

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

MISC. APPLICATION NO. 46 OF 2003

IN THE MATTER OF ARTICLE 139(1) OF THE 1995 CONSTITUTION AND SECTION 16, 35, AND 41 OF THE JUDICATURE STATUTE NO. 13 OF 1996 AND SECTION 101 OF THE CIVIL PROCEDURE ACT AND

O. 48 r.1 & 3 OF THE CIVIL PROCEDURE RULES, S. 1 65-3

AND

IN THE MATTER OF ISAAC KAWEESA.....MINOR

AND

IN THE MATTER OF

1. MARIAM SEBAGALA

2. HAROUNA SEBAGALA.....APPLICANTS

BEFORE: HON. MR. JUSTICE V. A. R. AMISAZI-KAGABA R U L I N G

This is application for guardianship made under Article 139(1) of the Constitution, sections 15 and 33 of the Judicature Act, section 98 of the Civil Procedure Act and Order 48 of the Civil Procedure Rules: The applicants, who are husband and wife and biological father and mother of Isaac Kawesa, are seeking the orders of court to permit them to transact business by dealing with the property comprised in LRV 2575, Folio 5 Plots 2E and 2D situated at Nalcasero Hill Road on behalf of the minor, Isaac Kawesa.

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Only the first applicant and the minor were in court. Iga Bukenya appeared for the applicants. He, Counsel, submitted, that as Isaac Kawesa, is still a minor he is incapable of dealing with the said property in his own right. Mr. Bukenya submitted the order sought is for the welfare of the infant.

In support of his application, Counsel cited the cases of:-

1. Pascal Musoni vs. Emmanuel Nkusi - Misc. Appl. 227/2000
2. Pros. Nalukwago vs. Immaculate Ndagire - Misc. Appl. 500/1997
3. Nyakaira vs. Nyakairu - Divorce Cause 19/1997
4. Mariam Hassan vs. Islam Mohamed - Misc. Cause 7/1975

In order to grant or refuse the application Court must address the following issues

- a) is the person in respect of whom the application is made a child,
- b) is the applicant(s) a fit responsible and capable person to be granted the guardianship?
- c) Is the application in the best interest and welfare of the child

The only source about the minor's age is his presence in court on the 14/7/2004. There is no mention of Kawesa's age in the affidavit sworn by Harouna Sebagala in support of the application. There is no Birth Certificate to show when Kawesa was born. Counsel for the applicants did not address me about the age the- applicant from the bar. The only source of the Kawesa's age is the Land Title where at page 1 of Annexure "A" the following statement appears.

“Sebagala Haroona, Sebagala. N. Mariam, S. Nabaggala (minor till 2002), Dauda Senoga (minor till 2001) Hamuza Sengendo (minor till 2002) and Isaac Kawesa (minor till 2004) all of P.O. Box 6021 Kampala.”

The Children Act specifically uses the expression Child in section 2 thereof “as a person below the age of eighteen years. Going by the description of Kawesa, on the annexure “A” he is not a person under the age of 18 years in 2004.

The established law is that a party is bound by his pleadings and a matter not pleaded in the pleadings should not be raised in evidence at the trial except with leave of court.

See: (1) Struggle (U) Ltd. vs. Pan African Insurance Company Ltd.

Civil Suit No. 240/1989 (1988-90) HCB 86

(2) D. A. C. B. vs. Issa Bukenya - Civil Appeal

26/1992 (S.C.)

In an application of this type it was an essential fact that the age of the “**minor**” had to be pleaded and proved. Failure to prove the minor’s age as being below 18 years is fatal to the application as the court is rendered without jurisdiction to hear the application.

See: Assanand & Sons (Uganda) Ltd. vs. East African Record Ltd.

(1959) EA 360 (C.A-K)

On the second issue, the grant should issue to a person who is ready and willing to manage the affairs of the child. He should be a person or persons who are able to meet the parental responsibility for the minor. The applicant should be a person capable of providing the needs of the child. Such needs may include those listed in sections 4 5 and 6 of the Children Act.

(For the definition of “guardian” and “parental responsibility” refer pages 253 and 395 of Bromley’s Family Law - 8th Edition sections 1(0) and 6 of the Children Act.

