IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
FAMILY & PROBATE DIVISION
ADOPTION CAUSE NO. 17 OF 2022

IN THE MATTER OF THE ADOPTION OF CHILDREN ACT (CAP 26:01 OF THE LAWS OF MALAWI)

-AND-

IN THE MATTER OF THE ADOPTION OF C.K. (A MALE INFANT) OF XXX VILLAGE, TRADITIONAL AUTHORITY XXX, XXX*

AND

IN THE MATTER OF A PETITION FOR THE ADOPTION OF THE SAID C.K (A MALE INFANT) BY J.E.B. AND T.N. OF XXX, STATE OF XXX, XXX*

BETWEEN:

J.E.B.* ……..…..... 1ST PETITIONER

T.N.* ……..……..……..2ND PETITIONER

-AND-

C.K.* (INFANT)……...…….……..RESPONDENT

-AND-

ENOCK BONONGWE ……..GUARDIAN-AD-LITEM

(*Names withheld to protect the identity of the infant)

CORAM: THE HONOURABLE JUSTICE FIONA ATUPELE MWALE

Soko, Counsel for the Petitioners

Mpandaguta, Court Clerk

In attendance:

Chisomo Kalindafwifwi, the infant

Mr. James Eduardo Bellini, the first petitioner

Ms. Thais Nazareth, the second petitioner

Mr. Sevilliano Levison Jesward, maternal uncle of the infant

Mr. Enock Bonongwe, Guardian-ad-Litem

MWALE, J

JUDGMENT

Introductory Background and Facts

1. Before me is a petition for the adoption of a male infant, C.K. aged five years and two months. His mother M.A., has serious mental health problems and is often seen roaming around XXX trading Centre. The father of the infant is unknown and it is believed that an unknown person took advantage of the mother's mental state and raped her. The infant is not the biological mother's first child. The first child was killed by the mother who in her mental state thought she was giving the child a bath with scalding hot water and an abrasive

stone as a cleaning agent. The child died of severe wounds and bleeding as a result. There is no doubt therefore, that the mother is unfit to provide care for the infant.

2. The infant was consequently taken away from the biological mother by the extended family after she complained that he was biting her during breast feeding for fear of harm. With the intervention of the District Social Welfare Officer, the infant was taken to XXX Child Care Institution for care. The infant was placed in this facility for 6 years until 2019 when the XXX District Social Welfare Office reintegrated him with an uncle.

3. The uncle and members of the extended family live in abject poverty. However, despite the challenges they face, they were originally in disagreement with the idea of giving up the infant for adoption. They failed to envisage a situation of total transfer of parental rights to an adoptive parent and were only prepared to grant consent if the child was only to be temporarily taken with a view to returning to the birth family. The family had asked the Guardian-ad-Litem to allow them to have a private family conference after which they would communicate their decision. When they did finally communicate, it was to say that if adoption means total relinquishment, they would not grant consent. Thus, at the time of preparing the report of the Guardian-ad-Litem, there was no consent by the family. Of the family members concerned, only one has actual custody of the infant.

4. The first petitioner is a XXXian national aged 62 years. He is the CEO of a family business that is run as XXX. He met the second petitioner, his wife aged 50 years in 2016. She too is XXXian and is a XXX working in XXX.

She has a daughter from a previous relation aged 27 years and the first petitioner too has a son aged 29 years. The two have been married for 7 years and have failed to conceive naturally. Adoption is therefore the logical solution for their desire to parent a child together.

5. By way of background, the petitioners sought to embark on the process of adoption around 2019 when the infant was identified and matched with them by the Department of Social Welfare. Unfortunately due COVID-19 to travel restrictions, they were unable to travel and the process stalled. It is in that time that the child care institution the infant was placed in decided to reintegrate the infant with his family without seeking the approval of the Department of Social Welfare. It was only after the uncle reached out to the Department of Social Welfare about the difficulties he was experiencing with taking care of the infant due to financial constraints that the Department resuscitated the connection between the infant and the petitioners. The prospective adoptive parents at this point committed to support the infant's needs as they waited for the adoption process. They proceeded to make payments directly to the infant through their legal counsel.

