THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

FAMILY CAUSE NO. 28 OF 2009

IN THE MATTER OF NAMUGERWA JOYCE, NANTONGO HARRIET, NAKAFERO JACKLINE (MINORS)

AND

IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP OF THE ESTATES OF THE SAID MINORS BY NAKABUGO CATE (PATERNAL AUNT)

FOR

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

The applicant brought this application under the provisions of s.14 and 33 of the Judicature Act, s.98 of the Civil Procedure Act and s.1 of the Children Act. She sought an order for the guardianship of the estates of the minors.

The applicant is the paternal aunt of the minors and she was given powers to take care of the minors after the death of their father. The minors have land measuring 0.057 hectares in their names which is registered in the mailo register as Kyaggwe Block 109, Plot 2174 and situated at Gwafu, Seeta in Mukono District. In her affidavit in support of the application, the applicant averred that she has been responsible for the children's welfare though she has never been appointed their guardian by a court of law. Further that she is registered as a joint owner of the property named above with the minors. Further that the minors do not have the capacity to enter into contracts with respect to the land. The applicant averred that she is desirous of selling part of the land in order to provide some basic necessities to the minors such as pay for education, buy clothing. The applicant further averred that she would like to be appointed the guardian of the said minors in order to effect the sale of the part of their property.

I have considered the order prayed for and have found no specific law that caters for such applications. Applications for guardianship of infants and their estates used to be issued under the provisions of s.9 of the Judicature Act of 1967. However, when that Act was repealed and re-enacted in 1996, that provision was omitted. It is for that reason that advocates have had to improvise by filing such applications under the provisions stated above, in particular, s.14 and 33 of the Judicature Act which confers unlimited original jurisdiction on the High Court in all matters. The application was therefore brought under the correct law.

The applicant wishes to be appointed the guardian of the infants so that she can dispose of part of the property that they own. According to s.1 (k) of the Children Act, a "guardian" means a person having parental responsibility for a child. S. 1 (o) provides that "parental responsibility" means all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child. Parental responsibility includes the parent's right at common law over the child's property together with such rights as a guardian of the child's estate would have (Principles of Family Law, 6th Edition, S. M. Cretney & J.M. Masson, Sweet & Maxwell, London, at page 619).

According to s. 5 of the Children Act, parents and guardians of children have to maintain them by providing education and guidance, immunization, an adequate diet, clothing, shelter, and medical attention. The applicant stated that she has been providing some of these requirements but wishes to sell part of the property held in her names and the minors so that she continues to provide for them and that would be in order.

Section 3 of the Children Act provides that the welfare principle and the children's rights set out in the First Schedule to the Act shall be the guiding principles in making any decision based on the Act. Paragraph 1 of Schedule 1 of the Act then provides that whenever the State, a court, a local authority or any person determines any question with respect to the upbringing of a child; or the administration of a child's property or the

application of any income arising from it, the child's welfare shall be of the paramount consideration. The criteria for making decisions are provided for in paragraph 3 of the 1st schedule as follows:

a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;
b) the child's physical, emotional and educational needs;
c) the likely effects of any changes in the child's circumstances;
d) the child's age, sex, background and any other circumstances relevant in the matter;
e) any harm that the child has suffered or is at the risk of suffering; and
f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.

I am of the view that in the recent past, courts have been too quick to grant orders for the sale of property that has been left to children. Courts have not taken the provisions of paragraph 3 of the 1st Schedule to the Children Act seriously because invariably, they are never examined as was envisaged by the Legislature. In a few years to come when these children whose property is being so disposed of come of age, there may be a deluge of litigation between the minors who will then be adults and the guardians that were appointed by the courts and allowed to dispose of property without any orders to account for the proceeds thereof.

The court sitting in any matter relating to the child or his/her property has the obligation to stand in the shoes of that child and examine whether the applicant really has cause to dispose of it. That is especially so because in all cases of this nature that come before the courts, the child is not represented. This is unlike jurisdictions like New South Wales (Australia) where the law requires that in a case where the child's interests are at stake, that child must have his/her own legal representative called a "best interests representative." A best interests' representative must act impartially and make

submissions to the court to further the best interests of the child. The representative must inform the court of the child's wishes. However, the representative does not act on the child's instructions and may present a conclusion to the court inconsistent with the child's wishes where the representative considers this to be in the child's best interests. A best interests' representative is sometimes referred to as a "separate representative" or "child's representative". A best interests' representative does not have a client. A best interests' representative acts as an officer assisting the court by representing the best interests of the child. Nevertheless, the child must still be given the opportunity to express his/her views and have those views taken into account. He/she may be appointed by a court or retained directly by the parents or guardians of the child. (See The Law Society of New South Wales, Representation Principles for Children's Lawyers, 2nd Edition, at pages 1 & 2. retrieved from http://www.lawsociety.com.au)

