

An overview of Adoption Laws in Kenya and Emerging Challenges

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**ADOPTION TOWARDS A RATIFICATION OF THE HAGUE CONVENTION
ON INTERNATIONAL ADOPTION ON 29TH MAY 1993**

(THE 1993 INTERCOUNTRY ADOPTION CONVENTION)

13TH & 15 DEC 2006, AT PANAFRIC HOTEL, NAIROBI- KENYA

INTRODUCTION

The world which we have constructed for our children to inhabit has grown immensely complex, filled with opportunities but also littered with risks. International mobility, the opening up of borders and the dismantling of some intercultural taboos have, with all their advantages, nevertheless given rise to a new set of risks for children caught up in cross border situations. At one end, there is the phenomenon of cross border trafficking of children for economic or sexual exploitation. At another end, there are the children caught in the cross fire of broken relationships within trans-national families, with ensuing disputes over custody and relocation, with the hazards of international abduction, the chronic problems of maintaining access or contact internationally, and the uphill struggle of securing cross frontier child support. Then there has been the upsurge, notably since the 1950's, in the cross border placement of children whether for alternative long- term care,

including inter-country adoption, or for shorter recuperative placements, and all the dangers inherent in a situation in which one set of countries, for reasons of war, disease or poverty, find it difficult to ensure family care for all of their children, while in another set of countries lowering birth rates and infertility have fuelled demand for children from abroad. Then there are Children internationally displaced through war, civil disturbance or natural disaster, and finally, the teenage runaways attracted by the bright lights of foreign cities and often blinded to the risks.

THE DEVELOPMENT OF NORMS

The general norms that should apply to the protection of children in these cross frontier situations are by now broadly known and accepted internationally. Their development culminated in the drawing up of the *United Nations Convention on the Rights of the Child*^[1] in 1989. These norms consist of the well-known general principles of the child's best interests, non-discrimination, and the right of the child to be heard, combined with the more specific principles applicable to cross border situations, such as the right of the child to maintain continuing contact with both parents (See Articles 10.2 and 9.3) and the general principles regulating inter-country adoption to be found in Article 21 of the *UN Convention on the Rights of the Child*.

THE DEVELOPMENT OF INTER-STATE CO-OPERATION

The three modern Hague Children's Conventions on child abduction, Inter-country adoption and international child protection (even though one of them pre-dates the *UN Convention on the Rights of the Child*) may be regarded as answering this call for international co-operation at the multilateral level. The same is true of the Convention currently under negotiation on the international recovery of child support. The Hague instruments give practical effect to some of the broader principles and aspirations contained in the *UN Convention on. The Rights of the Child*. It has been a major work of the Hague Conference over the last quarter of a century to build specialised legal frameworks, combined with workable systems of international co-operation both at administrative and judicial levels – in other words to provide some of the nuts and bolts – for achieving cross frontier child protection.

THE CENTRAL AUTHORITY MODEL

One of the distinctive features of the three Hague Children's Conventions is the role which they give to Central Authorities in each Contracting State as the lynch pin for administrative co-operation in achieving child protection. In the case of the 1980 Abduction Convention, the role of the Central Authorities is integral to the procedure set out by the Convention for achieving the prompt return of abducted or unlawfully retained children. In the case of inter-country adoption, Central Authorities or accredited bodies are given responsibility for overseeing or carrying out the essential preliminary steps in the adoption process. In the case of all three Conventions, the Central Authorities have more general functions of co-operation with respect to international child protection.

These include

- a role in locating missing children,
- exchanging information about children at risk,
- promoting agreed solutions where these are appropriate,
- exchanging information with other Central Authorities about the child protection laws and services operating in their countries,
- providing assistance or advice to foreigners who are seeking to obtain or enforce child protection orders, and
- Removing obstacles to the proper functioning of the various Conventions.

In a very real sense, Central Authorities established under the Hague Conventions constitute the core of a global network of inter-State co-operation for the protection of children. Among the advantages for States in being part of this international network is the opportunity it gives for sharing knowledge, experience and expertise about child protection.

THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO- OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

There are now 66 Contracting States to the Convention. These Are roughly equally divided between States of origin and receiving States. A further four countries have signed the Convention. Among these is the largest of the receiving States (the United States of America) and two of the largest States of origin (China and the Russian Federation).