6. There are filed in these proceedings the Petition itself and in addition, the following:

6.1 Sworn Statement verifying the Petition sworn by the petitioners;
6.2 The petitioners' passports;
6.3 The petitioners' marriage certificates;
6.4 Birth certificate of the 2nd petitioner's daughter;
6.5 Proof of ownership of the 1st petitioner's business;

6.6 Proof of the 1st petitioner's annual income;

6.7 The petitioners' intent and purposes for adopting letter;

6.8 Medical and physical health assessment report, certifying the petitioner as fit to adopt;

6.9 Judgment of the court approving the registration of the petitioners in the register of adopters after considering all reports and the opinion of the Public Prosecutor that recommended the petitioners for adoption;

6.10 Opinion of the public prosecutor supporting intent to adopt a child outside XXX;

6.11 Social and Psychological Study Report prepared for the purposes of determining the eligibility of the Petitioners to adopt;

6.12 Certificate of completion of adoption course;

6.13 A police report certifying that the petitioners have no criminal record;

6.14 Criminal record certificates showing that the petitioners have no judicial criminal records;

6.15 Civil record certificate certifying the absence of civil liability;

6.16 Declaration of residence;

6.17 The petitioners' full professional qualifications; and

6.18 Sworn statement of alternative guardianship in the event of death or incapacitation of the petitioners.

All official documents were duly apostilled, and all originals were made available to the Court for verification.

7. In compliance with rule 8 of the Adoption of Children (High Court) Rules, an application for the appointment of a Guardian -ad-Litem was also filed and the Director of Social Welfare was appointed Guardian-ad-Litem in these proceedings. Mr. Enock Bonongwe the Deputy Director of Social Welfare

duly took up this role and filed a Gaudian-ad-Litem Report. Counsel for the petitioner also filed Skeleton Arguments which were adopted at the hearing. In addition, this Court having noted that the biological parents have been making payments for the support of the infant directly to the birth family, directed counsel to file supplementary arguments on the legitimacy on such payments, especially considering they were made directly and not through the Department of Social Welfare. This issue gains significance when to the surprise of the Guardian-ad-Litem a family member appeared during the proceedings to give consent, when the family had expressly told the Guardian-ad-Litem they would not be giving consent.

8. I also directed counsel to provide the court with medical proof as to the mental state of the biological mother. Despite the fact that there was evidence of her previous ill-treatment of her first child, medical conditions must be proved by medical evidence. Counsel submitted both the supplementary arguments and a sworn statement of Chifundo Stanley Tepeka a Senior Clinical Associate-Psychiatrist at Kamuzu Central Hospital. He also prepared a Mental health Evaluation Report for the mother and this was duly filed with the Court. In his professional opinion the biological mother is to mentally ill to make any decisions. She is also reported to have poor social skills , impaired judgment and poor self-care ability. She also has impaired memories and disorganized behaviour that needs mental health treatment.

Issues

9. The matter before appeared at first instance fairly straightforward. The petitioners have glowing assessments from all their background checks and on

the face of it as I communicated to them, based on the guidance indicators ***In the Matter of the Adoption of Children Act and in the Matter of the Adoption of Children Act and in the Matter of P.S. (a male infant),*** *Adoption Cause No. 10 of 2012, Lilongwe District Registry,* my preliminary view was that they were suitable adoptive parents. I however refrained to make a final decision until I had received supplementary arguments because the whole issue of making payments directly to the birth family and the circumstances surrounding consent. It was my hope that counsel's submissions would dispel all doubts of impropriety. However, the issue of payments is one which has gained substantial notoriety in inter-country adoption, with the question on how to balance the need to recognize legitimate costs paid surrounding the adoption, altruistic donations and child selling. The manner in which the payments were done in this matter and the fact that the payments were not made through the Department of Social Welfare but directly through the petitioner's legal counsel raises issues of irregularity.