In Uganda the equivalent would be the Probation and Social Welfare Officer as is inferred from the provisions of s.95 of the Children Act. It is there required that when the court is considering making a detention or probation order, a written social background report shall be prepared by a probation and social welfare officer and shall be taken into account by the court before making the order. In such cases, the PSWO acts as the "eyes and ears of the judge or the court". However, the Act is silent on this requirement in civil proceedings and the courts have hitherto made decisions without the assistance of probation services. I have therefore not found any case in which the courts have required a report in applications for guardianship between children and their relatives yet by virtue of s.98 of the CPA civil courts may have recourse to such reports in order to prevent the abuse of court process. As a result, in all such applications the court only has the word of the applicant and in many cases the children who may be of too young to give details to the court of what is happening in their lives are not consulted. Neither are children who are above 14 years and above who have the legal capacity to give evidence on oath consulted. This is contrary to Article 12 of the Convention on the Rights of the Child (CRC) which preserves the child's right to be heard. Article 12(2) provides that the child shall in particular be provided the opportunity to be heard in any judicial and

administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Uganda ratified the CRC on 17th August 1990 and it has more or less been re-enacted in paragraph 4 (c) of the First Schedule to the Children Act as follows:

> **4. Rights of the child.**
>
> **A child shall have the right—**
>
> **a) ……**
>
> **b) ……**
>
> **c) to exercise, in addition to all the rights stated in this Schedule and this Act, all the rights set out in the United Nations Convention on the Rights of the Child and the Organisation for African Unity Charter on the Rights and Welfare of the African Child with appropriate modifications to suit the circumstances in Uganda, that are not specifically mentioned in this Act.**

One of the grounds of this application was that the applicant was given powers to take care of the minors after the death of their father. However, the applicant did not give any information about who gave her the powers or how she came to have them. Under the law, the right to act as legal guardian may be vested by the parent in another person by a will or some other document that takes effect after the death of both parents who by law have parental responsibility. In my view, the fact that the applicant is jointly registered as proprietor of the land with the minors does not necessarily mean that she is *de facto* to be appointed their guardian or that she is the best person to ensure that their rights are sufficiently respected, enforced and protected.

It is inferred from paragraph 2 of the affidavit in support that at the time of filing this application Namugerwa Joyce was 6 years old, Nantongo Harriet was 8 years old while

Nakafero Jackiline was 10 years old. It would have been desirable for this court to see the minors but the minors have never been brought to court. The children are obviously too young to make decisions about their guardianship and that of their property. That may be so, but the applicant did not disclose whether these minors have a mother or mothers who would be the automatic guardian(s) in the absence of their father. I therefore suspect that the decision to make the applicant the guardian of these infants and their property may have been premised on the fact that she is the paternal aunt of the children and that ordinarily under the customary laws of most traditional communities in Uganda she would have better rights to guardianship of the children than their mother(s). S.2 (n) of the Succession Act reinforces this practice which is premised on the dominance of the male who is the father because it still provides that with regard to kindred and consanguinity "*a paternal ancestor shall be preferred to a maternal ancestor*.

However, decisions that are premised in customary law and patriarchy are often discriminatory and controversial. Courts have to be careful in accepting them wholesale without adequate information on how they came to be made. This is so because customary law has come to be known as the tool by which women's and children's rights are made subordinate to those of other persons who are sometimes also women. That is a position that can no longer be accepted without question in light of the decision of the Constitutional Court in **Law & Advocacy for Women in Uganda v. Attorney General, Constitutional Petitions No. 13/05 and 13/06.** In that case the Justices of the Constitutional Court ruled that ss.2(n) (i) and (ii) of the Succession Act are inconsistent with and contravene Articles 21 (1) (2) (3) 31, 33(6)of the Constitution and they are null and void.

A court may only appoint a guardian if a minor has no surviving parent who automatically has parental responsibility. In this case it was not disclosed whether the minor herein has a surviving parent or not. I am therefore unable to make the decision requested for without adequate information, i.e. whether the minors herein have a mother(s) and about how the applicant got powers to act as the guardian of the minors in

this application. This is especially so because in the absence of such information I am also unable to determine what is required of the court in paragraph 3(d) and (b) of Schedule 1 of the Children Act, i.e. what the real background of the children is, apart from the fact that they lost their father, and whether the children would be emotionally affected by a decision declaring the applicant their legal guardian.

The applicant did not disclose the sources of income she has relied on to maintain the minors before this application so it is not possible to establish the requirements of paragraph 3 (f) of the 1st Schedule to the Children Act. And in the absence of their mother(s) court is unable to tell whether there are other sources of financing to cater for the necessities that these children require. It is also pertinent to note that the applicant did not disclose to court how much of the land she wishes to dispose of. This leaves that issue of accountability for the property hanging. It is therefore not possible to tell whether the applicant's prayers that she be made the legal guardian of the minors and their property would be in their best interests or not. Paragraph 3 (e) of Schedule 1 to the Children Act requires this court to establish whether the decision to sale the property would result in harm to the children or not. In the absence of adequate information this is left to conjecture.

In the circumstances, I am unable to grant the orders prayed for and the application is accordingly dismissed. The applicant may renew her application and give adequate information that will enable this court to make a decision which will leave little or no room to prejudice the interests of the minors.

Irene Mulyagonja Kakooza
JUDGE
10/02/2010