

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**FAMILY DIVISION**  
**HCT-00-FD-FC-0199-2008**  
**IN THE MATTER OF BILL LOCHORO AND BECKY ILUKOL (INFANTS)**  
**AND**  
**IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY BRIAN**  
**CHRISTOPHER BERRY AND SHANNON ALISE BERRY**  
  
**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**RULING**

1.

Brian Christopher Berry and Shannon Alise Berry, the applicants in this matter, are United States citizens living at 11734 Via Sefton, El Cajon CA 92019 in the United States. They are married. In this application they seek to be appointed guardians of Bill Lochoro and Becky Ilukol, two infants born to Ugandan parents.

2. The infants were born to Suukuku David and Aleper Lucia of Masese Jinja on the 27<sup>th</sup> May 2003. The infants are twins. The mother of the infants, Lucia Aleper, it is averred by the father, Suukuku David, was mentally sick, and abandoned the father and infants in the same year of their birth. She has not been seen again.

3. Mr. Suukuku David claims to be a peasant with no source of income. He approached Welcome Home Ministries Africa seeking assistance for the children. The infants were admitted to the home ran by Welcome Home Ministries Africa on 27<sup>th</sup> June 2003. Subsequently Welcome Home Ministries has notified the father that the applicants are interested in adopting the infants. He supports their application for legal guardianship of the infants.

4. Brian C Berry averred that they have 3 children already aged 11, 8 and 6 years respectively. Brian C Berry works as Student Missions Pastor by Journey Community Church 8363 Grossmont Center Drive, La Mesa CA 91942 in the US. The applicants want the infants to join their family and they intend to adopt them in the United States.

5. An inter-country adoption home study on the applicants was carried out at their request by

Angels Haven Outreach who issued their report on 1<sup>st</sup> December 2008. The report finds the applicants as suitable adoptive parents with sufficient income to take on additional responsibility of 2 new children in the family. The applicants have no criminal record in the US.

6. Honourable Peter Nyombi, learned counsel for the applicants, submitted that the applicants apply for legal guardianship under Article 139(1) of the Constitution, Sections 14, 33, and 39 of the Judicature Act and Section 3 of the Children's Act. From the applicants' affidavits and supporting documents it is clear that their intention is to adopt the said children. The law applicable therefore would be Section 46 of the Children Act which deals with inter country adoption.

7. Clearly the applicants under Section 46 of the Children Act would not qualify on at least 2 out of the 6 conditions that have to be fulfilled. The applicants have not been residents in this country for 3 years and have not fostered the infants in question at all let alone the required period of 36 months. I suppose the applicants would fulfil the rest of the conditions. I shall set out Section 46 of the Children Act below.

**'46 Intercountry Adoption** (1) A person who is not a citizen of Uganda may in exceptional circumstances adopt a Ugandan child, if he or she-- (a) has stayed in Uganda for at least three years; (b) has fostered the child for at least thirty six months under the supervision of a probation and social welfare officer; (c) does not have a criminal record; (d) has a recommendation concerning his or her suitability to adopt a child from his or her country's probation and welfare office or other competent authority; and (e) has satisfied the court that his or her country of origin will respect and recognise the adoption order.'

8.

That being the case the applicants have resorted to another route. They have applied for legal guardianship under the provisions of the law that Mr. Peter Nyombi referred to. I am sceptical whether those provisions would grant this court the authority to grant an order of legal guardianship in the circumstances of this case. Firstly because clearly there is law that would govern the circumstances of this case but which is evaded by the present application. Secondly those provisions do not provide expressly that this court is seized with the jurisdiction to grant orders of the kind now sought. However, the Court of Appeal has in the case of *In the Matter of*

*Francis Palmer an Infant, Civil Appeal No. 32 of 2006*, and in the case of *In the matter of Howard Amani Little, an infant, Civil Appeal No.33 of 2006* held that this court has jurisdiction and authority to grant orders of legal guardianship. In that regard I am bound to follow that decision. What that decision does not make clear are the circumstances in which a court may issue that kind of order, especially in cases that are akin to inter country adoptions.

9. In that decision the Court of Appeal was divided as to when and how the High Court may grant orders of legal guardianship in the circumstances where the applicants were foreign applicants resident outside this country and whose intention of applying for legal guardianship was to take the children outside this jurisdiction, with the aim of adopting such children.

10. One of the judges was of the view that legal guardianship was to be resorted to where the applicants could not fulfil the conditions under Section 46 of the Children's Act. Another judge disagreed. Though in agreement that this court had jurisdiction to grant orders of legal guardianship, the judge stated that it should not be applicable where the applicants were foreign applicants who did not qualify under Section 46 of the Children's Act. To allow such applicants to obtain orders of legal guardianship, while they did not qualify to adopt the children under the Act, would be an infringement of the Act. The third judge did not agree that the High Court had the power to grant orders of legal guardianship, such power being only available to Family and Children Court, by the issue of care orders and appointment of Foster Parents. Nevertheless the judge concurred in the orders proposed for legal guardianship proposed by the first judge.

11. The Court of Appeal decision, given the conflicting legal positions taken by each judge, provides no authoritative guidance as to how this court should exercise its power in granting orders of legal guardianship. In the result perhaps I must turn to simply one question. Is the grant of such an order in the best interest of the infants?

12. The father of the infants claimed that he was unable to look after the infants and requested Welcome Home Ministries in Jinja to look after them. While this institution is providing care now this can only be of a temporary nature, and is not necessarily the best environment in which to raise children. I am aware that Welcome Home Ministries is not an approved home within the provisions of the Children's Act. However, as in this case the father of the infants is the one who took the children to the home, and he supports the application of the applicants, I will not hold the fact of non approval of the home by the Minister against this application.

13. Like all other children, the two infants in question need to grow up in a loving and caring

home. The applicants are offering this kind of home to the infants. I am satisfied that it is in the best interests of the infants in question to allow this application rather than to refuse.

14. The applicants are forthwith appointed legal guardians of Bill Lochoro and Becky Ilukol.

Signed, dated and delivered at Kampala this 28<sup>nd</sup> day of January 2009

FMS Egonda-Ntende

Judge