The law

10. Section 3 of the Adoption of Children Act (Cap 26:01 of the Laws of Malawi) provides for restrictions on the making of orders on adoption as follows:

> *(1) An adoption order shall not be made in any case where—*
>
> *(a) the applicant is under the age of twenty-five years; or*
>
> *(b) the applicant is less than twenty-one years older than the infant in respect of whom the application is made:*
>
> *Provided that, where the applicant and the infant are within the prohibited degrees of consanguinity, it shall be lawful for the court, if*

it thinks fit, to make an order notwithstanding that the applicant is less than twenty-one years older than the infant.

(2) An adoption order shall not be made in any case where the sole applicant a male and the infant in respect of whom the application is made is a female unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.

(3) An adoption order shall not be made except with the consent of every person or body who is a parent or guardian of the infant in respect of whom the application is made or who has the actual custody of the infant or who is liable to contribute to the support of the infant:

Provided that the court may dispense with any consent required by this subsection if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the infant or cannot be found or is incapable of giving such consent or, being a person liable to contribute to the support of the infant, either has persistently neglected or refused to contribute to such support or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with.

(...)

(5) An adoption order shall not be made in favour of any applicant who is not resident in Malawi or in respect of any infant who is not so resident.

11. Section 4 of the Act places a further duty on the Court on matters to which it must be satisfied before it can make an order as follows:

> *The court before making an adoption order shall be satisfied—*
>
> *(a) that every person whose consent is necessary under this Act and whose consent is not dispensed with has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;*
>
> *(b) that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant; and*
>
> *(c) that the applicant has not received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption except such as the court may sanction.*

As the welfare of the infant under section 4 (b) of the Adoption of Children Act is interpreted to require the Court to consider the best interests of the child in the grant of an order of adoption. The twinning of the two concepts (best

interests of the child and welfare) find justification under section 23 (1) of the Constitution which provides as follows:

> *"All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them"* (Emphasis supplied).

12. As was determined by this Court, ***In the Matter of the Adoption of Children Act and In the Matter of EM and SM,*** Adoption Cause No. 1 of 2017, High Court, Lilongwe District Registry (unreported):

> "*Adoption petitions are heard by the High Court as an exception to the general rule under section 134 of the Child Care Protection and Justice Act which gives generally child justice court's jurisdiction "over children matters". However, it is clear from the decision in* ***In the Matter of the Adoption of Children Act and in the Matter of the Adoption of Children Act and in the Matter of P.S. (a male infant),*** *Adoption Cause No. 10 of 2012, Lilongwe District Registry (unreported) that the High Court has jurisdiction over inter-country adoption matters by virtue of section 9 of the Adoption of Children Act. In its exercise of jurisdiction over children the High Court must comply with the requirements of the Child Care, Protection and Justice Act and most importantly, it must give primacy to the rights of the child as set out in the Convention of the Rights of the Child (See section 88(b) of the Child Care Protection and Justice Act). In particular, as the Malawi Supreme Court of Appeal determined in* ***In the Matter of the Adoption of Children Act and in the Matter of C.J.*** *(a* ***female infant)***

(cited above), the primary consideration in the grant of an order of adoption is "the best interests" of the infants concerned."

13. Further, section 10 of the Adoption of Children Act further proscribes the giving or making of payments as follows:

> "10. *It shall not be lawful for any adopter or for any parent or guardian except with the sanction of the court to receive any payment or other reward in consideration of the adoption of any infant under this Act or for any person to make or give or agree to make or give to any adopter or to any parent or guardian any such payment or reward*."

Court's reasoned determination

14. As far as the restrictions for the making of adoption orders under section 3 of the Adoption of Children Act are concerned, the petitioners have no bars in as far as age restrictions are concerned as set out in section 3 (1). They are both adults and they age difference between them and the infant is withing the stipulated ranges.

