

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO

ADOPTION CAUSE NO.003 OF 2017

IN THE MATTER OF NEKESA DEBORAH

AND

IN THE MATTER OF A PETITION BY SCOTT RYAN MONTGOMERY

AND KAKAYI HILDA

RULING

BY HON. LADY JUSTICE MARGARET MUTONYI,

JUDGE HIGH COURT

By this Petition, the Petitioners Scott Ryan Montgomery and Kakayi Hilda moved court seeking orders that they be appointed adoptive parents of Nekesa Deborah an infant aged 9 years.

The Petition was made under Articles 139 (1) and 34 (1), (2) of the Constitution of the Republic of Uganda, Section 14 and 33 of the Judicature Act, Section 3, 4, 13 and 14 of the children (Amendment) Act 2016, sections 45 and 46 of the children Act, section 98 of the Civil Procedure Act and Rule 17 of the children Adoption Rules.

It was supported by the Affidavits of Scott Montgomery, Wakalanga Moses the biological father of the infant, and Kakayi Hilda.

The father Wakalanga Moses and Kimono Farida the mother of the infant filed written consents and personally appeared in court in support of the Application.

The notice of adoption was published in the New Vision of 9th October 2017 and nobody lodged a caveat forbidding the grant of the adoptive order.

At the hearing of the adoption court explained to both parents the consequences of allowing their child to be adopted and they appeared to have understood and had no reservations at all. They were ready to forfeit their parental rights over their child in favour of the Adoptive parents.

Evidence on record also revealed that the infant Nekesa Deborah was under the custody of the Applicants vide a Court Order issued by the Family and Children Court Mukono in Care Application No.72 of 2017.

The Probation Officer of Mukono Mr. James Ntege in his sworn statement stated that the infant Nekesa Deborah was abandoned by her mother at the home of her grandmother paternal side. She was 3 months old and the Applicant took care of the child and has since lived with her. Her husband the first Petitioner is also interested in adopting this child who is related to the second Petitioner.

The Applicants got married at the office of the chief Administrative Officer Mbale on 17th December 2015.

Mr. Scott Ryan Montgomery is an American Citizen aged 29 years having been born on 27th October 1987 as per his Passport No.545627170 issued by the United States of America. He is a resident at Plot 1907 Raven Rock road, Ararat, VA 24053 United States. He was issued with a Certificate of good conduct by Uganda Police Force, Interpol Kampala under Reg. No. Enq No.17135/17.

In his affidavit in support, he informed court that he is gainfully employed with HALOTRUST as Global Finance Officer. He attached a Statement of Employment particulars where he is paid US \$36,000 per annum with other allowances and benefits.

He also provided details of his Bank Account in Charles Schwab Bank Account No.440021011570. He informed court that he was financially stable and happily married and ready to provide the necessary atmosphere for children to develop into their full potential.

Of great importance was assurance in his affidavit evidence that the Government of the United States will respect the order of this Honourable court.

He was free from any communicable, physical or mental impairment that could endanger the child.

Likewise his wife Kakayi Hilda was cleared by Police and issued with a Certificate of criminal clearance and good conduct. She deponed that she was going to live with the child in Uganda and or any other country that they may decide to go and was ready together with her husband to provide a home, parental love and care to the child.

The Applicants have one biological child called Montgomery Ryan Harry as per the Birth Certificate issued by NIRA on 20th May 2016.

In his submissions Counsel Mustapha Songon submitted inter alia that the Applicants have fulfilled the conditions under the law to warrant them the adoption of the infant. He submitted further that the Petitioner have the financial capacity to look after the child and have bonded well with the child since they live with the child.

He emphasized the welfare Principle being the main consideration when making decisions concerning children. The issue for courts consideration is whether the Applicants qualify to be appointed adoptive parents of the infant.

This case is unique in the sense that the Applicants have different citizenship. The first Applicant Mr. Scott Ryan Montgomery is an American citizen while the second Petitioner is a Ugandan Citizen. The law provides for different conditions for both categories.

A non citizen has to fulfill different conditions from that of a Citizen. Section 44 (1) (b) of the children (Amendment) Act 2016 allows this court to grant custody to a non Citizen.

