

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**ADOPTION CAUSE NO. 028 OF 2018**

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**IN THE MATTER OF KISAKYE HANNAH NOEL (A CHILD)**

**AND**

**IN THE MATTER OF A PETITION FOR AN ADOPTION BY ELKINS ASHLEY  
RENEE**

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**RULING**

**BEFORE: HON. LADY JUSTICE EVA K. LUSWATA**

This petition was presented through M/s Ekirapa & Co., Advocates by **MS. ASHLEY RENEE**  
15 **ELKINS (the petitioner)** seeking an order to adopt **KISAKYE HANNAH NOEL** (hereinafter  
referred to as the child).The application was filed on 07/08/2018 and will be considered by this  
court under the enabling provisions of the Constitution of Uganda, the Judicature Act, and the  
Children Act and Children (Amendment) Act 2016 and Rules (hereinafter referred to as the Act).

20 The petitioner filed an affidavit in support of the application with supporting documents.  
Additional affidavits were filed by Isabirye Ratifu, (maternal great uncle), Namulondo Sarah  
(maternal grandmother) of the child, as well as Watsemba Sophie a social worker attached to  
Arise Africa International Babies Home also known as Bukaleba Babies Home (hereinafter  
referred to as the Home). The affidavits collectively, gave the antecedents of the petitioner, the  
25 child's background, recommendations and other relevant information. The contents although not  
reproduced here, will be considered in my ruling.

On 17/4/19, the Court met and interviewed the petitioner and her witnesses and was able to see  
the child who is the subject of this application. In addition, petitioner's counsel filed written  
30 submissions. The information recorded during these interviews in court, the pleadings, evidence  
and documents shall all be considered in my ruling.

It is stated briefly in the petition that the petitioner was at the time of filing the petition aged 36years. She is unmarried and has no biological children. She is normally resident as a tenant at Plot 7 Kisinja Road, Jinja District and a tenancy agreement was attached to her affidavit to that effect. She works as a registered nurse with an NGO called Healing Faith Uganda and has  
5 formerly fostered the child for nearly three years and has the wish to obtain a formal adoption order whose conditions she is prepared to comply with.

It was stated in the petition that the child

- 10 (a) Is a female, citizen of Uganda born to Namususwa Jalia and an unknown father on 09/12/2015.
- (b) Presently in *de facto* custody of the petitioner by virtue of a placement order of the Probation and Social Welfare Officer of Jinja on 24/10/2016 and a Care Order of the Jinja Magistrate's Court dated 5/11/2018.

15 It was stated by Ms. Watsemba in her affidavit that the primary objective of the Home is to provide a home and care for children in need of protection. That pursuant to their mandate, they received a call from the Mayuge Health Centre III to collect the child then a new born. The child was referred to the Home by the Probation officer of Mayuge who explained that her mother was clearly of unsound mind and unable to carry out her parental duties. The child was placed in the  
20 home as efforts were made to locate her relatives. According to the petitioner, she was at the time working at the Home as a volunteer nurse. She is the one who collected the child from the Mayuge Health Centre III on 10/12/2015, and thereafter personally took care of her health until she made the decision to foster and then adopt the child.

25 **The Law:**

It is provided in Section 3 of the Children (Amendment) Act that;

30 *“(1) The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines any question in respect to the upbringing of a child, the administration of a child's property, or the application of any income arising from that administration.*

I believe the two crucial points to note of our current law is that under all circumstances, the welfare of the child shall be paramount before any consideration is made by this court to allow an adoption. See for example **Payne vs. Payne (2001) EWCA 166** and **B vs. B (1940) CH 54**. This principle has been well followed by our courts. See for example **Deborah Alitubeera Civil Appeal No. 70/2011** and **Re AM Adoption Cause No. 12/2017**. Secondly, inter-country adoption or specifically, a non-citizen of Uganda is allowed to adopt only in exceptional circumstances and even then, only if they fulfill the conditions under Section 46 of the Act which provides that: -

- 10                   “(1) A person who is not a citizen of Uganda may in exceptional circumstances  
adopt a Ugandan child, if he or she:
- (a) Has stayed in Uganda for at least one year;
  - (b) Has fostered the child for at least one year under the supervision  
of the probation and social welfare officer
  - 15                   (c) Does not have a criminal record;
  - (d) Has a recommendation concerning his or her suitability to adopt a  
child from his or her country’s probation and welfare officer of  
other competent authority; and
  - (e) Has satisfied the court that his or her country of origin will respect  
and recognize the adoption order.
- 20

Emphasis of this Court.

Even then, under Section 46(4) of the Act, my Court has powers in exceptional circumstances to waive any of the requirements mentioned above.

25                   Our law does not define exceptional circumstances. In my view, they would be or amount to unusual, extraordinary or not-typical circumstances surrounding the upbringing or commonly associated with the upbringing of a child. Of course the court should consider these to be dependent on the circumstances of each individual case.

