

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO 142 OF 2014**

5 **IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP**  
**OF OFOIRWOTH JOSEPH (INFANT) BY CHRISTOPHER BRITT GRAFF**  
**AND KATHLEEN PEARL GRAFF**

10 (Appeal from the judgment of the High Court of Uganda before  
the Honourable Lady Justice P. Basaza Wasswa  
dated 1<sup>st</sup> July 2014 arising from Miscellaneous Cause No.20 of 2014)

15 **CORAM: HON. MR. JUSTICE REMMY KASULE, JA**  
**HON. MR. JUSTICE RICHARD BUTEERA, JA**  
**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**

**JUDGMENT OF THE COURT**

20 **The Background facts.**

The appellants are husband and wife. They are American citizens. They applied to the High Court in Jinja to be appointed guardians of Ofoirworth Joseph then a child aged 3 years old.

25 The child lost a mother in a motor accident on 22<sup>nd</sup> September 2011. He was 9 months old then.

30 The Family and Children Court Jinja granted a care order to Welcome Home Ministries Africa, an orphanage home because the infant's father and other relatives declared and were found financially incapable of taking care of the child. The child had stayed at the home for 3 years at the time of the instant application.

The application for guardianship was disallowed by the High Court. The appellants were dissatisfied with that decision hence this appeal.

5 The appeal according to the Memorandum of Appeal was on the following grounds:-

**1. The learned trial judge erred in law and fact by not applying the welfare principle and best interest of the child properly in determining the application.**

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**2. The learned trial judge erred in law and facts by not evaluating evidence on record properly in the determination of the application.”**

15 The appellants prayed this Court to allow the appeal and grant them the following orders:-

(a) Judgment and decree of the High Court be set aside and an order appointing the appellants as Legal Guardians of the child be granted.

(b) Costs of this application be granted.

20 At the hearing of this appeal, the appellants were represented by learned counsel, Mr. Charles Majori from Nyombi and Co. Advocates.

Counsel for the appellants argued the two grounds of appeal concurrently as they are inter-related. He submitted that the learned trial judge erred in law and fact by not applying the welfare principle and best interest of the child properly in determining the application before the High Court.

According to counsel, the learned trial judge did not evaluate the evidence on record properly in reaching the decision the trial Court reached.

5 Counsel contended that there was evidence on record by affidavits of the child's father and other relatives that they were all unable financially to take care of the child. The child had been staying in the home for 3 years because the father and other relatives failed to provide care to the child. The relatives had also consented to the appellant's application for legal guardianship of the child.

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Counsel submitted that if the learned trial judge had properly evaluated the evidence she would not have held that the child should be returned to the biological father after 5 years since the father had already failed to provide care to the child and was unable to do so. The other relatives too were unable to provide  
15 the necessary care to the child.

Counsel contended further that the learned trial judge did not properly evaluate the evidence and would not have disallowed the application on the ground that the other siblings of the child would take care of the child since these too were  
20 unemployed and were unable to look after the child.

Counsel submitted that if the learned trial judge had applied the child's welfare principle, she would have found that the applicants were best placed to provide care, a home, future education, and parenthood and the learned trial judge should  
25 have granted the legal guardianship to the appellants.

## The Court's decision

We find it appropriate in this matter to consider and state the law on whether or not the learned trial judge had jurisdiction to grant legal guardianship. This court has had occasion to consider the jurisdiction of the High Court over Legal Guardianship in Civil Appeal No.33 of 2006 In the matter of Howard Amani Little (an infant) and In the matter of an application for Legal Guardianship by Mr. Kevin Little & Mrs. Rebecca Little and Civil Appeal No.32 of 2006 In the matter of Francis Palmer (an infant) and In the matter of an application for Legal Guardianship by Mr. Noel Adam Palmer & Mrs. Michelle Louise, when it held:-

“In our view the provisions of Section 9 of the Judicature Act 1967 were saved by and incorporated in the subsequent enactments, under Sections 16, 35 and 41 of The Judicature Statute 1996, and reproduced in the revised Judicature Act 2000, under sections 14, 32 and 39 of the said Act. Further, Article 139 of the Constitution confers to the High Court unlimited original jurisdiction. Additionally under Section 98 of the Civil Procedure Act, the High Court may invoke its inherent powers to grant remedies where there are no specific provisions or in appropriate cases. It can also apply Common Law and Equity as can be seen in the chapter on Family Law in Halsbury's Laws of England paragraph 533, 4<sup>th</sup> Edition which reads as follows:-

*'The High Court may appoint a guardian of a minor where (1) the proposed guardian applies for such appointment and the minor has*

*no parent or guardian of his person and there is no other person having parental rights with respect to.... And other instances.*

As far as I am concerned the High Court has jurisdiction to entertain applications for guardianship orders.”

The law on the issue of jurisdiction is now settled. The High Court has jurisdiction to grant guardianship. The appellants application for guardianship orders was hence properly before the learned trial judge.

As we proceed to resolve the appeal we find it relevant to remind ourselves of our duty as a first appellate court which duty is stated in Rule 30 of the Rules of the Court as follows:-

**“Power to re-appraise evidence and to take additional evidence.**

**(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the Court may-**

**(a) Re-appraise the evidence and draw inferences of fact; and**

**(b).....”**

The Supreme Court had occasion to state the duty of a first appellate Court in the case of Kifamunte Henry versus Uganda Criminal Appeal No.10/1997 and stated it as follows:-

**“The first appellate court has a duty to rehear the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”**

Applying the principles stated above we shall proceed to re-appraise the evidence available to the trial judge on the court record. We shall consider the submissions of counsel and the available authorities and come to our own conclusion of the appeal resolution. The evidence was by affidavit and was uncontested and is as it  
5 has been summarised above in the background facts of this judgment. It is unnecessary to repeat the same here except for clarity of relevant facts.