Kenya has not yet ratified but we are now moving towards that direction and a policy paper has been forwarded to the cabinet for Adoption by the Adoption Committee through the Ministry of Home Affairs.

The objectives of the Convention, as set out in Article 1, are:

- a) To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;**
 - b) To establish a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;**
 - c) To secure the recognition in Contracting States of adoptions made in accordance with the Convention.**
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The objectives and promise of the 1993 Convention

It is worth recalling some of the practical objectives of the Convention, for it is against these that the promise of the Convention will come to be judged.^[1] There were four hopes in particular surrounding its inception:

- a That the Convention would contribute to the elimination of various abuses which had been associated with intercountry adoption, such as profiteering and bribery, the falsification of birth documents, coercion of biological parents, the intervention of unqualified intermediaries, and the sale and abduction of children;

 - b That the Convention would bring about a more “child-centred” approach within inter-country adoption. The process would become less that of finding a suitable child for a childless couple and more that of finding a suitable family for a child;
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- c That the Convention would improve the situation from the point of view of the prospective adopters, for whom lack of regulation and the absence of clear procedures were leading to delays, complications and often considerable costs;**

 - d That the Convention would bring about the automatic recognition in all Contracting States of adoptions made in accordance with the Convention and thus avoid the legal limbo of non-recognition in which many children who are the subject of inter-country adoption have found themselves in the past.**
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HISTORICAL BACKGROUND TO THE LAW ON ADOPTION IN KENYA

- **Before the enactment of the Children's Act No 8 of 2001, adoption were governed under the Adoptions Act Cap 143 Laws of Kenya. However, the Children's Act of 2001 repealed the Adoptions Act, Guardianship of Infant's Act and Young Persons Act, all of which were harmonized and updated into one set of legislation. The Act has borrowed greatly from the United Nations Convention on the Rights of the Child (CRC), and the African Charter on the Rights and Welfare of the child which the Government has committed itself to. The Government attempted to demonstrate that the rights provided in these instruments are also provided in the National Law. The Act became operational on 1/3/2002.**
- **The Act provides for establishment of institutions dealing with children and gives guidelines on issues of children's welfare, legal aid, custody and care of children, foster care, guardianship and adoption. For purposes of this paper we shall constrain ourselves to adoption rules contained in part XII section 154 -183 of the Act and in all other relating sections.**



WHAT IS AN ADOPTION ORDER?

An adoption order connotes an order giving the adopter parental rights and duties relating to a child. This must be greatly distinguished from guardianship which merely refers to a person who has charge or control of the child and a foster parent which simply refers to a parent registered under the Act to keep and care for a child apart from the child's parents, guardian or relative.

JURISDICTION

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It is only the High Court which has jurisdiction to hear and determine adoption applications. This is done in chambers and the identity of the child and applicant is kept confidential. (see section 154)

AGE FACTOR



- **No arrangements shall be commenced for adoption of a child unless the child is at least six weeks old.**
- **The child must also be declared free for adoption by a registered adoption society before filing the application in court.**
- **Applicant must be over 25 years and at least 21 years older than the child.**
- **Has not attained the age of 65 years.**



PERSONS PRECLUDED FROM ADOPTING:-

- **A sole male applicant in respect of a female child**
- **A sole female applicant in respect of a male child**
- **A sole foreign female or male applicant**
- **People of unsound mind**
- **Homosexuals**
- **Joint applicants not married to each other.**
- **There are exceptions to the above only on special circumstances.**

A decorative graphic at the top of the slide consists of two rows of circles. The top row has three circles: a solid light purple circle on the left, a hollow light purple circle in the middle, and a solid light purple circle on the right. The bottom row has three solid light purple circles. The text 'REQUISITE CONSENT' is positioned over the first two circles of the top row.

REQUISITE CONSENT

The following consents are extremely necessary.

- Consent of parent/guardian**
- Consent of parents of the mother if the mother is a child.**
- Consent of a father who had acquired parental responsibility**
- Consent of other spouse if only 1 spouse is applying**
- Consent of the child if it has attained 14 years.**

However on special cases the court can dispense with consent i.e if you abandon the child, neglect, or persistently failed to maintain the child or where the person required to give consent cannot be found or in case of a persistent failure to honour a maintenance order.



