

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS CAUSE NO. 21 OF 2012

IN THE MATTER OF WANZALA HASSAN ADAM (INFANT)

AND

**IN THE MATTER OF AN APPLICATION FOR APPOINTMENT AS THE LEGAL
GUARDIANS OF WANZALA HASSAN BY ANDRE' DEES AND MARGARETHA
HELENA DEES – SCHOUTEN**

BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

The Applicants Andre' Dees and Margaretha Helena Dees-Schouten made this Application seeking orders of this Court appointing them Legal Guardians of Wanzala Hassan Adam an infant. They also sought permission to immigrate with the infant to the Netherlands, their home country; and costs of the Application.

The Application was made under Article 139 (1) of the Constitution, Sections 14, 33 and 39 of the Judicature Act, section 3 of the Children Act and O.52 rr.1 & 2 of the C.P.R.

The grounds of the Application are that:

- (1) The mother of the infant is mentally ill and yet the father of the infant is unknown.
- (2) The known maternal relatives of the infant have no means to support the infant and thus surrendered him into the care of a Children's Home.
- (3) The Applicants wish to provide the infant with a home, parental love and care.

(4) The Application is for the benefit and welfare of the infant.

The Application was supported by the affidavits of both Applicants, both the maternal Aunt of the infant's mother and the grandfather of the infant, the Administrator of the Welcome Home Ministries one William Edema, that of the LC.I Chairperson Basalirwa David and of the Probation and Social Welfare Officer Jinja Opio Ouma. All the affidavits were relied upon at the hearing.

Present at the hearing that took off on 16/10/2012 were both Applicants, the infant, the infant's mother Nabukwasi Ayisat and all the other deponents of the affidavits above mentioned.

The grounds for the Application were presented to Court by two Counsel after which some of the deponents of the affidavits were examined by Court as per the established practice.

Sembera Faith Namono a resident of Wairaka, Jinja District is a peasant. She lived with her niece the mother of the infant. She told Court that Ayisat who is mentally unstable conceived as a result of rape. The man said to be responsible was arrested and taken to Bugembe Police and he accepted having committed the offence. The case was referred to Jinja CPS, and it was suggested that a DNA be conducted but the family failed to transport Ayisat, the alleged father and the infant to Kampala for the test to be done. Eventually, the alleged father of the infant disappeared without a trace. The Police report by which the case was referred to the Probation Officer is Annexure "B" to Sembera's affidavit.

Court was further informed that the infant's mother became unstable after giving birth to the infant and could not take care of him properly. The matter was taken up with the Local Council Chairperson of the area and he referred it to the Probation Welfare Officer.

In turn the Probation Welfare Officer visited the home where the infant lived and referred him to the care of Welcome Home Ministries. By then the infant was 2 months of age.

In 2011 this process for Legal Guardianship was initiated by the Children's Home. Sembera went and sought the permission of the parents of Ayisat, and she met the Applicants for the first time on 05/10/2012 and also consented to this Application.

She states that she does not have the means to care for the infant herself as she and her husband have a total of 10 other dependants to provide for.

Court was also told that Ayisat the mother of the infant cannot give the necessary consent because of her unstable mental state.

Sulaiman Gidudu the father of Ayisat assured Court that he and his wife have given their free consent to the Application as they do not have the means to add another dependant to the numerous dependants they already have. The very reason the mother of the infant was staying with her Auntie Sembera.

He first met the Applicants on 13/10/2012 but had prior information about the Application from his sister.

The LC Chairperson of Wairaka Central village, Jinja, where the infant was born confirmed the testimony of Sembera. He also assured Court that there were no other relatives of the infant who are able to care for him. And that since the Applicants have made the offer to take up responsibility for the infant, they should be allowed to do so. That this would save the infant from growing up in a hostile environment where the father is unknown and therefore cannot be prevailed upon to care for the infant.

The Probation and Social Welfare Officer Opio Ouma also confirmed to Court that the mother of the infant is mentally unstable and that he referred the infant to Welcome Home Ministries at the request of the infant's relatives, when they went to his office seeking for assistance.

A Care Order was obtained and the infant was placed in the home-Annexure "A" to the Application dated 16/10/09.

He pointed out that the infant is in need of care and protection which the Applicants have offered to provide. And that the two are very well recommended in their Home Study Report and their home country would honour the orders made by this Court. He recommended that they be appointed Legal Guardians of the infant.

The Administrator of Welcome Home Ministries Children's Home, Edema William confirmed that the infant was placed in the Home in 2009, the father of the infant denied paternity, the mother is mentally ill and there are no relatives willing to care for the infant as they have big families of their own.

He has talked to the mother of the infant but that she does not appear to understand what is going on.

No advertisement was put in the papers regarding the infant as the parents were known though the father denied paternity; and the maternal relatives were known.

He first got to know the Applicants through an Adoption Agency in Holland and he met them recently. However, that upon going through their Home Study Report and interacting with them for over a month when they have been here, he concludes that they are fit and proper people to be appointed Legal Guardians of the infant.

The parents of the mother of the infant were advised and indeed took Ayisat to Jinja Hospital for mental examination. The Doctor's report is attached to the supplementary affidavit of Gidudu Suliaman. It is dated 28/02/2012.

No Ugandan has offered to care for the infant.

Counsel for the Applicants filed written submissions where she reiterated the grounds of the Application, gave details about the infant's back ground, the particulars of the

Applicants as evidenced by copies of their Passports and Home Study Report, where the Applicants have been found to be fit adoptive parents by the Council for the Welfare of Children in Arnhem their home town.