Although I did not see Harouna Sebagala in Court, I have no doubt that, he and Mariam Sebagala, being the biological parents of the minor, are responsible persons, who, the court

would doubt their intentions to manage the person and property of Kawesa (minor) to the best of his (minor) advantage. It has also been accepted as good law that the biological parents of the child can be granted the legal guardianship of their child.

See: In the matter of Sarah Namakula and Felix Katende - Misc. Appl. 91/1993.

The last issue is whether the orders sought by the applicants are for the benefit and welfare of Kawesa. In determining the guardianship of a child the guiding principles is his or her welfare.

The welfare principle is a set of rights and facilities which the child must have and enjoy as of right. They are God-given and cannot be taken away from them (children) by man or any process of the law.

The rights and facilities enjoyed by the child under the Welfare Principle are listed in sections 4 5 6 and the First schedule of the Children Act. They include their right to:-

- a) stay with parents and or guardians,
- b) education and guidance,
- c) immunization
- d) 'adequate diet,
- e) clothing,
- f) shelter,
- g) medical attention

The welfare principle has been discussed in several cases of this and other jurisdictions in such cases as:-

1. ***In the matter of Pros Nalukwago (infant) and Immaculate Ndagire (Applicant) — Misc. Appl. 500/1997***
2. ***Re McGrath (infants) [1893] 1 Ch. 143 at 148***
3. ***Clarke — Hunt vs. New Combe (1983) 4 FLR 4S2-CA.***
4. ***Re O (infants) [1962] 2 All. E. R. 10***

Counsel for the applicant has cited to me four cases in support of the welfare principle. I agree with the principles discussed in those case save for the fact that three of those cases discussed the welfare of the child in the context of the custody of the child.

The case at hand related to managing the property of Kawesa. This is permissible where the child still suffers the incapacity to manage his or her own affairs. Refer to:

(1) Bromley's Family Law - 8th Edition pp. 395-407

(2) Halsbury's Laws of England —3rd Edition — paragraphs 449-551.

How will this application (if granted) benefit Kawesa's welfare? In order to answer this question I must point out that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. The burden to • prove a fact rests on the person who wants court to believe in its existence.

See: (1) Sections 101102 and 103 of Evidence Act

(2) *Sebuliba vs. Cooperative Bank Ltd. (1982) HCB 129*

(3) *Muller vs. Minister of Pensions (1947) 2 All. E. R. 373*

In paragraph 5 of the Harouna Sebagala's affidavit it is stated that the "applicants need to Mortgage the above title to Orient Bank in order to raise money to renovate property comprised in LRV 2575 Folio 5 Plots 2D which is to be rented to Save the Children Fund. Reading paragraphs 5 and 9 of Haruna's affidavit.) I see nothing (stated or implied) how the Minor will benefit from the Mortgaging of his property (which is an Incumbrance to his title) will benefit him. What the applicants are seeking to do is to place an incumbrance upon the title. They are in fact putting the minor's title and interest in the property in jeopardy. Article 34(4) of the Constitution provides that Children are entitled to be protected from social or economic exploitation. This is what the applicants want to do once armed with order of guardianship.

There are two other negative features to this application.

- a) Nowhere in this application (affidavit and Counsel's submissions) is it mentioned that the money borrowed on a mortgage is required to provide any of the facilities listed in section 5 and the First Schedule of the Children Act.
- b) The title - Plot 2D is registered in the names of six people. Two are the applicant, three have since become adults and the last is Kawesa whose age I have already held is not under 18. Even if I were to grant the order such order would have no legal force as it would affect the interests of Nabaggala, Senoga and Sengendo who

(a) are not a party to these proceedings and (b) have not consented to have their interest in the title to be incumberred or mortgaged and (c) their interests are alienated to cater for the welfare of Kawesa alone.

The end result of what I have said above is that this application is incurably defective. The application also lacks substance as the applicants have not satisfied court that what they propose to do, after mortgaging the minor's title is for the welfare of the minor. I find on the contrary, it is detrimental and prejudicial to the welfare of Kawesa and adverse to the interests of other stakeholders in the title.

In conclusion, I find the application is defective and or lacks merit. It is dismissed. Since the application was not contested, let the applicants bear their own costs.

V.A.R .Rwamisazi-Kagaba

JUDGE

2/9/2004