

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**  
**FAMILY CAUSE NO. 207 OF 2013**  
**IN THE MATTER OF THE CHILDREN ACT CAP 59**

**AND**

**IN THE MATTER OF NZIAWAHEKA KELEVINE AN INFANT**

**AND**

**IN THE MATTER OF AN APPLICATION BY CLINT DAVID KAEB AND JAMI LYN  
KAEB TO BE APPOINTED LEGAL GUARDIANS OF THE SAID MINOR**

**BEFORE LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This is an application for legal guardianship brought by notice of motion under section 14 of the Judicature Act, cap 13; section 98 of the Civil Procedure Act; Order 52 rules 1 & 2 of the Civil Procedure Rules, the Children Act cap 59 and all enabling provisions of the law. The applicants are seeking this Court's orders that:-

- a) **Clint David Kaeb** and **Jamil Lynn Kaeb** of c/o Kiyimba Kisaka & Co Advocates of Plot 1936 Old Kiira Road Bukoto P. O Box 6768 Kampala be appointed legal guardians of **Nziawaheka Kelevine**.
- b) The applicants be charged with the responsibility of taking up the child into their personal care and custody and provide for its physical, social and spiritual needs and generally to look after the minor as guardians would reasonably be called upon to perform in that role.
- c) The applicants be granted leave to take the child into their custody and live with her at their perpetual place of residence at 1 Wood Bridge Blvd. Bloomington IL 61704, USA.

d) The costs of this application be provided for.

The application is supported by the affidavits of the applicants, and of the known caregivers and relatives of the child. The grounds in the application are generally that:-

1. The said minor child **Nziawaheka Kelevine** is a needy orphaned and vulnerable child.
2. The child's mother **Peluce Matsimwe** died of natural causes and the child has been left motherless.
3. The minor child is aged approximately three years and she is currently in custody of her father.
4. The child's father is overwhelmed with the number of children and has been receiving assistance from caregivers in the community.
5. The applicants are American citizens who live and reside in America and were introduced to the child through International Adoption Net (IAN) of 7500 Arapahoe Road # 250 Centennial, CO 80112.
6. The applicants are willing to provide support to the child and are applying for an order to take her into their custody and provide the warmth of family and all attendant support.

The application is accompanied by affidavits of the two applicants **Clint David Kaeb** and **Jamil Lynn Kaeb**, the infant's biological father **Matsimwe Daneri**, the local council 1 chairman Kikonge Bwetsumbi **Kanyamikule Timothy**, and that of the infant's maternal uncle **Musoka Noah**. There is also an affidavit by the senior probation officer Kasese district, **Sowedi Kitanywa**.

The two applicants were in court when the application came up for hearing. The infant, **Nziawaheka Kelevine**, the subject of the application, was also in court. At the hearing, **Daneri Matsimwe** answered under oath a few questions put to him by this court. After the hearing, this court was availed originals of the documents annexed to the statutory declarations and affidavits in the application.

The background to the application is that **Nziawaheka Kelevine** is a child of Matsimwe Daneri and Peluce Matsimwe of Bwesumbu sub county Kasese district. The infant's mother died of natural causes on 25/12/2010. The child is aged three years and is in the custody of her father. The oldest of her siblings is 25 years of age. The applicants, who are husband and wife, came to

learn about the infant through International Adoption Net (IAN) based in Colorado USA, who identified the child in Uganda. The applicants desire to live with the infant in the United States of America (USA). They seek this court to appoint them legal guardians of the infant so that they can take her up into their personal care and custody and provide her with a home, care, love and warmth of family.

Learned Counsel Dorothy Kisaka for the applicants framed three issues on which she based her submissions. The first is whether the child Nziawaheka Kelevine is a vulnerable and needy child. The second is whether the applicants **Clint David Kaeb** and **Jamil Lynn Kaeb** are fit and proper for the grant of a legal guardianship order over the child. The third is whether the application is in the interests of the child.

On the first issue, she submitted that the child is in need of motherly care, that she is vulnerable and in need of care and protection in a home setting where her needs would be served. On the second issue, she submitted that the applicants have fulfilled the legal requirements that would qualify them for legal guardianship. On the third issue she submitted that the application has the best interests of the child considered. She based her submissions on section 3 of the Children Act. She cited **In the matter of Kabugho Rolivine FC 92/2013; In the matter of Deborah Joyce Alitubeera Civil Application No 38/2012**, and **In the matter of Richard Masaba Civil Appeal No 81/2011** to support her submissions. She prayed this court to grant the applicants a guardianship order in respect of the child.