However inspite of the fact that the two have different citizenry, they are married and the law presumes them to be one. They have both lived with the child for more than two years.

Section 46 of the children Act allows a non Citizen to adopt a Ugandan child if that person has lived in Uganda for a year and has fostered a child for a year.

According to the evidence of the Probation Officer, Mukono Mr. Ntege James in his sworn statement, the Applicants live in Njerere Village Seeta Parish, Goma Division, Mukono Municipality with the child and have lived with her for more than a year. In respect of the first

Petitioner and nine (9) years in respect of the second Petitioner; since she started living with her from the time she was three (3) months.

Under section 45 of the children (Amendment) Act, 2016, a person qualifies to adopt a child if that he or she is 25 years of age and is at least 21 years older than the child.

The first Petitioner Mr. Scott is 29 years old while the second Petitioner Kakayi Hilda is 27 years old. The Infant Nekesa Deborah is 9 years old. None of the Petitioner is 21 years older than the infant. Mr. Scott is 20 years older while Kakayi is 18 years older.

Both of them have however expressed better interest and responsibilities towards this child more than the biological parents. Kakayi has lived with the child from the age of three (3) months. She is more of a mother to her than her biological mother who has no interest in living with the child and abdicated her parental responsibility towards the infant long ago. Apart from the age difference, the Applicants are financially stable to provide for this child.

They are already providing a home, education, medication, care, love and protection to the child. Adoption is a creation of a parent-child relationship which is a life long time and as such, since it involves children, Court considers the Welfare Principle of the child as paramount.

Section 3 of the children Act states that the welfare principles and children's rights set out in the first schedule to the Act shall be the guiding principles in making any decision concerning children. Paragraph 3 of the said schedule provides as follows:

“In determining any question relating to circumstances set out in paragraphs 1 (a) and (b), the court or any person shall have regard in particular to;

- (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 to the matter.
- (e) Any harm that the child has suffered or is at a risk of suffering.
- (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”.

It is apparent that the second Petitioner started taking care of the needs of the child from three months. She has grown knowing her as her mother. She knows the family of the Applicant as her own family.

Court observed during the hearing that the infant's parents are more of strangers to her. The Applicants are taking care of her needs and requirements to enable her develop into a responsible person.

In Bromley's family law 8th Edition at page 336, the author stated

"The child's welfare is the court's sole concern and other factors are relevant only to the extent that they can assist the court in ascertaining the best solution for the child". He went on to state at page 338 that "In applying the welfare principle, the court must act in the child's best interest, and at page 341 he stated "the child's welfare is so overwhelmingly important that it can outweigh the interest of even unimpeachable parents in seeking to look after their own child against a stranger".

Why am I citing the above?

The law states that the adoptive parent must be 25 years and at least 21 years older than the child.

Both the Applicants are not 21 years older than the child. However, considering the best interest of the child, it would be very unfair and unjust to deny her the opportunity to be parented by the petitioners who have loved her, as their very own, who are ready to provide a better life and future for her than her biological parents who abandoned her.

Since a person of 18 years can marry and start a family according to the Uganda Constitution the difference of 21 years cannot be a basis of denial of adoption order to an Applicant who has exhibited responsibility to a child. The physical, emotional and educational needs of Nekesa Deborah can best be catered for by the Applicants since her biological parents have declined parental responsibilities and assured court that they have freely given consent to the Petition.

In the result, the Petition is allowed with the following orders;

1. Scott Ryan Montgomery and Kakayi Hilda are appointed as adoptive parents of Nekesa Deborah with full parental rights and responsibilities.
2. They are permitted to move with the infant to the USA and or any other country.
3. This Order shall be registered with;
 - (a) The Uganda Registration Services Bureau (NIRA) under the Registry of Adoptive parents.
 - (b) The Consular Department in the Ministry of Foreign Affairs, Uganda.
 - (c) The American Embassy in Kampala, Uganda and the Ugandan Embassy in Washington DC, USA.

The Petitioner shall meet their own costs of the Petition.

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Margaret Mutonyi

JUDGE

01st December 2017