ACTIVE PLAYERS IN ADOPTION

I. GURDIAN AD LITEM

The court shall either on its motion or on its own appoint a guardian ad litem. The guardian must swear an affidavit of fitness and also swear a verifying affidavit to the effect that he/she has no interest adverse to the minor or that he/shall indemnify the child incase of negligence.

The guardian must give written consent that he/she has agreed to act as guardian.



ACTIVE PLAYERS IN ADOPTION... (contd)

DUTIES OF THE GURDIAN:-

- a) Safeguard the interests of the child pending determination of adoption proceedings.**
- b) Investigate and appraise the court in the circumstances pertinent to the adoption**
- c) Make recommendations as to the propriety of making adoption order or interim orders for the child.**
- d) Intervene on behalf of the child**
- e) Undertake duties as the court may from time to time direct.**

NOTE THAT the duties of the guardian shall expire upon the making of a final order. While an application for adoption is pending the child shall not leave Kenya unless in very exceptional circumstances with the consent of the parent/guardian and after the court has made an awardship order. This could be health grounds or safety of the child. Upon making an adoption order the court shall communicate the decision to the Registrar- General

ACTIVE PLAYERS IN ADOPTION... (contd)

II. A SOCIAL WORKER

THE ROLES OF THE SOCIAL WORKERS AND LAWYERS: WHERE IS THE MEETING POINT?

The Social Workers.

- i. A competent social worker is one professionally trained and experienced in adoption. His/her work entails**
- ii. Makes the initial assessment of the adoptive couple**
- iii. They can recommend for counseling and do give advice on the issues relating to adoption including disclosure, teenage management and safety procedures.**
- iv. Social workers make an assessment of the suitability to the adopting couple and the extended family.**
- v. Carries out investigations on the background of the child to declare him/her free for adoption**
- vi. Carries out evaluation and assessment of both the child and the applicant couple during the three months preceding the filing of the applications**

A SOCIAL WORKER (contd..)

THE ROLES OF THE SOCIAL WORKERS AND LAWYERS: WHERE IS THE MEETING POINT? (...contd)

The Social Workers.

- vii. Investigate and appraise the court as to the circumstances pertinent to the adoption of the child.**
- viii. Make recommendations as to the priority of making any interim orders or an adoption order in respect of the child.**
- ix. Make efforts to ensure that the Country where the adoptive couple ordinarily reside and where they expect to reside with the child immediately after adoption order and will grant resident status to the child.**
- x. Make recommendations as to the suitability (including being morally fit and financially capable) to adopt a child supervision by and advice from an adoption society specified by the court for such period as the court may specify periodical reports from a court competent authority in the adopter's Country of residence for such period as the court may specify.**
- xi. Makes arrangements for the adoption of a child through a registered adoption society**
- xii. All this should be done without any intimidation or influence.**



A SOCIAL WORKER (contd...)

The Social Worker ensures that the following documents are in order

- a) Home study report of the adoptive parents prepared by a professional social worker**
- b) Recent photographs of the adoptive family**
- c) Marriage certificate of foreign adoptive parents**
- d) Declaration concerning health of adoptive parents**
- e) Certificate of medical fitness of adoptive parents duly certified by a medical doctor.**
- f) Declaration regarding financial status of foreign adoptive parents along with supporting documents including employer's certificate, where applicable.**
- g) Employment certificate where applicable, of adoptive parents**
- h) Income tax assessment order of adoptive parents**
- i) Declaration from adoptive parents stating willingness to adopt the child**



A SOCIAL WORKER (contd..)

The Social Worker ensures that the following documents are in order

- j) Undertaking from the social or child welfare enlisted agency sponsoring the foreigner to the effect that child would be legally recognized as a citizen of the adopter's country without any form of discrimination and that the child would be entitled to the same rights as those of citizens of that country.**
- k) Undertaking from the foreign adoptive parents that adopted child would be provided necessary education and upbringing according to the status of that country**
- l) Undertaking from the social or child welfare enlisted agency sponsoring the foreigner to the effect that child would be legally recognized as a citizen of the adopter's country without any form of discrimination and that the child would be entitled to the same rights as those of citizens of that country**

A SOCIAL WORKER (contd...)