30                   A new addition to our law appears in Section 46 (5) of the Amendment Act, by which certain persons are now permitted to give information that would assist courts to determine that the best

interests of the child are protected. These include advocates, probation and social welfare officers or a guardian *ad litem* for the children. That list is not exhaustive and the court may, depending on the circumstances presented, invite information from other sources.

5 Further in Section 46 (6) & (7) of the Amendment Act, adoption should be the last recourse for children and the court is enjoined to consider a continuum of comprehensive child welfare services before international adoption. These would include a broad range of services and community based family centered alternative care options which may either be family preservation, kinship care, foster care or, institutionalization.

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**Does the petitioner qualify to be an adoptive parent?**

The children Act and its amendment have provided a check list of the conditions for an intercountry adoption and I will not repeat them here.

15 The petitioner, an unmarried female has a valid work permit and is licensed to practice as a registered nurse in Uganda until October 2019. She is 21 years older than the child and furnished proof to show that she has no criminal record in Uganda and her home country. She has received suitable recommendations of her suitability to adopt from the mandated authorities in the USA and Uganda. I shall return to the content of those recommendations later in this ruling.

20

The petitioner has fostered the child since 24/10/2016, a period of more than the statutory period of one year. She stated in court that she arrived in Uganda six years ago and has lived here since. It is therefore certain that she has carried out her fostering duties in Uganda. It is not specifically shown in the attached Home Study report that the Government of the USA will respect an  
25 adoption order in respect of the child if granted by this Court. However, I am prepared to take judicial notice that the American Embassy in Uganda has previously considered adoption orders made by the High Court of Uganda. It will still remain the discretion of the petitioner's home Country to afford the child entry into their boundaries based on criteria under their laws.

30 I would conclude that the petitioner has fulfilled all the conditions of inter country adoption.

**Issue 2 – Whether the application is in the best interests of the child:**

As I have stated in our law, the welfare of the child in question must be paramount in any decision. Our law gives no clear definition of the term “welfare”. The House of Lords sought to construe the meaning of the words ‘*shall regard the welfare of the infant as the first and paramount consideration*’. Lord MacDermott stated: “*it seems to me that they must mean more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.*”

Further according to Section 3(3) of the Amendment Act, meeting a child’s welfare it would entail giving regard to;

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(a) *The ascertainable wishes and feelings of the child concerned considered in the light of his or her age or understanding.*

(b) *The child’s physical, emotional and education needs;*

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(c) *The child’s age, sex, background and any other circumstances relevant in the matter.*

(d) *Any harm that the child has suffered or is at risk of suffering*

(e) *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.*

Petitioner’s counsel recounted evidence in the several affidavits filed in support of the application. They argued that the child is under the Constitution entitled to certain rights that can only be provided by her parents or those under whom she is entrusted. They continued that evidence indicated that the child’s father was unknown and her mother of unsound mind thus incapable of meeting her needs or caring for her. That the other surviving relatives had shown inability to take on parental responsibility and accordingly consented to the adoption. Counsel further argued and I agree that, the child was at birth placed in institutional care, and was likely to be returned there, yet it is not the best alternative and cannot provide a loving and caring

environment for a growing child. See for example **Re. Nyangoma Veneranda and Kato John Mary**  
**(Infants) HCT-00-FD-FC-0198-2008.**

5 It was stated by Watsemba that the child was received at the Home when only one day old after a referral by the Probation officer of Mayuge. The petitioner who picked up the child from Mayuge stated that she saw Namususwa, the child's mother soon after the delivery and observed that she exhibited symptoms of mental illness and rejected the child. Being a nurse, I would believe the petitioner's observation which was infact supported by a report of Ms. Wambete a  
10 nursing officer who added that at some point after the delivery, Namususwa was found attempting to murder the child. The medical officers then immediately stepped in to report the matter to the Community Development Officer of Mayuge which resulted into the child being placed into the Home.

15 There was evidence that much effort was made between June and August 2019 to locate the child's relatives. According to Ms Watsemba, on undisclosed date, she managed to trace Siraj Batambuze (now deceased) and Namulondo Sarah, Namususwa's biological parents in Namalege Village in Mayuge District. That they both accepted paternity but Batambuze revealed that he had about 30 children and about 30 grandchildren who he could not afford to care for, let  
20 alone take on an extra grandchild. Batambuze's antecedents were confirmed by Isabirye his brother who confirmed that following Batambuze's death, he had to take over responsibility of some of his dependants and was unable to take care of the child.

Namulondo Sarah, the child's maternal grandmother appeared to have the same predicaments.  
25 When Watsemba visited her in Namalege Village Mayuge District. She noticed that she resided in a grass thatched house with many children, all who appeared malnourished. Namulondo swore an affidavit confirming that Namususwa's mental illness had developed after a bout of cerebral malaria when she was only four years old. That she occasionally received treatment from her father a traditional healer but never improved. That her illness intensified with age and she often  
30 took to the streets to beg for food and was at some point seen by people to be heavy with a child. Namulondo did hear about the birth of the child which was confirmed by Watsemba when she visited her.