She concluded stating that since the infant is needy and there are no relatives willing to care for him and yet the Applicants are committed to doing so, the Application should be granted. The case of **Evelyn Atukwase Brianne Gamelin (infant) F.C. No. 118/2010** was cited in support.

The issue for Court to determine is whether this is a proper case for grant of Legal Guardianship. The Law and decided cases have firmly established that **“in all decisions concerning children undertaken by any person or authority the best interests of the child and its welfare are the paramount considerations.”**

Article 4 of the African Charter on the Rights and Welfare of a Child, section 3 and the 1st Schedule to the Children Act of Uganda, Article 3 of the United Nations Convention on the Rights of the Child confirm the above stated position. And the following cases among others fortify that position – **In the Matter of Edith Nassaazi and Re: M (An infant) Adoption cause No. 09/95.**

Details of the infant’s background in the present case paint a grim picture. The mother of the infant is a young woman of about 20 years of age, however, she is mentally unstable and indeed looking at her she appears not to be very much concerned with what is going on around her. Her mental condition is confirmed by her Aunt Sembera, her father and the Medical report from Jinja Hospital.

The father of the infant denied paternity and though reported to Police has since disappeared without a trace. The Police has not effectively dealt with the circumstances under which the infant was conceived.

The maternal relatives of the infant have categorically told Court that they are not in a position to provide the much needed parental care and love for the infant, and they declined responsibility by placing the child in the Children's Home.

No other Uganda has come up to offer to care for the infant. The infant is therefore in need of care and protection. And its best interests and welfare which include emotional, physical, material, educational needs and the harm suffered or likely to be suffered by the infant require that he be placed in the custody of the Applicants who will provide for all those needs and much more.

Court has taken cognizant of the fact that the infant is already fostered by Home Care Ministries Children's Home. However, Courts have repeatedly stated that **“stay of children in such homes should be temporary as they deny the children their natural rights of being raised by parents in a loving family and home environment”** – Refer to **Bernie Hansen and Patricia Hansen F.C. No. 78/2009 and in the Matter of Nicholas Mwanje and Brenda Nakidde.**

The Applicants, Dutch citizens have exhibited that rare generosity of heart and have offered and shown commitment to caring for the infant and providing it with a loving home. They have no children of their own. They are legally married – Annexure “B” to the Application. They are both gainfully employed-Annexures “C” and “B” to their affidavits and therefore financially able to provide for the basic needs of the infant that children of his age are entitled to.

Their Home Study Report and the interactions they have had with the Director of the Children's Home and the Probation and Welfare Officer all point to the fact that they are fit to be Legal Guardians and adoptive parents of the infant. - see Annexure “D” to the Application.

The Applicants were subjected to a criminal record check by the Department Justice Ministry of Security and Justice of their Home country and were declared to have no

criminal record – Annexures “E” and “R”. Their medical reports indicate that they have no communicable physical or mental impediment that would endanger the infant – Annexures “F” and “C”.

The consent to the Application was freely given by the known maternal relatives of the infant’s mother.

The Applicants are well aware of the likely negative response towards the infant that may arise due to the differences in appearance but they are well prepared to counter them and they have undertaken never to subject the infant to or allow it to be subjected to any kind of discrimination or child labour.

Court finds that the Applicants fulfill all the requirements needed for the responsibilities they seek to undertake. And being foreigners is not a bar to obtaining orders relating to Ugandan Children, more so in circumstances like the present, where the relative of the infant have declined responsibility and there are no other Ugandans who have offered love for the child. Section 46 Children’s Act – provides for this position and it is fortified by the case of **Evelyn Atukwase Brianne Gamelin (infant) FC. No. 118/2010** where the Court relying upon the decision in **Bernie Hansen and Patricia Hansen (supra)** held that **“in the absence of any relative or any other Applicant showing any interest in obtaining Guardianship or adopting the child, the Court would grant the Application.”**

The Applicants are suitable persons to be appointed Legal Guardians of the infant and the Application is therefore allowed in the best interests of the child.

The two have applied to be allowed to move back to their Home country Netherlands with the infant and that permission is also hereby granted. This is because **“they are fit and proper persons to be entrusted with parental responsibility for the child. And they are ready to place themselves in relation to the infant in loco parents for purposes of its care and welfare.”** – The decision in **Family Cause 76/2011** fortifies its position and

also other decisions where Courts have observed that a Guardian **“should have a child in their charge and actually look after it. They should be able to exercise powers of control over the child while ensuring that the physical well being of the child is cared for and also ensure that its legal rights are protected. A guardian should be a person who can reasonably be expected to take whatever action may be necessary or desirable on behalf of the infant”** – Refer to **Nakanwagi Gladys Matovu and Another (Children) Family Cause No. 104/2011.**

These responsibilities also require the infant to be in the custody of the Applicants.

The Application is accordingly granted for all those reasons.

The Applicants Andre’ Dees and Margaretha Helena Dees are hereby appointed Legal Guardians of the infant Wanzala Hassan Adam with full parental responsibilities and obligations.

They are permitted to travel back to their Home country the Netherlands with the infant.

The Court shall be kept informed of the progress of the infant by way of periodic reports made to the Registrar of the High Court, Jinja.

This order shall be registered with:

- (1) The Uganda Registration Services Bureau Ministry of Justice and Constitutional Affairs.
- (2) The Consular Department of the Ministry of Foreign Affairs Uganda.
- (3) The Netherlands Embassy in Uganda and the Uganda Embassy in the Netherlands.

- (4) The Council for Child Welfare at Arnhem, the Netherlands where the Applicants reside.

The costs of the Application are to be met by the Applicants.

Flavia Senoga Anglin

JUDGE

01/11/2012