

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE NO. 223 OF 2013
IN THE MATTER OF THE CHILDREN ACT CAP 59

AND

IN THE MATTER OF NAMULINDA JOVIA (INFANT)

AND

**IN THE MATTER OF AN APPLICATION FOR APPOINTMENT AS THE LEGAL
GUARDIANS OF NAMULINDA JOVIA (AGED 1 YEAR) BY MICHAEL WILLIAM
FRIEDRICH AND DANIELLE JEAN FRIEDRICH**

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; sections 14, 33 and 39 of the Judicature Act, cap 13; and sections 3, 4 and 5 of the Children Act. The applicants are seeking this court's orders that:-

- a) The applicants **Michael William Friedrich** and **Danielle Jean Friedrich** be appointed legal guardians of **Namulinda Jovia**.
- b) The infant **Namulinda Jovia** be allowed to immigrate and live with **Michael William Friedrich** and **Danielle Jean Friedrich** in the United States of America (USA) and elsewhere they may live.
- c) Costs of this application be provided for.

The grounds of the application are that:-

1. The infant is a single orphan having lost her mother.

2. The infant's father is unknown.
3. The infant was admitted to the care of a children's Home by the probation officer upon the request of the social worker of Jinja Hospital.
4. The applicants are ready and willing to provide the infant with a home, parental care and love.
5. This application is for the welfare and benefit of the infant.

The application is accompanied by statutory declarations of the two applicants **Michael William Friedrich** and **Danielle Jean Friedrich**, and affidavits of **William Edema** administrator of M/S Welcome Home Ministries Africa, **Wayidila Shaban**, the infant's maternal uncle, **Katonda Siraji** the infant's maternal grandfather, **Namulega Desiranta** the infant's maternal grandmother, **Keibanda Kenneth** a social worker employed by Jinja Regional Referral hospital, **Opio Ouma** Jinja District, and **Owori Steven** the Local Council 1 chairman of Nabweya, Busesa, Iganga.

The two applicants were in court when the application came up for hearing. The infant, the subject of the application, was also in court. This court did not request any one to give oral testimony. However, it interacted with the applicants and the deponents who attended court at the hearing. The applicants also availed this court with the originals of all documents annexed to the affidavits and statutory declarations.

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

The infant Namulinda Jovia was born on 15th February 2012 to Namulinda Nabuati who was mentally sick. The infant's father is not known. Namulinda Nabuati used to move from place to place and the pregnancy could have been the result of a rape. The infant's mother died on 27th May 2012. The infant's grandmother Namulega Desiranta took up the responsibility of looking after the infant. However, she could not afford to continue doing so due to the poor health of the infant. Keibanda Kenneth a social worker with Jinja Referral Hospital referred the grandmother to the probation officer Iganga who in turn referred the matter to Opio Ouma probation officer Jinja. Opio Ouma recommended the infant to the care and custody of M/S Welcome Home Ministries Africa. M/S Welcome Home Ministries Africa eventually procured a care order in

respect of the infant from the Family and Children's Court at Jinja vide care application no. 06 of 2013.

The applicants, who are husband and wife, learnt of the infant's plight through Monday Sydo the director of M/S Welcome Home Ministries Africa. The applicants desire to live with the infant in the USA and elsewhere they may live. They seek this court to appoint them legal guardians of the infant where they can provide her with a home, medical care, education and other necessities of life.

The affidavit evidence on the court record reveals that the applicants are a legally wedded couple with one biological child aged two years. They are adult American citizens. The applicants have been found to be fit adoptive parents by M/S Angels Haven Outreach, a nonprofit international Adoption Agency licenced in their country to carry out investigations and prepare home studies to determine the suitability of applicants as adoptive parents. Their home study report marked **D** is attached to the 1st applicant's sworn statutory declaration.

