

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0031 OF 2016

AJIDIRU LULUA JENIFER **APPLICANT**

VERSUS

NDERA JUSTINE ANGUZU }

ASIANZO JOVIA ANGUZU } **RESPONDENT**

Before: Hon. Justice Stephen Mubiru

RULING

This is an application for guardianship by a mother in respect of her two biological children aged nine years and eleven years respectively.

The background to the application is that some time during April 2016, the applicant acquired land comprised in Freehold Register Volume HQT741 Folio 20, Block (Road) 3 Plot 475, being 0.0500 hectares at Oleva, Ayivu County, Arua District. She decided to have the land jointly registered in her names and those of her two infant children; Ndera Justine Anguzu (a minor until 08.09.2024) and Asianzo (sic) Jovia Anguzu (a minor until 04.04.2023). The registration was effected on 1st April 2016 and the duplicate certificate of title was issued to her on that day. She has custody of the title deed. She also lives with and cares for her said two infant children.

Being desirous of using the title deed as security for a salary loan to be obtained from her employer, a bank, in which case the grant of a guardianship order was a prerequisite, the applicant filed this application by way of notice of motion under the provisions of section 98 of *The Civil Procedure Act, cap 71* and Order 52 rules 1, 2, and 3 of *the Civil Procedure Rules, SI 71-1*. In her affidavit supporting the motion, she stated the facts summarized above. She was self-represented (appeared *pro se*) at the hearing of the application whereupon she reiterated the facts and prayers contained in the application.

The court has noted a number of shortcomings in the pleadings; the infants are named as respondents in the notice of motion, which should not be the case, especially considering their incapacity; the applicant does not in her affidavit in support allude to the interests of her infant children at all in relation to the planned transaction. All she states is that she desires to mortgage the property. She filed a photocopy of the certificate of title in question but does not allude to it at all in the affidavit in support. However, considering that the applicant is self-represented and the biological mother of the infants and for other reasons explained elsewhere in this ruling, this court is inclined, in accordance with article 126 (2) of the *Constitution of the Republic of Uganda, 1995*, to consider this a proper case where substantive justice ought to be administered without undue regard to technicalities.

By the nature of the registration indicated on the certificate of title filed alongside the motion and affidavit in support, the applicant is a joint tenant of the property together with her two infant children. Under section 56 of the *Registration of Titles Act, cap 230*;

Two or more persons who are registered as joint proprietors of land shall be deemed to be entitled to the land as joint tenants....

As joint tenants together with their mother, the infants have the same interest in the land, accruing under the same conveyance, commencing at the same time and held under the same undivided possession. The applicant could have unilaterally decided to sever the joint tenancy but she has not. The result is that at the time of this application, her interest in the land is inextricably interwoven with that of her infant children. The court is required to determine whether in these circumstances, the applicant is a "fit and proper person" or a "suitable person" to be appointed a guardian of the two infant children.

The court is mindful of the fact that based on her pleadings and submissions before court, the grant sought by the applicant is not one that confers on her power with regard to the personal affairs (health, education and welfare) of the two infants (which in any case she already has by virtue of being their biological mother with physical custody and therefore their natural guardian), but rather one that confers on her powers with regard to the real and personal property of the infants.

In matters of this nature, where the legal property rights of children are involved, yet by virtue of their status as legal incompetents, the children do not have the capacity to safeguard those rights on their own, courts are expected to exercise a *parens patriae* authority. A judge is required to make an independent assessment of these interests, to prioritize them above the competing interests of adult claimants, and to make orders most likely to safeguard and promote these interests. Accordingly, a child in whose name property is registered has a cognizable proprietary right that need not be claimed by way of right of audience before the court. The Judge acting as *parens patriae* is responsible for protecting the interests of the children which come before him or her. The Judge is obligated to do what is best for the interest of the child. He is to put himself in the position of a “wise, affectionate and careful parent” and make provision for the child accordingly.

When appointing a guardian of this sort, court ought to consider; - (a) the capabilities and (b) potential conflicts of interest of the proposed guardian. Regarding capability, ordinarily the child’s parents are considered the natural guardians until a replacement or substitute is needed. In this case, there is nothing to suggest that the applicant is not a suitable guardian of her two infant children. In any case, article 31 (4) of the *Constitution of the Republic of Uganda, 1995*, confers a right and duty on parents to care for and bring up their children. I find therefore that the applicant does not need to be replaced or substituted. She meets the capability test.

With regard to conflict of interest, the court is in this case not determining rights as between a parent and child but is cognizant of the fact that being joint owners of the property in issue, there *prima facie* is a potential conflict of interest between the applicant and the infants. The applicant might potentially deal with the property in a manner that is inconsistent with the rights and interest of the infants therein. An inability to put the children’s interests ahead of her own in the co-owned property yet this is a case where she would have a duty to make certain decisions on the children’s behalf in accordance with the children’s rights.

On the other hand, denial of guardianship on that account would require her to sever her interest from theirs (which is doubtful considering that the land is only 0.0500 hectares) or result in, as a natural consequence, denying her the opportunity to enjoy and exercise her proprietary rights under the same undivided possession.

This court has to enable the applicant enjoy of her proprietary interest in the property but without exposing the infants to the dangers of decisions she might take in respect of the property. Being cognizant of her potential inability to put the children's interests ahead of her own in dealings relating to the property, this court will grant her a conditional guardianship, in furtherance and protection of the children's best interests.

The application is granted with power conferred on the guardian to deal with the property provided that in all dealings the guardian should not waste the property and should, in the event of disposing it off, preserve, invest, expend and / or use for the benefit of the children, such a proportion of the proceeds as represents their interest in the property. There is no order as to the costs of this application.

Dated at Arua this 28th day of June, 2016.

.....

Stephen Mubiru
Judge.