Article 139(1) of the Constitution, read 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, section 3 and the first schedule to the Children Act, as well as various international conventions ratified by Uganda concerning the rights of children.

I have carefully analyzed and evaluated the affidavit evidence on the court record. During the hearing, I observed the applicants, the infant and those who swore affidavits in support of this

application. I will address issues 1 and 3 together since they concern the infant. Issue 2 which concerns the applicants will be addressed first.

*Issue 2: Whether the applicants **Clint David Kaeb** and **Jamil Lynn Kaeb** are fit and proper for the grant of a legal guardianship order over the child.*

There is affidavit evidence on record that the applicants are a legally wedded couple. They are adult American citizens. They have six children – two natural and four adopted. They have been found to be fit adoptive parents by **The Baby Fold** which made a home study report marked **CD-8**, attached to the 1<sup>st</sup> applicant's affidavit. **Clint David Kaeb** is employed by Kaeb Sanitary supply inc. as a business owner and salesman. **Jamil Lynn Kaeb** is a stay at home mom. The applicants have no criminal records, as indicated in annexures **CDK-4** to their respective affidavits. This is corroborated at pages 7 and 9 of the Adoptive Parent study report of **The Baby Fold** annexed to each applicant's affidavit. The affidavit evidence on record shows the applicants as fit and proper persons for grant of guardianship. All the reports and assessments on their character, family and financial competence are convincingly impressive. Issue 2 is therefore answered in the affirmative.

*Issue 1: Whether the child Nziawaheka Kelevine is a vulnerable and needy child.*

The undisputed affidavit evidence on record shows that the infant Nziawaheka Kelevine was born to Matsimwe Daneri and the late Peluce Matsimwe on 15/01/2010. Her mother is dead, as evidenced by the death certificate attached as annexure **NK-3** to Daneri Matsimwe's affidavit. The infant's mother died when the infant was only five months old. She was brought up under the care of his father.

Daneri Matsimwe states in his affidavit that Nziawaheka Kelevine is the youngest child of his ten children, and that his children are aged between 25 years and three years. He stated to this court under oath that he lives with all the ten children declared in his affidavit. The evidence of Sowedi Kitanywa the senior probation officer Kasese, however, is that there is a child younger than Nziawaheka born to Matsimwe by Stella whom he married after Nziawaheka's mother had died, that Nziawaheka is the tenth child in a family of eleven children. This is revealed in Sowedi Kitanywa's probation report, attached to his affidavit. Kitanywa states in his affidavit that he interacted with the infant's father and visited the family. His report states that Stella Matsimwe

has been a supportive mother to all the children, that there are no reports of mistreatment, and that she is considered a blessing to the family.

Daneri Matsimwe did not state anything about the new wife or her child in his affidavit. However, when probed by court, he did state under oath that he has a new wife who is good and they live together with Nziawaheka the infant, but that the family decided to give Nziawaheka another guardian to look after her. In his affidavit, he stated that he loves his daughter and he desires that she should be cared for well, that he learnt about alternative foster care through community education and decided to avail his child for alternative care to the applicants. The local council chairman of the area, Kinyamikule Timothy, also stated in his affidavit that Matsimwe looks after his ten children single handedly with difficulty after the death of his wife.

I have carefully analyzed the above evidence. I find that the infant Nziawaheka Kelevine has a loving home where she lives with her biological father, a supportive step mother, plus sisters and brothers. There is evidence that the father can afford to look after the infant. It is deducible from the report of the senior probation officer who visited Matsimwe's home, that the family rears cattle. They also have a substantial piece of land of about ten acres with a coffee plantation. Daneri Matsimwe himself stated to court under oath that he is a cultivator and that all the ten children are still maintained by him. In his affidavit, he stated the said children to include adult children namely Nziawaheka Eric, Bwambale Hezekia, Nziawaheka Surgeon and Nziawaheka Zekelina, aged 25, 23, 21 and 18 years respectively.

