

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

FAMILY CAUSE NO. 231 OF 2013

IN THE MATTER OF TAMALE ORUKO AND NAKILIYA OLIVER (INFANTS)

AND

IN THE MATTER OF AN APPLICATION BY JOHN MATTHEW CONRAD AND KATIE MARIE MUSSELMAN CONRAD FOR APPOINTMENT AS THE LEGAL GUARDIANS OF TAMALE ORUKO AND NAKILIYA OLIVER AGED 5 AND 4 YEARS RESPECTIVELY.

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application for legal guardianship brought by notice of motion under Articles 139(1) and 34(1) & (2) of the Constitution, section 14 of the Judicature Act, cap 13, and section 98 of the Civil Procedure Act. The applicants are seeking this court's orders that:-

- a) The applicants **John Matthew Conrad** and **Katie Marie Musselman Conrad** be appointed legal guardians of **Tamale Oruko** and **Nakiliya Oliver**.
- b) The infants **Tamale Oruko** and **Nakiliya Oliver** be allowed to immigrate to the United States of America to live with the applicants.
- c) Costs of the application be provided for.

The grounds of the application are that:-

1. The infants' biological father, one **Luyonde Geoffrey**, drowned in Lake Kyoga on 16th July 2009 and he was the sole bread winner of the family.
2. The infants' biological mother **Nafula Annet** is helpless without any employment and cannot sustain the children.

3. The infants are currently living under the care of Pastor Rashid Luswa of Bethel House Orphanage pursuant to a care order issued by Entebbe Chief Magistrate's court on 15th November 2012 in Family Cause No. 53 of 2012.
4. The applicants wish to provide for the infants' emotional, psychological and educational needs, and to give them a home, parental love and care.
5. The applicants intend to immigrate with the infants to the United States of America where they can provide them with a home, parental love and care.
6. The biological mother of the infants has consented to this application.
7. This application is for the welfare and benefit of the infants.

The application is supported by the affidavits of the applicants **John Matthew Conrad** and **Katie Marie Musselman Conrad**, as well as those of **Nafula Annet** the infants' biological mother, and **Pastor Rashid Luswa** the Director of Bethel House Orphanage which has care orders in respect of the two infants.

The two applicants were in court when the application came up for hearing. The two infants, the subject of the application were also in court, so were the said infants' biological mother **Nafula Annet**, and **Pastor Rashid Luswa**. This court did not request any one to give oral testimony. Court however interacted with and carefully observed the applicants, the infants, the infants' mother as well as **Pastor Rashid Luswa** when they were being introduced before court by their Counsel.

The facts, as deduced from the affidavit evidence before court, are as follows:-

Tamale Oruko and Nakiliya Oliver were born on 12th November 2008 and 5th October 2007 respectively to Nafula Annet and Luyonde Geoffrey. Their biological father Luyonde Geoffrey, a fisherman, drowned in Lake Kyoga on 16th July 2009. This left the infants under the care of the biological mother. The infants' mother had no employment and could therefore not look after them. On 1st September 2012, she voluntarily handed them over to Pastor Rashid Luswa of Bethel House Orphanage to look after them.

Bethel House Orphanage eventually procured care orders in respect of the two infants from Entebbe Chief Magistrate's court, that is, in Family Cause No. ENT/00/CV/FC/053/2012 regarding Tamale Oruko, and Family Cause ENT/00/CV/FC/054/2012 regarding Nakiliya

Oliver. The reports of the Probation and Social Welfare Officer of Entebbe Municipal Council, Achen Annet, in respect of the two infants and their plight are on the court record as annexures **C** to Pastor Rashid Luswa's affidavit.

Bethel House Orphanage had contacts with the applicants, who are husband and wife. The applicants learnt of the infants' plight through Pastor Rashid Luswa. They felt sympathetic to the two infants and desire to live with them in the United States of America (USA). They seek this court to appoint them legal guardians of the two infants where they will take care of all their needs emotionally, psychologically, physically and financially, by providing a home and parental love and care.

The affidavit evidence on the court record reveals that the applicants are a legally wedded couple with four biological children. They are adult American citizens of sound mind. Their two eldest sons aged six and four years are excited and eagerly waiting for the two infants to join them. The applicants have supportive families. This is revealed by the Adoptive Home Assessment done by a home study case worker Jamie Fernandes, annexed as **H** to the applicants' respective supporting affidavits. **John Matthew Conrad** is employed as a Director of Transportation Solutions with M/S Kenco earning an annual income of US \$ 121,084.20 (United States Dollars one hundred twenty one thousand eighty four point twenty). **Katie Marie Musselman Conrad** is a home maker.

The applicants have no criminal records as indicated in annexures **E** to their respective affidavits. This is corroborated at pages 10 and 11 of the Adoptive Home Assessment annexures **H** to the applicants' respective supporting affidavits.

In his submissions, learned Counsel Matovu for the applicants reiterated the facts and grounds of the application. He also referred to the affidavits and their annexures. He submitted that it will be in the best interests of the two infants, and it will enhance their welfare if the application is allowed. He cited the Court of Appeal decisions **In the Matter of Deborah Joyce Alitubeera Civil Appeal No. 70/2011** and **In the Matter of Richard Masaba Civil Appeal No. 81/2011** to support his submissions.

Article 139(1) of the Constitution, together with section 14 of the Judicature Act, cap 13, give the High Court unlimited original jurisdiction in all matters. Section 98 of the Civil Procedure

Act empowers the High Court to invoke its inherent powers to grant remedies where there are no specific provisions.