The Social Worker ensures that the following documents are in order

- m) Undertaking from the foreign adoptive parents that adopted child would be provided necessary education and upbringing according to the status of adoptive parents**
- n) Undertaking from the social and child welfare enlisted agency that report relating to progress of the child along with his/her recent photograph would be sent quarterly during first two years and half yearly fro the next three to the adoption society**
- o) Power to Attorney from foreign adoptive parents in favour of the adoption society which will be required to process the case and such power of Attorney, should authorize the Attorney to handle the case on behalf to the foreigner in case the foreigner is not in a position to come to Kenya during the initial stages that both the minor being adopted and the adoptive parents must be resident in Kenya for at least three consecutive months before the legal process begins and both must also be present during the court hearing for the adoption**
- p) Certificate from the enlisted social or child welfare agency sponsoring application of the foreigner to the effect that adoptive parents are permitted to adopt a child according to the law of their country.**



A SOCIAL WORKER (contd...)

The Social Worker carries out a home study to assess the following:

- a) Social status and family background**
- b) Description of home including the number of bedrooms and whether it can comfortably accommodate the child**
- c) Standard of living as it appears in the home**
- d) Current and previous relationship between husband and wife.**
- e) Current previous relationship between the parents and children (if any children)**
- f) Development of already adopted children (if any)**
- g) Current and previous relationship between the couple and the members of each others family.**
- h) Employment status of the couple**



A SOCIAL WORKER (contd..)

The Social Worker carries out a home study to assess the following:

- i) Health details such as clinical tests, past illnesses e.t.c (medical certificates)**
- j) Economic status of the couple**
- k) Accommodation of the child**
- l) Schooling facilities**
- m) Amenities in the home**
- n) Reasons for wanting to adopt a Kenyan child**
- o) Attitudes of relatives towards adoption**
- p) Anticipated plans for the adoptive parents**
- q) Legal status of the prospective adoptive parents**
- r) The report includes both verbal and non-verbal observations.**

ACTIVE PLAYERS IN ADOPTION



III. THE LAWYER/ADVOCATE

The main duty of a lawyer in the adoption process is to represent the adoptive parents. It is presumed that their job is to ensure the best interest of the parents and child since in essence they are his/her clients.

Therefore the entry point may be considered to be either when the couple has already been placed with the child and wants to proceed with the court process or from the very initial process where an ignorant prospective adopter wants to be guided and advised through the process.

The lawyer also has a duty to advise the couple as to their rights as parents, the implications of an adoption order and the general process of adoption within the legal engagement as per the law.

ACTIVE PLAYERS IN ADOPTION



IV. ADOPTION SOCIETIES

FUNCTIONS OF ADOPTION SOCIETIES

- a) Make inquires, investigations and make reports as to suitability of children for adoption
- b) Examine and interview any respective applicant for an adoption order;
- c) Ensure that parent/guardian of a child understand effects of adoption order and procure relevant consents;
- d) Ensure relevant steps have been taken in respect to abandoned children;

Other key players are the Adoption Committee and case Committee under adoption societies which I shall refer to later while addressing Adoption Regulations, 2005.



EFFECTS OF ADOPTION:

- a) **Upon an adoption order being made the rights, duties, obligations and liabilities of the parent/guardian become extinguished.**
- b) **Adoptive parents become the lawful father and mother of the child.**
- c) **For purposes of written law relating to marriage the child shall be deemed to be within the prohibited degree of consanguinity**
- d) **Orders for payment of a child for maintenance born out of wedlock shall cease to have effect.**
- e) **The adopted child shall be entitled to inherit his adoptive parents property. The will hitherto written shall be construed as including a reference to the adopted child**
- f) **Any will of natural parents referring to the child shall cease to have effect.**



RESTRICTION ON ADVERTISING (S. 180)

It is unlawful for any advert to be published indicating:

- i. Parent, guardian wishes to have child adopted**
- ii. A person desires to adopt a child;**
- iii. Any person not being adoption society) is willing to make arrangements for the adoption of a child.**



NO PAYMENTS/ADVERTISMENT.

The act prohibits receipt of money or other reward in consideration of the adoption of child. However there are exceptions:-

- a) Sanctioned by court**
- b) For maintenance of a child in an adoption society made by parent or guardian so long as child is at society and not with adopter.**
- c) Made by adoption society for maintenance of child under society's disposition;**
- d) Payment to an advocate who acts on behalf of any party in application;**
- e) Voluntary contribution made by any adopter or parent/guardian to an adoption society;**
- f) Any fee prescribed by Minister payable to Ministry.**



WHAT NEXT UPON OBTAINING ADOPTION ORDER.