Namulondo requested Watsemba to keep the child at the Home as none of Namusuwa's relatives was willing or able to care of her. She cited poverty and prevailing responsibilities as a bar to her own involvement in the child's care and confessed that she had never visited the child at the Home. She further stated she had last seen Namususwa around December 2016 and several  
5 notices in the audio and print media (attached to the petition) did not lure Namususwa back to claim her child.

It is clear that none of the child's relatives are willing or able to take care of her. Her biological mother who cannot be traced was stated to be suffering from mental illness. Even if traced, she  
10 will be unable to care for her. Her biological father is unknown and to date the only parent she has known is the petitioner who she has substantially resided with, since her birth. Both Isabirye and Namulondo indicated that they had no contest to the adoption and filed written consents to that effect.

15 There is sufficient evidence to show that this child was abandoned soon after birth and has no living relative able and willing to take care of her. As she grows up, she will need to be educated as well as physical, material and social support which are her constitutional rights. The Home in which she was received made their contribution and then handed her over to the petitioner who has so far cared for her. Formalizing that relationship through an adoption order will indeed meet  
20 the welfare and interests of this child.

**Whether the petitioner is a suitable candidate for adoption of this child.**

The petitioner's relationship with this child begun very early in her life. She is the one who  
25 collected her from Mayuge and using her skills as a registered nurse, took care of her health and well being. She has since been looking after this child and the recommendation from the Home is that the petitioner has cared for many children who have been charges of the Home. That she genuinely cares for the child and for the time they have been together the child has progressively and positively developed.

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Similarly, the probation and welfare officer of Jinja under whose supervision she has fostered the child in brief stated that in his visits with the petitioner, he has found her to be a very capable and

suitable foster parent who is physically, mentally and emotionally healthy as well as stable. That she has provided a spacious and secure home and provided all the child's necessities. She has allowed the child to interact with other Ugandan children thus building her confidence and can thereby remain connected to her culture. The home is conducive to the child's educational  
5 enrichment and learning and the petitioner being religious, will lead the child spiritually. He continued that the petitioner treats the child as her priority and her love, care and concern for her is evident. He gave a favourable recommendation for this adoption.

I had an opportunity to interview the petitioner in Court. She struck me as one sincere and  
10 devoted to the child who throughout the court proceedings insisting on staying in close company with her and referred to her as "mamma". The petitioner has lived in Uganda for six years and plans to stay a little longer caring for Ugandan children. I believe her work in Mayuge and Jinja has given her sufficient knowledge of the child's culture and way of life and should prepare her well enough to introduce the child to American culture when she decides to return home. Her  
15 work as a nurse ensures that the child's health will be well cared for. She is paid a monthly stipend of USD 1,800 which is supplemented by support from the Journey Church in Ohio of USD 1500. In my view, that sum should be sufficient to maintain her and the child comfortably. She furnished sufficient proof of her residency in Uganda and stated that she resides in a two bedroom apartment which the probation officer visited and confirmed to be suitable for her and  
20 the child's wellbeing.

In addition to the other local recommendations, the petitioner filed a home study report compiled by Ms Julian Tracy Alum, a licensed foreign exempt home study provider under M/s Nightlight Adoptions, a Hague credited adoption service provider. She is also a registered member of the  
25 National Association for Social Workers in Uganda. Ms. Alum interviewed and visited with the petitioner whom she found to be tender hearted, confident and flexible. She confirmed that the petitioner had strong family ties and although she has no immediate plans to marry, supports values of traditional marriage and has strong value in her relationship with God. That for the moment, she has chosen to prioritize her relationship with the child who she will give an all  
30 rounded upbringing. That the petitioner has strong bonds with the child with whom she shares her hobbies and even if she makes the decision to leave Uganda, she will always respect Ugandan culture, history and way of life because it is the child's birth place. That she has no

history of serious ill health, but in the event of death, has made arrangements for her close friends Phillip and Holly Mix to take up the guardianship roles for the child. In conclusion Ms. Alum reported that the petitioner is emotionally prepared to adopt and will be a suitable parent for the child.

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I entirely agree with that evaluation.

From the above recommendations and resolve of the petitioner, I am persuaded that the facts of this case present exceptional circumstances to permit the petitioner a non-citizen to adopt the child concerned. By her proven capabilities, experiences and reliable positive references, the petitioner qualifies to be appointed the adoptive parent and I would accordingly allow the application and order as follows: -

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1. The petitioner **ELKINS ASHLEY RENEE** is granted an order of adoption in respect of the child **KISAKYE HANNAH NOEL**
2. The petitioner may travel with the child to the United States of America or any other country that she may choose as residence, in order to fulfill her obligations as an adoptive parent.
3. I direct that the Registrar of Births and Deaths makes an entry recording this adoption order in the Adopted Children Register.
4. It is further directed that this adoption order be furnished to the consular department in the Ministry of Foreign Affairs at Kampala and at the Ministry of Gender, Labour and Social Development in Kampala.
5. The petitioner shall meet the costs of this application.

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I so order.

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**EVA K. LUSWATA**  
**JUDGE**  
**22/08/2019**