In all matters concerning children, the best interests of the child shall be the primary consideration. This is a legal principle contained in Article 34 of the Constitution, sections 3 and the first schedule to the Children Act, as well as various international conventions ratified by Uganda concerning the rights of children.

Section 3 of the Children Act, read with the first schedule to the same Act, sets out the criteria to be followed in applications of this nature as follows:-

- a) The ascertainable wishes and feelings of the child in 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, background and other circumstances relevant in the matter.
- e) Any harm that the child has suffered or is at the risk of suffering.
- f) Where relevant, the capacity of the child's parents, guardians or others involved in meeting his or her needs.

Also see **In the Matter of Deborah Joyce Alitubeera Civil Appeal No. 70/2011** and **In the Matter of Richard Masaba Civil Appeal No. 81/2011** already cited.

I have analyzed and evaluated the affidavit evidence on the court record. I observed the applicants, the infants and all those who supported this application during the hearing. Bearing in mind the welfare principle, or the best interests of the two infants, I make the following findings:-

Nafula Annette, the biological mother of the two infants, deponed in her sworn affidavit that she has no means to look after the two infants after their father drowned in Lake Kyoga. Annexure **C** to her affidavit confirms the death of her husband which occurred on 16/7/2009. She voluntarily handed the infants over to **Pastor Rashid Luswa** due to her incapacity to look after them. There is sworn affidavit evidence by the said pastor that care orders were procured by

Bethel House Orphanage in respect of the two children. Copies of the care orders are attached to the applicants' respective affidavits as **D**.

The Probation and Social Welfare Officer's reports confirm that the biological mother of the infants is unable to bring them up. This was the reason she relinquished them to the care of Pastor Luswa and eventually to Bethel House Orphanage.

The two infants are clearly in need of a home which their mother, who is the only parent alive, cannot avail. Though they are currently under the care of an orphanage, the principle as laid out in the cited cases - **In the Matter of Deborah Joyce Alitubeera Civil Appeal No. 70/2011** and **In the Matter of Richard Masaba Civil Appeal No. 81/2011** – is that an orphanage is a temporary residence for a child pending the availability of a suitable home in which the infant can be raised.

This is in line with the spirit behind the provisions of sections 6 and 27 of the Children Act which, in my understanding, imply that placing a child in an institution should be a last resort after all attempts to have such child live in a suitable home have failed. The next best thing for the two infants, in the circumstances where their mother is unable to avail them a home, love and care, would be to place them with persons who are able and willing to avail them with such home, love and care.

There is evidence before this court, as discernible from the applicants' sworn affidavits and annexures, that the applicants desire to avail the two infants the home and care the said infants need at this vital stage of their growing up. Both applicants aver in paragraphs 11 of their respective affidavits that they will take care of the two infants' needs ***“emotionally, psychologically, physically and financially by providing a home, parental love and care to these infants.”*** (emphasis mine).

The Adoptive Home Assessment based on a home study of the two applicants, annexed to their respective affidavits as **H**, portrays them as a stable couple equipped to parent their children and groom them into mature loving adults. They have no criminal records as indicated in annexures **E** to their respective affidavits. I observed their interactions with the two infants in court. They appeared to have picked a rapport with the two infants.

This court is aware that though the Children Act does not specifically provide for guardianship orders, the constitutional and other statutory provisions highlighted above empower this court to award guardianship orders.

Section 1 of the Children Act defines “guardian” to mean a person having parental responsibility for a child. It has been stated in previous case decisions that a guardian must be a person who is ready to place himself/herself, in relation to the child, in *loco parentis* for purposes of its care and welfare. A guardian should have the child in his/her charge and actually look after it. He/She should be able to exercise powers of control over the child. While ensuring that the physical well being of the child is cared for, a guardian should 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 an infant. See **In the matter of Jane Nakintu, Emmanuel Brenda Senabulya and David Mwanje & In the matter of an application by Mukwenda Elly Mukisa Miscellaneous Application No. 966/1997**, Moses Mukiibi Ag J, as he then was.

I find that the two applicants in the instant application clearly meet the requirements of legal guardianship.

In the circumstances, and the laws applicable as highlighted above, I am of the opinion that this is a proper case where the two infants will have an opportunity to get a home where they will get love, care and basic needs for their nurturing and development in life. It will be in the two infants’ best interests to allow this application. I accordingly make the following orders on terms I consider fit for the welfare of the two infants:-

- a) The applicants **John Matthew Conrad** and **Katie Marie Musselman Conrad** are hereby appointed legal guardians of **Tamale Oruko** and **Nakiliya Oliver**.
- b) The infants **Tamale Oruko** and **Nakiliya Oliver** are allowed to immigrate to the United States of America to live with the applicants.
- c) The legal guardians are directed to obtain Ugandan passports for the two infants using their current names.
- d) The legal guardians shall submit once a year, photographs and a report on the state of health, progress and welfare of the two infants/children to the Registrar, Family Division

of the High Court of Uganda at Kampala until each child attains 18 (eighteen) years of age or until directed otherwise.

- e) The Registrar of the High Court shall furnish a copy of the orders in this ruling, together with the address of the legal guardians in USA to the Ministry of Foreign Affairs of Uganda at Kampala; the Embassy of USA in Kampala; the Ministry of Justice and Constitutional Affairs of Uganda; and M/S Lifeline Children Services.
- f) The legal guardians shall immediately communicate any changes of addresses to the authorities mentioned above.
- g) Costs of this application will be met by the applicants.

Dated at Kampala this 17th day of October 2013.

Percy Night Tuhaise

Judge.