- i. One must proceed to the Ministry of Foreign Affairs and have the adoption order legalized or notarized.**
- ii. Thereafter the order will be lodged with the office of the Registrar General who shall cause it to be entered into the adoption register and cancel the previous birth certificate and issues a fresh one thereof.**
- iii. Subsequently the order is lodged with the Director of Children's affairs who will issue a letter of no objection addressed to the Immigration Department for purposes of obtaining a passport for international adoptions.**
- iv. The above documents are then lodged with the immigration department for purposes of obtaining a passport.**

THE CHILDREN'S ADOPTION REGULATIONS 2005

Section 182 gives the Minister in consultation with council Powers to *inter alia*, make regulations for the following purposes:-

- i. Maintaining and regulating activities of adoptions societies.**
- ii. Regulate the making of International adoptions**
- iii. Prescribe manner of making arrangement for International adoptions.**

In exercise of these powers the then Minister for National Heritage Honourable Najib Balala on 20th May 2005 published the Children (adoption) regulations, 2005.



(1) ADOPTION COMMITTEE:-

- a) **Established by the Minister**
- b) **Comprises of: The Director of Children's Services; 4 representatives of Charitable Children's Institution; 1 representative of Kenyatta National Hospital; 1 representative from a private hospital dealing with children; 1 representative of Law Society of Kenya; 1 representative of MOFA; The Attorney General.**



ADOPTION COMMITTEE:- (cont'd...)

An adoption committee was activated and given *inter alia* the following mandate:-

- i. Formulate adoption policies**
- ii. Regulate the registration of adoption societies**
- iii. Approve/reject application for registration of International and adoption societies**
- iv. Coordinate International adoptions and approve foreign agencies wishing to conduct adoption in Kenya**
- v. Keep a register for approved adoption societies**
- vi. Fix fees to be charged by adoptions societies for processing application for adoption.(none has been fixed so far.)**

(2) ADOPTION SOCIETIES

WHAT ROLE DO ADOPTION SOCIETIES PLAY?

Upon registration an adoption society is supposed to set up an Adoption Case Committee of not less than 3 and not more than 5 one of whom shall be a social worker. Adoption applications must be approved by the Adoption Case Committee.

Preliminary duties of the Case Committee include:-

- i. Explain to the parent/guardian the effect of adoption on him/her
- ii. Not to accept the child unless the parent or the guardian has signed a certificate of acknowledgment that he/she understands the effect of adoption.
- iii. Ultimately the adoption society must declare a child free for adoption before commencement of adoption proceedings in the High Court.

ADOPTION SOCIETIES (contd..)

DUTIES OF REGISTERED ADOPTION SOCIETY BEFORE ADOPTER ACQUIRES CHILD

- a) A social worker shall obtain inquires and make a report about the child, parents, guardian and indicate whether the child has any relative who wants to offer it a home
- b) Obtain a medical report on the health of both the child and adopter

CONDITIONS TO BE FULFILLED BEFORE PLACING A CHILD WITH ADOPTER:-

- a) The case committee must have considered a social worker's report
- b) The adopter must get approval from the case committee.
- c) The adoptive parent must have read and understood explanatory memorandum and signed a certificate of acknowledgment
- d) The adopters (joint) must have been married at least for a period 3 years prior to the date of commencement of adoption arrangements.

RULES GUIDING INTERNATIONAL ADOPTION VIDE **ADOPTION REGULATIONS 2005**

Refers to an adoption order given to joint applicants who are not Kenyan and are not resident in Kenya.

International adoptions shall be commenced by collaboration of a foreign adoption agency which has duly been approved by the adoption committee. Presently the adoption committee has only approved and licensed two:-

- i. Help a Child Germany**
- ii. Tictina Africa of Netherlands.**

Consequently an application for adoption shall be made by a licensed foreign adoption agency through a local adoption society and shall be accompanied by the following documents:-

- a) Passports**
- b) Full size colour photograph**
- c) Full size colour photograph of their children**
- d) Religion**
- e) Occupation**
- f) Birth certificates**
- g) Birth certificates of their children**
- h) Marriage certificate**
- i) Medical certificate**
- j) Social inquiry report from an official agency of Country of origin.**
- k) References from responsible persons**



Continued....

