

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

HCT-00-FD-FC-0089-2009

IN THE MATTER OF ANDREW KAYOMBYA, AN INFANT

AND

IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY TANYA
NANNETTE 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 Andiru Margaret, the Officer in Charge of the Child and Family Protection Unit of Old Kampala Police Station. The applicant is seeking an order for legal guardianship of one Andrew Kayombya an infant.
2. Andrew is estimated to be one year old. On 5th May 2009 he was brought to Old Kampala Police Station by a one Kalemba Fred of Kisenyi, Kampala who reported that a young lady had left this child with him promising to return after a visit to the bathroom. She did not return to collect Andrew. Margaret Andiru referred the child to Sanyu Babies Home who received the child and continue to have custody of the same up to today. On the 12th June 2009 the Family and Children Court of Mengo at

Mwanga 11 issued a care order in favour of Sanyu Babies Home in respect of this infant.

3. Notice of this application with a photograph of Andrew was published in the New Vision Newspaper of 15th June 2009. This is an English language daily newspaper published in Kampala.
4. 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-equipped, mentally, emotionally, financially, and physically to take on additional responsibilities of two internationally adopted children.’

5. 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.
6. 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.

7. 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.
8. 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.
9. 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 to adopt 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.
10. 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 child?

11. 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 were only intended to be temporary, pending the availability of a suitable home in which he could be raised. Institutional upbringing denies children their natural and legal rights of being raised by their parents whether natural or adopted.
12. 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 a non citizen who is the only viable alternative.
13. 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 Andrew Kayombya to the applicant effective immediately.

Signed, dated and delivered at Kampala this 21st day of July 2009

FMS Egonda-Ntende

Judge