Michael William Friedrich is employed as a reverse logistics manager at Nexsan Technologies, 302 Enterprise Street Suite A, Escondido CA 92029 USA, as per annexure **C** to his statutory declaration. **Danielle Jean Friedrich**, is an emergency room registered nurse, Palomar Medical Centre, 2185 Citracado Parkway, Escondido CA 92029 USA, as per annexure **B** to her statutory declaration.

The applicants have no criminal records, as indicated in annexures **B1** and **E** of **Danielle Jean Friedrich's** and **Michael William Friedrich's** statutory declarations respectively. This is corroborated at pages 6 and 7 of the International Adoption Homestudy report of M/S Angels' Haven Outreach attached as **D** to the 1st applicant's statutory declaration.

In his submissions, learned Counsel Charles Majoli for the applicants reiterated the facts and grounds of the application. He prayed this court to allow the application to enable the applicants fulfill their parental obligations towards the infant who has no relative capable of taking care of her. He cited **Evelyn Atukwase FC 118/2010; Re Man, an Infant SCCA 22/1994; and Family Cause No. 76/2011** to support his case.

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.

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

The affidavit evidence on record shows that the infant Namulinda Jovia is orphaned. Her mother is dead, as evidenced by the death certificate attached as annexure **A** to Namulega Deziranta's affidavit. The infant's father is not known as revealed in the affidavits of Namulega Deziranta, Katonda Siraj and Wayidila Shaban. There is evidence from the affidavits of Keibanda Kenneth and Opio Ouma that Namulega Deziranta, the infant's maternal grandmother, cannot afford to look after the infant mainly due the infant's ill health.

The infant is clearly in need of care and a home. The known immediate relative Namulega Deziranta, who is her maternal grandmother, cannot afford to look after her. Though she is currently under the care of M/S Welcome Home Ministries Africa, the principle as laid out in 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** – 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 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.

There is evidence before this court, as analyzed from the applicants' statutory declarations, that the applicants desire to avail the infant the home and care he needs at this vital stage of her growing up. The applicants stated in their sworn statutory declarations that they intend to live with the child in USA where they can provide her with a home, medical care education and other necessities of life.

The International Adoption Homestudy report of M/S Angels' Haven Outreach based on a home study of the two applicants, annexed as **D** to the 1st applicant's statutory declaration, portrays them as a stable couple outstanding in their moral conduct and very law abiding. They have no criminal records as indicated in the annexures to their sworn statutory declarations. They each have a steady source of income to maintain their family. I observed them and their interactions with the infant in court. They appeared to have picked a rapport with her.

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 it 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 Nabyama Moses alias Nabyama Abasa Family Cause No. 76/2011** Moses Mukiibi J.

In the circumstances and the laws applicable as highlighted above, I find that where the infant's known relative cannot afford to look after the infant whose mother is dead and the father unknown, and where no other relative is showing interest in the infant, the applicants are the next best suited persons to look after her. The applicants, on basis of the adduced evidence on record, clearly meet the requirements of legal guardianship. Denying them to look after the child would deprive her any hope of being in a home where she is loved and cared for, and result in her staying in a children's home which is only temporary. This is a proper case where, through a guardianship order, the infant will get a home, love, care and basic needs for her nurturing and development in life which she currently lacks. It will be in her best interests to allow this application.

I accordingly make the following orders on terms I consider fit for the welfare of the infant:-

- a) The applicants **Michael William Friedrich** and **Danielle Jean Friedrich** be appointed legal guardians of **Namulinda Jovia**.
- b) The infant **Namulinda Jovia** be allowed to immigrate and live with **Michael William Friedrich** and **Danielle Jean Friedrich** in the United States of America (USA) and elsewhere they may live.
- c) The legal guardians are directed to obtain a Ugandan passport for the infant using her 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 infant to the Registrar, Family Division of the High Court of Uganda at Kampala until she 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 Angels' Haven Outreach.

- 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 24th day of October 2013.

Percy Night Tuhaise

Judge.