- a) Affidavit from reliable persons to take charge of the child in case of accident or death of adoptive parents**
- b) Report on financial means supported by official means**
- c) A report on fixed assets**
- d) Record of convictions (if any)**
- e) Certificate of good conduct**
- f) Consent from competent court or government authority permitting adopters to adopt a foreign child**
- g) Undertaking from adopter to take over parental responsibilities permanently**
- h) An undertaking from a foreign adoption society to perform duties similar to those performed by adoption societies in Kenya**

All above documents need to be notarized by Ministry of foreign affairs.

IMPORTANT REQUIREMENTS



- i. Consents;**
- ii. Satisfied court that country of residence and where child will reside will recognize order and will grant child residence;**
- iii. Authorized and recommended as suitable persons to adopt foreign child by competent government authority or court of competent jurisdiction in country where they expect to reside after order is granted.**

PROCESSING OF APPLICATIONS

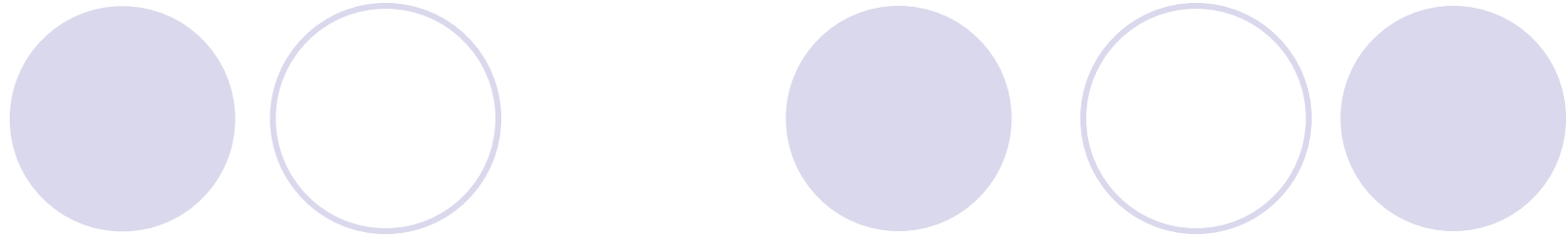
- a) A legal adoption society shall forward application to adoption committee within 30 days**
- b) The adoption society shall accept or reject within 30 days**
- c) An adoption society shall inform the foreign adoption agency within 60 days and include the following information:-**
 - i. A brief report of the children available**
 - ii. Approximate length of time it will take**
 - iii. Court filing fees**
 - iv. Advocate fees**
 - v. Other likely expenditure**
- d) Adopter shall travel to Kenya within 3 months from date receiving notification**
- e) Child shall be placed in the care of adopter in Kenya for 3 continuous months**

NOTE: The adoption society may assist the adopter in making an application in the High Court for an adoption order (Rule 26(4))



EMERGING CHALLENGES:

- 1) The new regulations infringe upon the provisions of the Advocates Act by allowing unqualified persons to draft documents and assist adopters in drafting adoption documents.**
- 2) In this era of gender parity its difficult to comprehend why the Act prohibits single female and male applicants from applying for adoption.**
- 3) By allowing adoption societies to advice foreign applicants on the fees to be charged by advocates the regulations are infringing on the advocate/client confidentiality.**
- 4) The process of appeal ought to be made faster as the adoptive parents could already have stayed in Kenya for over 3 months.**
- 5) Even upon obtaining an adoption order from court, the children's department can still successfully lodge an objection on the legitimacy of the order.**



- 6) Kenya has not yet ratified the Hague Convention on the protection of Children and co-operation in respect of inter country Adoption of 29th May 1993 – which endeavors to protect children in international Adoption”. However a policy paper is before the cabinet for approval).
- 7) Slow phase on the Judicial reforms to appreciate best practices in handling Adoptions matter.
- 8) “Human Trafficking of persons” where we do not have a specific legislation on this matter.
- 9) No clear provisions for intra-family (Domestic/International) adoptions where relatives abroad want to adopt their relatives or even local adoptions for relatives
- 10) Fees charged for both local and international adoptions is high.

~The End~

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~THANK YOU~