15. The petitioners are a married couple and therefore there is no need to look for exceptional measures which would be required under section 3 (1) of the Adoption of Children Act if the petitioner was a single parent.

16. Section 3(3) requires the consent of "every person or body who is a parent or guardian of the infant in respect of whom the application is made or who has the actual custody of the infant or who is liable to contribute to the support of the infant". Considering that there is evidence that the biological mother is

mentally ill and incapable of making decisions, it is the consent of the uncle in actual custody of the infant which is legally required. A Consent to Adoption order was duly filed in these proceedings and the biological uncle confirmed that he was consenting, during examination by the Court.

17. The consent required is further clarified in section 4 of the Adoption of Children Act (a) which provides that one of the facts that the Court is to be satisfied before granting an order is that the person wo is giving consent "understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights". Examination of the uncle during the proceedings would indicate that he was firm and resolute in his decision. However, examination of the uncle also revealed that he has been receiving money from the petitioners, directly through their counsel. His (translated) testimony on the subject was as follows:

> "*I can't afford to send him to school. I did give consent when the lawyers called me. I thought it was a good idea to relinquish for adoption. The petitioners gave me money to send him to school. They gave me K100,000.000 for fees etc. rest for uniform. Soko and Company have been giving me the money for school fees. Then they explained the process of adoption. I consulted the family. All cousins came together. At first meeting we agreed. Then they (lawyers) called us to come and sign forms*.
>
> (…)
>
> *This money was not given as an inducement for me to give consent. Nobody has threatened, coerced or induced me in any way*."

18. From his testimony it would appear that to begin with the Department of Social Welfare had been at the forefront in explaining the requirements and prerequisites of adoption. It was due to this explanation that the other relatives refused. They changed their minds thereafter, but the family members never got a chance to go back and tell the Department of Social Welfare that the position had changed. This position was confirmed by the Guardian-ad-Litem. Whilst the uncle stated that he was not influenced by the money he was getting, there is no escaping the obvious fact that before this money was given, consent was denied.

19. In the recent case of ***In the Matter of the Adoption of Children Act and In the Matter of K.A.Z.,*** Adoption Cause No. 13 of 2022, High Court, Lilongwe District Registry (unreported), this Court had occasion to provide guidance on the distinction between the roles of the Guardian-ad-Litem and counsel for the petitioners. Explaining the consequences of adoption on the parental rights of the biological parents is a role that is reserved for the Guardian-ad-Litem in recognition of his expertise as a social worker. Consent to adoption under section 4 (a) of the Adoption of Children Act, as that case illustrates, must be full and informed in order to be valid. The Guardian-ad-Litem should therefore report to the court that he gave the biological family all the necessary information for them to make such a decision and that it was based on that information that consent was given. Once a Guardian-ad-Litem is appointed therefore, the Consent to Adoption Order should be handed over to him or her along with the order of the Court, appointing the Guardian-ad-Litem. Once the Guardian-ad-Litem does their duty in explaining the consequences of relinquishing parental responsibility, he or she should have the form signed by the biological parents. The form should then be returned to the legal

practitioners who will file it accordingly. To reiterate this finding, I repeat below the reasoning I provided in ***In the Matter of the Adoption of Children Act and In the Matter of K.A.Z.*** (cited above) at paragraph 66 that:

> *"Although the Adoption of Children Act is silent with regard to which party in the proceedings should obtain consent, as reasoned above, the legal practitioner should not be that party. It becomes peculiar if this process is facilitated by counsel because the very nature of the role in legal representation precludes counsel from giving evidence in the very case in which he or she is on record. It would be highly and professionally embarrassing (to say the least) if counsel had deponed to the fact that the biological father was given all the necessary information and he now states during the proceedings that this was not the case. Counsel's veracity would be called to question and their role as officer of the court compromised. Suffice it to say, it is clear that the biological father was not given sufficient information by the party who facilitated the consent. I reiterate that the Guardian-ad-Litem should therefore never delegate this role and should always account to the court in the Guardian-ad-Litem Report as to process that was followed in obtaining consent and the information given to the biological parent so that the court is satisfied that informed consent was indeed given*."

