THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

HCT-00-FD-FC-0079-2009

IN THE MATTER OF IREN NAJJUMA, AN INFANT

AND

IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY TANYA NANNETE EVANS

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant is a United States female citizen living at 368 Evans Lane, Jasper, AL 35504 in the United States of America. The application is supported by affidavits of the applicant, Sarah Buzabalyawo, Ag. Probation and Welfare Officer of Lubaga Division and Barbara Nankya of Sanyu Babies Home. The applicant is seeking an order for legal guardianship of one Irene Najjuma an infant. Irene is estimated to be 8 months old. Her parents are unknown. She was abandoned near the Sanyu Babies Home, Kampala on 17th May 2009 at around 2.00am.

2. Mr. David Mugerwa, the Chairman LC 1 of Namirembe Church Village referred the matter to the Child and Protection Unit of Old Kampala Police Station on 18th May 2009. The Officer in Charge, Old Kampala Police Station then referred the child to Sanyu Babies Home. On the 8th June 2009 the Family and Children Court of Mwanga 11 issued a care order in respect of this infant to Sanyu Babies Home. Sanyu Babies

Home now asserts that it has found the applicant who is ready and willing to provide a home for Irene.

3. The applicant is a 41 year old first grade teacher at Curry Elementary School in Jasper, Alabama. She is not married. Neither has she any children. She does not have a criminal record in the USA. Neither does she have a history of child abuse. She has been the subject of an international adoption home study by Lifeline Children Services of 2908 Pump House Road, Birmingham, Alabama 35243, a child adoption agency licensed by the State of Alabama to undertake adoptive home studies. The report states in part,

> 'Ms Tanya Nannette Evans appears to be capable of giving any child excellent parenting. She has demonstrated that she is equipped to handle the responsibilities and duties that come when adding children to her home. She has extensive experience with children and a solid knowledge base concerning child development. Her motivations to adopt include the desire to begin her family, the desire to parent two children, and the desire to give children a chance to a complete family. The worker believes Ms Evans is well-equiped, mentally, emotionally, financially, and physically to take on additional responsibilities of two internationally adopted children.'

4. I am satisfied that the applicant, on the facts available to me, is a suitable adoptive parent and or guardian. I must now turn to the law and determine whether it is possible for this court to make the order sought.

5. The applicant is applying 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 Act. It is clear that the applicants' intention is to adopt the infant in question and intends 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 applicant 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.

6. 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.

7. 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.

8. 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.

9. 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?

10. What is needed for this infant and many other children in a similar position is a home with loving parents and a family. This child is being provided an opportunity to grow up in a loving family environment to be provided by the applicant. The child's current circumstances as a ward of an orphanage was only intended to be temporary, pending the availability of a suitable home in which she could be raised. Unfortunately no suitable home has been available locally since she was picked up abandoned. Institutional upbringing denies children their natural and legal rights of being raised by their parents whether natural or adopted.

11. 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 her 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 a non citizen who is the only viable alternative.

12. I am satisfied that it is in this infant's best interests to grant rather than refuse this application. Accordingly I grant an order of legal guardianship of Irene Najjuma to the applicant effective immediately.

13. In the paragraphs below I wish to repeat what I stated in the In the Matter of Nicholas Mwanje and Brenda Nakidde (Children) HCT-00-FD-0078-2009 (unreported) with regard to current state of the law of guardianship and adoption.

14. 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.

15. 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.

16. There are no statutory guidelines with regard to guardianship of children beyond the foster care placement rules which are not applicable to the case at the bar. 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.

17. 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.

18. 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.

19. 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 2nd 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.
20. 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 1st day of July 2009

FMS Egonda-Ntende

Judge