The Family and Children's Court had placed this infant in the home where he has stayed for 3 years because the child's father and other relatives had failed to take  
10 care of the child.

They have sworn affidavits to that effect. We find the conduct of the father and other relatives irresponsible and rather unfortunate. Parents have a duty and responsibility to look after the children they produce irrespective of their station of  
15 life. Poor parents in this country have strived and brought up their children who have turned out to be some of the most responsible citizens in the country. The African extended family has always been useful in this regard in raising children especially where there are financial and material challenges. It may in some cases not be easy to bring up children but there is a social responsibility to do so.

20 That does not seem to be the case here. The learned trial judge observed in her judgment as follows:

**“3. The infant has very close blood relatives including a maternal  
25 aunt; Acan Joyce, a paternal aunt; Aweko Nimungu Florence and  
a maternal grandmother; Rozalba Atoi Rwoth who can**

potentially provide the love and care that Kanyongope claims he cannot provide.

5 4. I observed in court when the infant's father Kanyogope Pastor, the maternal grandmother of the infant; Rozalba Atoi Rwoth, and the maternal aunt of the infant Acan Joyce, appeared before me, that they all look well, clean and decently groomed."

10 We find the learned judge's observations above to be clear evidence of irresponsible parents and immediate relatives. They have failed to look after the child despite the judge's observations.

15 The leaned trial judge goes further to state "The biological father of the infant should give sufficient thought to the several options available to him in bringing up this infant." The judge goes on to list the options.

20 These are all possibilities but we find that the sad reality on the ground is that none of them is available to the child in the instant case. The child is continuing to live in M/s Welcome Home Ministries Africa Home since 18<sup>th</sup> October 2011. In his affidavit, Mr. William Edema, who is the administrator of the children's home states in paragraph 2 of the Affidavit states as follows:-

25 "2. That M/s Welcome Home Ministries Africa is duly registered by the National Board for Non Governmental Organizations under the Non Governmental Organizations Act (CAP.59). Copies of its Certificate of Registration and Incorporation, and Permit to operate as an NGO are attached hereto as annexure "A" and "B".

He also states in paragraphs 11 and 12 as follows:-

5           **“11. That I believe that the above mentioned application is being made for the welfare and benefit of the infant as the applicants will provide the infant with a home where he will be accorded parental love and care.”**

10           **12. That I swear this affidavit to serve in support of the application by the applicants for appointment as Legal guardians of the infant Ofoirwoth Joseph.”**

15           The child was in this Court and appeared to us to be comfortable with the two appellants to whom the child is already used. The biological father and the other relatives are irresponsible. Their conduct in our view does not guarantee the welfare of the child. The interest and conduct of the applicants clearly, according to the evidence on the trial court’s record, supported the submission that a grant of guardianship to the appellants was in the best interest of the infant. We find that the application for guardianship was intended to provide a home, care and parental care to the infant. It is in the best interest of the child.

20           We can understand the desire of the trial judge to see to it that the infant is not separated from the surviving members of his family. But clearly the infant’s family is not willing to bring him up as demonstrated over the last 3 years. We do not find that on the evidence available the trial judge was justified in disallowing the application. We therefore quash the ruling disallowing the application and the  
25           subsequent order.



We grant the application and appoint CHRISTOPHER BRIFF GRAFF and KATHLEEN PEARL GRAFF legal guardians of the infant OFOIRWOTH JOSEPH. The applicants are citizens of the United States of America and that is where they live. The infant is a Ugandan citizen.

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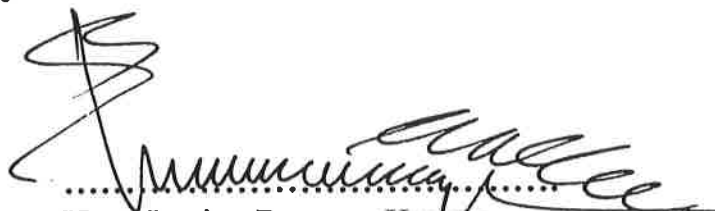
The infant being a Ugandan citizen may travel with the guardians to the United States of America. The child would travel on a Ugandan Passport. The appellants shall be under obligation to make progress reports on the welfare of the child every six months to the Registrar of the High Court at Jinja with copies to the Probation and Welfare Officer Jinja and Mukono. Any changes of address by the appellants should be communicated to the said Registrar and the Probation and Welfare Officer. The guardians will also facilitate the child to visit Uganda and be in touch with the relatives every five years until he is 18 years and has then attained adulthood to determine his own destiny.

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No order is made as to costs of this application.

Dated at Kampala this ..... 22nd ..... of ..... April ..... 2015.

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Hon. Justice Remmy Kasule

25 **JUSTICE OF APPEAL**

*Richard Buteera*  
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Hon. Justice Richard Buteera

5 **JUSTICE OF APPEAL**

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*Geoffrey Kiryabwire*  
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Hon. Justice Geoffrey Kiryabwire

**JUSTICE OF APPEAL**

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