

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**FAMILY DIVISION**

HCT-00-FD-FC-0086-2009

IN THE MATTER OF ANTONY OWOMUGISHA AN INFANT

AND

IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY JEFFREY  
ALAN KLUG AND AMY ANN COX

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**RULING**

1. The applicants are citizens of the United States living at 732 Rea Place, 2D, Evanston, Illinois 60202, United States of America. They are married. In this application they seek an order of guardianship in respect of Antony Owomugisha, an infant, currently in the custody of Ibanda Babies Home. The application is supported by affidavits of the applicants and Sister Christine Laboyi, the Warden of Ibanda Babies Home.
2. Antony was received at Ibanda Babies Home on 18<sup>th</sup> April 2008 at the written request of the Senior Probation and Social Welfare Officer, Mbarara, Mr. M S Tumwine. The letter states that the baby boy (Antony) had been abandoned at Kaniampiha hill, Rweibogo village, Bugamba Sub-county in Mbarara District. On 17<sup>th</sup> June 2009 the Family and Children Court of Mbarara sitting at Ibanda issued a care order in respect of Antony to Ibanda Babies Home. The parents or relatives of the infant are not known.
3. Jeffrey is 29 years old. So is Amy, his wife and co applicant. They got married on 19<sup>th</sup> July 2003 at Los Angeles in California, United States of America. Jeffrey is a graduate researcher at Argonne National Laboratory, 9700 South Cass Avenue, Argonne, IL60439, USA. Amy holds a Bachelors of Arts and Masters of Arts from the

University of California. She is a free lance writer and does some part time work to earn income. The couple has no children.

4. An International Adoptive Study carried out on the applicants by St. Mary's Services, an adoption agency was filed in support of this application. It stated in part,

‘Jeffrey Alan Klug and Amy Ann Cox were assessed as having the physical, emotional, and mental capabilities essential to parenting an internationally, adopted child. The couple has demonstrated a commitment to the adoption of a child of another race and culture through their participation in the home study process, and involvement with other families who have completed international adoptions of African children. This reporter believes that because of the couple's won temperaments, family and friends' support networks, and their willingness to be involved and educated on international adoption, they are excellent candidates for this adoption. It is recommended that a child of either gender between 0-12 months of age of age from Uganda be placed with Jeffrey Alan Klug and Amy Ann Cox.

Jeffrey Alan Klug and Amy Ann Cox meet the pre-adoption requirements of St. Mary's Services, a child welfare agency in the State of Illinois.

Jeffrey Alan Klug and Amy Ann Cox also meet the pre adoptive requirements of the State of Illinois Department of Children and Family Services.’

5. The applicants have no known criminal record in the United States. Neither do they have a history of child abuse or neglect. I am satisfied that the applicants, on the facts available to me, are suitable adoptive parents and or guardians. I must now turn to the law and determine whether it is possible for this court to make the order sought.
6. It is clear on the papers before me that the applicants' intention is to adopt the infant in question. However, they have not applied for adoption. They have applied for legal guardianship.

7. Clearly the applicants, under Section 46 of the Children Act, would not qualify on at least 2 out of the 5 conditions that have to be fulfilled in case of adoption. The applicants have not been residents in this country for 3 years and have not fostered the infant in question at all let alone the required period of 36 months. The applicants may 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. As the clear route of adoption is closed the applicants have resorted to another route, legal guardianship. This application is stated to be made under Article 139 (1) of the Constitution, Section 14 of the Judicature Act, Sections 2, 3,4, 5 and 6 of the Children Act and Order 52 rules 1 and 3 of the Civil Procedure Rules. The cited provisions, in my view, would not authorise this court to grant an order of legal guardianship in the circumstances of this case. Firstly because clearly the law that would govern the circumstances of this case is the law related to inter country adoption, which is evaded by the present application unless those conditions raise constitutional issues that may lead to their successful ouster by a competent court. Secondly the provisions cited as the basis for this application do not provide expressly that this court is seized with the jurisdiction to grant orders of the kind now sought.
9. However, the Court of Appeal, 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 to grant orders of legal guardianship by a 2 to 1 decision. What that decision does not make clear are in what circumstances should a court issue that kind of order, especially in cases that are akin to inter country adoptions.

10. 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.
11. L M Kikonyogo, DCJ., 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 Act. C Kitumba, JA., disagreed. Though in agreement with the learned Deputy Chief Justice that this court had jurisdiction to grant orders of legal guardianship, the learned justice of appeal stated that it should not be applicable where the applicants were foreign applicants who did not qualify under Section 46 of the Children 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. A Twinomujuni, JA., 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's Court, by the issue of care orders and appointment of Foster Parents. Nevertheless he concurred in the granting of the order of guardianship proposed by the Deputy Chief Justice.
12. The Court of Appeal decision, given the conflicting legal positions taken by each justice, 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 children?
13. The infant in this case is about one year old. It is not possible to seek his views on the matter. The child's parent's whereabouts and details are unknown. Ibanda Babies Home who have legal custody of the child support this application. So does the Probation and Welfare Officer for Mbarara. Care in an institution is only intended to

be temporary. The applicants are willing to provide a loving and caring home within which to raise this infant. In fact they are the only ones who have made such an offer. The applicants come well recommended.

14. No governmental support, be it local or central, is available for the care and upkeep of children in distress generally or specifically in the case of this infant. Right now the infant is under the care of a local non-governmental organisation. There is no offer from Ugandans or non-Ugandans resident in Uganda to adopt this child. It is imperative that his stay in an institution be terminated as soon as possible. I find therefore that exceptional circumstances exist for an order to be made in favour of non citizens who are the only viable alternative.

15. I am satisfied, on the information available to me at this stage that it is in the best interests of Antony to allow this application rather than refuse it. Accordingly I appoint the applicants legal guardians of the Antony Owomugisha.

Signed, dated, and delivered at Kampala this 22<sup>nd</sup> July 2009

FMS Egonda-Ntende  
Judge