20. The fact that counsel went further to facilitate payment from the petitioners to the biological parents knowing that there was a dispute in the family members with regards consent further puts the Court on High alert as to the existence of improper financial gain which is frowned up under the normative principles of

international law as well as our own law. With regard to the Adoption of Children Act, it is a requirement that the court is satisfied that the petitioner "has not received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption except such as the court may sanction." Section 10 of the Adoption of Children Act expressly proscribes giving or receiving "any payment or other reward in consideration of the adoption of any infant under this Act or for any person to make or give or agree to make or give to any adopter or to any parent or guardian any such payment or reward."

21. Whilst it is clear that the forbidden payments are those that are made to induce the adoption, practically there is a very thin line between legal and illegal or unlawful payments. Lawful or legitimate payments are those that are made with the courts sanction. It is the difficulty in proving intent that sets a mist over payments made to birth parents. Intercountry adoption legislative frameworks have to definitively deal with the ever-constant threat of improper financial gain and child-selling looming over adoption processes and without a process that ensures that there is no room for improper financial gain, the best interests of the child can never be guaranteed.

22. As was reasoned ***In the Matter of the Adoption of Children Act and In the Matter of K.A.Z.*** (cited above), the principle of the best interests of the child does not just relate to the substantive law aspects of a matter, but the procedures as well. An adoption that is in the best interests of the child must follow certain practical measures that will ensure that the process is sacrosanct and any deviation from security measures that surround me will greatly jeopardise the best interests of the child.

23. The United Nations Convention on the Rights of the Child (CRC) establishes some broad principles and norms in relation to intercountry adoption, one of them being that States Parties are obliged to take all appropriate measures to ensure that the adoption placement does not result in improper financial or other gain for those involved.[1] These measures are made more robust for signatories of the 1993 Hague Intercountry Adoption Convention[2] ("the Hague Convention") which establishes standards and guarantees for the protection of children who are adopted across national borders. Even though Malawi is not a signatory to the Hague Convention, its principles represent best practices which taken together with those in the Convention of the Rights of the Child, provide the international framework upon on which best interests decisions must be anchored. As I noted in ***In the Matter of the Adoption of Children Act and In the Matter of K.A.Z.*** (cited above), not being a signatory to the Hague Convention on Intercountry Adoption places Malawi in a very precarious position as it is not able to police safeguards against improper financial gain. I again call on the Ministry responsible for child welfare and the Ministry of Justice and Constitutional Affairs to take serious steps into making Malawi a party to the Hague Convention.

24. In circumstances such as these where it is the infant who is at grave risk should the payments turn out to be improper, it is my reasoned opinion that the presumption must be that payments are improper unless proven otherwise. This

[1] Article 21 (d) of the 1989 United Nations Convention on the Rights of the Child: "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (…) d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it." Available at www.ohchr.org

[2] Article 8 of the 1993 HC.

is particularly important in circumstances such as these where in flagrant disregard of the law none of the safeguarding measures of first seeking court sanction to make the payments were taken. Counsel for the petitioners has argued that the payments were specifically and only for the infant's school fees as no other child was unable to go to school because of lack of fees in the household. The money therefore directly went towards school fees and not to the family. However, counsel should be aware that even such a payment of just school, may influence the family's decision and as such careful measures should be taken to safeguard the infant who could easily be entangled in child selling. Counsel should have advised the petitioners against such conduct and not facilitated it. Even advice (wrongful as it still would have been) to pay the money directly to the school would have created better optics in this situation.

