

**THE REPUBLIC OF UGANDA**

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

**FAMILY DIVISION**

**HCT-00-FD-FC-0078-2009**

IN THE MATTER OF NICHOLAS MWANJE AND BRENDA NAKIDDE CHILDREN

AND

IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY BERNIE HANSEN  
AND PATRICIA HANSEN

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

**RULING**

1. The applicants, a married couple, are United States citizens residing at 11710 NE Fargo Ct. Portland, Oregon 97220, in the United States of America. In this application they are seeking guardianship orders in respect of 2 siblings, Nicholas Mwanje and Brenda Nakidde, hereinafter referred to individually as child and both as children.
2. Brenda was born on 14<sup>th</sup> April 1993 and Nicholas was born on the 5<sup>th</sup> August 1995. Both children were born to the late Stanely Edward Mwanje and the late Nalunga Jane Mwanje. The children's mother, Jane, died on 19<sup>th</sup> January 1999 and the father, Stanely, died on 20<sup>th</sup> May 2005. After the death of the children's parents one Suzan Lwakatale and her husband took over the responsibility of looking after these children having been asked to do so by the children's father prior to his death.
3. The children were then passed on to I AM CHILDREN'S FAMILY MINISTRIES home in Kampala. Subsequently care orders were obtained from the Family and

Children Court, Mwanga 11 Court, committing these children into the care of that home.

4. The applicants have been supporting this home for some time now and met the children on one of their visits to the home. In September 2008 the children visited the applicants in the US and stayed with them for about 3 months. The applicants now desire to take over full responsibility for raising these children, hence this application.
5. The applicants are a married couple who are blessed with 2 children, Joshua Peter Hansen, 34 and Joseph Timothy Hansen, 32. Bernie is 58 and Patricia is 60 years old. Bernie is a maths teacher and Patricia is a homemaker. Bernie teaches at Beaumont Middle School in Portland, Oregon in the United States of America. The applicants have no known criminal record in the United States.
6. An international Adoption Home Study on the applicants was done by Tree of Life Adoption Center of Portland. The report concluded,

‘Based on the home study conducted, along with a comprehensive review of the applicants documents, I find Bernie and Patricia are excellent candidates for adoption. They meet the standards for adoptive homes in the State of Oregon in accordance with OAR. 412-003 and ORS 109.309(5), (a)(c). Tree of Life Adoption Agency is authorised by the Department of Human Resources of the State of Oregon ‘to operate a child caring agency under the provisions of Oregon revised statutes 418.205 to 418.325 to 418.327 and related statutes. I recommend Bernie and Patricia Hansen be placed with a son, age 12 and a daughter, age 15, from Uganda, because they offer all the ingredients necessary to create a healthy, happy, safe home and environment for children to grow and develop to their fullest potential.’

7. 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.

8. The applicants apply for legal guardianship under Article 139 (1) of the Constitution, Sections 14, 33 and 39 of the Judicature Act and Section 30 of the Children Act. It is clear that the applicants' intention is to adopt the infant in question and intend to do so in the USA in case this application succeeds. Given that scenario I would have been inclined to find that the applicable law should be Section 46 of the Children Act which deals with inter-country adoption. In which case, this application, on its face, would have failed given the fact that the applicants would not have complied with the residency requirement and the 36 months foster period unless those conditions raise constitutional issues that may lead to their successful ouster by a competent court.
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 the 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'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. 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 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. What is needed for these children and many other children in their position is a home with loving parents and a family. These children are being provided an opportunity to grow up in a loving family environment to be provided by the applicants. The children's current circumstances as residents of an orphanage were only intended to be temporary, pending the availability of a suitable home in which they could be raised. Unfortunately no suitable home has been available locally for too long, since the death of their parents. Institutional upbringing denies children their natural and legal rights of being raised by their parents whether natural or adopted.
14. No governmental support, be it local or central, is available for the care and upkeep of the children in distress generally or specifically in the case of these children. Right now the children are under the care of a local non-governmental organisation. There is no offer from Ugandans or non-Ugandans resident in Uganda to adopt these children since the death of their parents. It is imperative that their 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 that it is in these children's best interests to grant rather than refuse this application. Accordingly I grant an order of legal guardianship of Nicholas Mwanje and Brenda Nakidde to the applicants effective immediately.
16. Before I take leave of this matter I wish to draw the attention of Government to the unsatisfactory state of the law with regard to guardianship of children and inter-country adoption. Based on the increasing frequency and volume of applications for guardianship by non residents and non citizens of this country in our courts it is apparent that this is so because of the stringent nature of the law with regard to inter-country adoptions that makes virtually impossible adoptions of children born and living in Uganda by non citizens not resident in Uganda.

17. During the proceedings for guardianship there is no independent representation of the child or infant in question to test the suitability of the applicants and the information that they present to court. Basically it is the applicants and the child or children only before the court with a supporting cast of counsel, relatives of the child and or those in custody of the child. In this particular case this situation is ameliorated by the fact that the children are adolescents and can, to some extent, express themselves and have done so in favour of this application. Nevertheless they are still children who would deserve independent representation in proceedings of this nature.
18. There are no statutory guidelines with regard to guardianship of children. There is no register for guardianship orders issued by this court, especially in the case of non citizens who take the children outside the country, unlike the one available for adoption orders. This is bound to make it difficult if any information is required at some stage in the child's or its guardians' life.
19. It appears to me that in its effect Section 46 of the Children Act effectively denies children the possibility of adoption and care, at times, of the only adoptive parents available to them, simply on the basis that those prospective adoptive parents are non-citizens of this country. In doing so this may not be in the best interests of those children in distress with no parents to look after them and no offer from local adoptive parents. In such cases it may well be that Section 46 of the Children Act runs counter to Article 34 of the Constitution that requires, inter alia, laws relating to children to be enacted in their best interests. It is questionable if Section 46 is in the best interests of children.
20. A somewhat similar point was considered by the Constitutional Court of South Africa in The Minister of Welfare and Population Development v Sara Jane Fitzpatrick and Anor Case No. CCT 08/2000. Section 18 (4) (f) of the South African Children Care Act bluntly barred non South African citizens from being able to adopt South African children. The Constitutional Court held that Section 18 (4) (f) was unconstitutional in so far as it failed to give paramountcy to the best interests of children as required by Section 28 (2) of the Constitution. Section 28 (2) of the South African Constitution in substance has the same import as our Article 34 of the Constitution of Uganda though

the wording is varied. To an extent, and in its effect, Section 46 of our Children Act is similar to Section 18 (4) (f) of the South Africa Children Care Act although it is not as pervasive as the former. It leaves a small window of opportunity for resident non-citizens.

21. Section 46 of the Children Act does not possibly run counter to our Constitution only but may also be in conflict with Uganda's obligations under Article 3(1) of the International [United Nations] Convention on the Rights of Child which entered in force on 2<sup>nd</sup> September 1990 which obliges national legislative bodies, among others, to make the best interests of the child a primary consideration in all its actions concerning children which includes law making.
22. It is time to reform this aspect of our law by making inter-country adoption possible where there are no suitable local adoptive parents in order to ensure that all our children grow up in the loving care of their natural parents or adopted parents and are able to develop to their full potential. This would bring the law in line not only with our Constitution and International Obligations but also with international practice under the Hague Convention on the Protection and Co-operation in respect of Inter-country Adoption of Children. It is time too for Uganda to sign up and ratify this convention for the benefit of its children and to take advantage of the availability of a worldwide/international network of government agencies for the protection of children.

Signed, dated and delivered at Kampala this 1<sup>st</sup> day of July 2009

FMS Egonda-Ntende

Judge

