the Ministry of Gender, Children, Disability and Social Welfare on 21<sup>st</sup> May 2017 and that the ‘guardian *ad litem* was appointed by the Zomba High Court’. As has already been noted this petition was filed on 20<sup>th</sup> June 2017, therefore it is unconscionable that the guardian *ad litem* report predates the date of filing and mentions a cause number which could not yet have been allocated at that time. It is really difficult to understand why the guardian *ad litem* and the legal practitioner would cause a confidential guardian *ad litem* report ordered by the High Court Zomba Registry to be lodged before another judge at the Principal Registry. Surprisingly, neither the petitioner nor his legal practitioner has disclosed the fact that the guardian *ad litem* was appointed by the High Court Zomba Registry. Although several affidavits have been filed in this matter, none of them reveal the above information. It is not only procedurally wrong and bad practice, but it is also deemed unethical conduct on the part of the legal practitioner handling this matter, to suppress material facts pertaining to a previous or subsisting petition for adoption in respect of the same child. The fact that a petition was filed at High Court Zomba Registry and the reasons a decision was made to file a similar one at the High Court Principal Registry are critical to determining this petition.

A search at the High Court Zomba Registry reveals that petitioner made the same application under the Adoption of Children Act under Adoption Cause no. 1 of 2017 in respect of the same child and the matter is still pending. When Adoption Cause no. 1 of 2017 was set down for hearing the petitioner did not appear and the presiding judge gave directions for further conduct of the matter. According to the case of *Kasungu Flue Cured Tobacco Authority v Zgambo*<sup>3</sup> it is an abuse of process of the court to seek similar reliefs from two courts. In this matter, this court finds that the petitioner’s decision to bring the present petition at the High Court Principal Registry when a petition involving the same child is still pending at the High Court Zomba Registry amounts to judge shopping and is an outright abuse of the process of the court.

The legal practitioner for the petitioner ought to know that the operationalisation of the electronic case management system (eCMS) in the Judiciary assists the court to track matters and identify instances of

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<sup>3</sup> [1992] 15 MLR 174 (SCA).

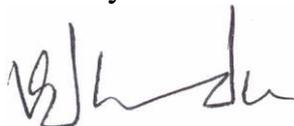
abuse of the court's process, such as the one that has occurred in the matter involving the parties herein.

4. Fourthly, that it is irregular for a petitioner or his legal practitioners to lodge at court a guardian *ad litem* report when such duty is supposed to rest on the lawfully appointed guardian *ad litem*. Further the information from the investigations of the guardian *ad litem* are confidential as states in rules 12 and 13 of the Adoption of Children (High Court) Rules. It is a serious breach of trust and confidentiality on the part of the guardian *ad litem* to release his report to the petitioner and/or his legal practitioner, as it seems to have occurred in this petition, before the report has been filed or lodged with the court and before the court has instructed him to do so. This court is left wondering as to how and when did the report landed in the hands of the legal practitioner for the petitioner. A guardian *ad litem* should conduct his duties professionally and in a manner that will not be perceived to be colluding with the legal practitioner for the petitioner. The court has to guard against un-procedural tendencies that can negatively impact on adoption proceedings and which may have the potential to compromise the interests of the minor, who happen to be the subject matter of the adoption proceedings.

Lastly, it should also be appreciated that although the petitioner, the respondent and the guardian *ad litem* are all based in Lilongwe, where there also exists a court of competent jurisdiction, the petitioner and his legal practitioner made a decision to file the same petition at the High Court Zomba Registry under Adoption Cause no. 1 of 2017. It is only procedurally proper that the petitioner pursues and prosecutes the petition that is pending before the High Court Zomba Registry.

Upon noting the above serious irregularities it is the considered view of this court that it will only be in the best interests of the child, who is the subject matter of the adoption process, that the *ex parte* summons for abridgement of time within which to hear the petition for adoption be dismissed and that the petition that was filed at the High Court Principal Registry be struck out from the cause list for being an abuse of the process of the court.

Dated in Chambers this 23<sup>rd</sup> day of June 2017 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga  
JUDGE

<i>case information</i>	:	
Mr. Julius Nyambo	:	Counsel for the petitioner.
Petitioner	:	absent, represented.
Respondent	:	absent.
Guardian <i>ad litem</i>	:	absent.
Mr. A. Ngámbe	:	Senior Court Clerk.