25. Before any payment was made, leave should have been sought from the Court. If the Court had permitted the payments after being satisfied that neither improper financial gain was involved nor the possibility of influence to consent arose, it may have directed an appropriate official body to receive the payments. Further, international best practices prefer that donations by prospective adoptive parents be made to institutions rather than for the direct benefit of the infant to be adopted due to the adverse implications created. The body ordered to receive the donations would have been responsible for accounting to the Court on how the process went and how it guaranteed that the donation did not play a role in the obtaining of consent or was in any way improper. The petitioners in this case jumped the gun as it were. If what they made were innocent payments, they committed themselves to paying towards the adoption of a child for which the court had not in any way indicated would be placed in their permanent care before they started making the payments. They put

themselves through the danger of attaching themselves to an infant with no guarantee of adoption. The Court was never given a chance to determine this issue. What has happened instead is a classic case of the prospective adoptive parents taking a position and expecting the court to rubber stamp it.

26. In the circumstances, counsel for the petitioners is left in an awkward situation. It must be proved that no improper financial gain was made and this would entail putting legal counsel in the witness box. As it is, it would take a great deal to convince the Court that a payment that suddenly caused a change of heart in the granting of consent was a proper payment. Because the safeguarding procedures for ensuring that the adoption process is not tainted with irregularity were not followed, this adoption cannot be in the best interests of the child. There is no doubt that the infant is in need of family integrity, which the petitioners can provide. However, the mere fact that the process that enables the courts to be sure that the best interests of the child are guaranteed have not been respected, the process cannot be said to be in the best interests of the child. The infant is indeed in need of parental care but the process that actualizes that need must be sacrosanct so that it is able to protect those very interests. By flouting safeguards and ignoring the statutory requirement that payments must be sanctioned by the Court, the process is thus irredeemably compromised.

27. Improper financial or other gain as understood in the context of the Hague Convention relates to an amount of money or other material gain that is not justifiable because it is not in accordance with ethical practices and standards, including national and international legislation, and/or is not reasonable in

relation to the service rendered.[3] The usual meaning of improper is dishonest or morally wrong. In the arena of intercountry adoption, improper financial or other gain results in illegal or unethical enrichment and often in improper influence on decisions regarding a child's adoption. All these issue are at play in the current matter and it is for that reason that the order adoption is not granted.

28. Although the grant of an order is denied solely for the reasons set out above, the issue of residence is always a live one intercountry adoption and with the ever-increasing threat to the infant caused by situations in which the Guardian-ad-Litem has not had the opportunity to observe the infant in the care of the petitioners. The adoption process should safeguard against all possible threats and this requires a different approach that fulfils this aim. Section 3 (5) of the Adoption of Children Act proscribes adoption by non-Malawians residents and in respect of infants not resident in Malawi.

29. The fact that the petitioners are XXXian nationals, resident in XXX, who only flew into the country for adoption is not by itself a bar to adoption, following the Supreme Court of Appeal decision ***In the Matter of the Adoption of Children Act and In the Matter of CJ, (A Female Infant)****MSCA* 2009 MLR at 247. However, as reasoned ***In the Matter of the Adoption of Children Act and In the Matter of K.A.Z.,*** Adoption Cause No. 13 of 2022, High Court, Lilongwe District Registry (unreported), allowing the practice of adoptive parents to jet in and out without a period of supervised placement makes it very difficult for best interests determinations to be made. The Guardian-ad-Litem should base his or her recommendations on actual observations of the bonding process in a

[3] Article 8 and 32(1)) of the 1993 HC

living environment in the country and this will enable the court to better assess the petitioners once they appear for the hearing.

Order

30. For all I have reasoned above,

30.1 The order of adoption is not granted.

30.2 Considering the inability of the uncle to care for the infant's financial needs, the Guardian-ad-Litem should place the child in a child care institution with immediate effect.

30.3 The infant shall remain in institutional care until placed with a family that is able to provide for his best interests, and an order of adoption is made in their favour.

I so order

MADE in Chambers in **Lilongwe in the Republic of Malawi** on this **18th** day of **November 2022**

Fiona Atupele Mwale

JUDGE

This judgment is being distributed on the strict understanding that in any report no person other than the advocates may be identified by name or location and that in particular the anonymity of the children and the adult members of their family and adopters must be strictly preserved.