It is evident Daneri Matsimwe has been able to cater for his family which includes adult children. If he can maintain adult children, how about the younger child, the three year old Nziawaheka who also lives in the same household? In any case, he managed to maintain and raise the said infant, who is his biological child, from the time the mother died, when it was five months. At three years it should be easier to raise and maintain the same infant who by now has grown attached not only to him but to the older siblings as well, not to mention the step mother whom he stated to be good. Daneri Matsimwe himself stated to court under oath that he loves his child Kelevine Nziawaheka. The fact that he has remarried indicates he is ready to even expand his family. The said situation as assessed contradicts his claims that he cannot afford to raise his child Nziawaheka Kelevine. In the circumstances, I do not believe Daneri Matsimwe's claims

and those of his local council chairman that Matsimwe cannot afford to look after his three year old daughter.

It is my considered opinion therefore that the infant Nziawaheka is not a vulnerable and needy child. If anything, she is surrounded by a loving family consisting of his biological father who raised her after the mother died, older siblings and a supportive step mother. Issue 1 is therefore answered in the negative.

*Issue 3: Whether the application is in the interests of the child.*

It is stated in section 3 of the Children Act and the first schedule to the same Act, as well as in Article 34 of the Constitution, that in all matters concerning children, the best interests of the child shall be the primary consideration. These include the child's physical, emotional and educational needs, the likely effects of any changes in the child's circumstances, the child's age, background and other circumstances relevant in the matter, any harm that the child has suffered or is at the risk of suffering, and, where relevant, the capacity of the child's parents, guardians or others involved in meeting his or her needs.

The evidence of the Probation and Social Welfare officer is that the infant's father rears cattle and owns about seven acres of land plus a coffee plantation. The said officer visited the family and found that Daneri Matsimwe has married another wife who has one child, and that there are no reports of the new wife mistreating Nziawaheka Kelevine in this matter. His report shows that the idea of guardianship was introduced to a family by a social worker of a local NGO and quickly accepted by the parents. When this court put a question to Daneri Matsimwe about how his current wife relates to the infant, he stated under oath that the relationship is good, but that they decided to give the child another guardian. I find it strange that in his affidavit he never mentioned the new wife or any child by the said wife as being part of his family until he was probed by this court.

The findings in issue 1 above indicate that the infant Nziawaheka Kelevine is surrounded by love and care from a stable family consisting of a biological father, older siblings and a supportive step mother. The family has managed to raise and care for the infant from the delicate age of five months when she lost her mother, to the current age of three years. The vital question is, is it in the interests of the infant to remove her from the natural home where she is currently living with

her immediate family to allow her join the applicant's home? Ideally any child should be raised in his/her natural home with biological parents, unless there are reasons which compel such child to be raised elsewhere. In this case I find no such compelling circumstances. Though there is convincing evidence that the applicants have good intentions of availing the infant a home and care, the welfare principle, in the circumstances of this case where the infant has a home with a biological father, a supportive step mother and older siblings, dictates that she stays with her family rather than leave it to live with the applicants in another country.

I must state here that the intention of legal guardianship is to avail a home and parental love and care to a child who needs it, for the child's welfare. Legal guardianship is not meant for parents who want to abdicate their parental responsibilities by simply giving away their children to financially capable persons who offer to look after them. Section 4 of the Children Act provides that a child is entitled to live with his or her parents or guardians. Where a child is to be separated from his/her parents, the best substitute care available shall be substituted. Article 31(4) of the Constitution provides that it is a right and duty of parents to care for and bring up their children. Section 5 of the Children Act places the same duty on parents to maintain their children by availing them education and guidance, immunization, adequate diet, clothing, shelter, and medical attention. Those who have custody of the child must protect the child from discrimination, violence, abuse and respect.

Thus, if the issue, as appears to be the situation in the instant case, is simply to let well intended and financially capable applicants look after children whose parents simply want to abdicate their parental duties or pass them on to third parties, this can be done by letting such applicants avail financial assistance to the children without the children leaving their homes. It should not be through granting of legal guardianship which has the effect of separating the child from his/her parents or family. Issue 3 is therefore answered in the negative.

It will not be in the infant's best interests to allow this application. In fact, it is my opinion that allowing the application will disentangle the infant from her natural home to which she has had undisturbed attachments, to a completely strange environment. This would not be good for her psychological and emotional development. It is in the infant's best interests to stay with her natural family than to join the applicants' family. The application is accordingly dismissed.

**Dated at Kampala this 5<sup>th</sup> day of November 2013.**

**Percy Night Tuhaise**

**Judge.**