

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE 153 OF 2013
IN THE MATTER OF CAROL GIFT NAKILINYA..... (A CHILD)
AND
IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP
BY
JOHN DAVID ADAMS
DARA ANNE ADAMS.....APPLICANTS
BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application for legal guardianship brought by notice of motion under Articles 139 of the Constitution; sections 14, 33 and 39 of the Judicature Act, cap 13; section 98 of the Civil Procedure Act cap 71; and Order 51 rules 1 & 2 of the Civil Procedure Rules. The applicants are seeking the issuance of an order granting legal guardianship and costs of the application.

The grounds of the application are that:-

1. The child is a girl aged three years and is the daughter of Madina Kyolaba and Chysostom Wekulwagana.
2. The child is in the legal custody of Dr. Babi E Kasadha and Sarah Nabunya by virtue of a care order issued by the family and children's court of Iganga.
3. The parents of the child are unable and unwilling to look after the infant.
4. The applicants herein are able and willing to provide a home, love and care and sustenance for the infant.

5. The applicants qualify for an order of legal guardianship for the custody of the infant.

The application is supported by the affidavits of the two applicants **John David Adams** and **Dara Anne Adams**, Madina Kyolaba, Chysostom Wekulwagana, Aisha Musibika Aliziki, plus Babi E Kasadha.

The two applicants were in court when the application came up for hearing. The infant, the subject of the application, was also in court. Court was availed some of the originals of the documents annexed to the affidavits.

The facts are that the child Carol Gift Nakilinya was born to Chysostom Wekulwagana and Madina Kyolaba on 26th January 2005 in Buwolomera Iganga district. Madina Kyolaba later had misunderstandings with Margret, Wekulwagana's former wife who had returned to the home on reconciling with her husband. Madina and her children were consequently thrown out of the home by Margret. On being thrown out of the home, Madina took her children to her mother's home. One of the children eventually passed away due to their grandmother's inability to cater for them. Nakilinya was later taken away by Aisha Musibika, Madina's sister, who placed her in the care of Dr. Emmanuel Babiiha Kasadha. Dr. Babiiha procured legal custody of the child vide a care order issued by court at Iganga.

The applicants, who are husband and wife, learnt of the infant's plight through the Christian Ministry of Dr. Babiiha. The applicants desire to help the child and provide her with a loving home environment. They seek this court to grant them legal guardianship of the child to give her a loving and secure upbringing as their own child.

Learned Counsel George Mugume for the applicants, in his submissions, reiterated the facts and grounds of the application. He submitted that the case for legal guardianship of the child by the applicants is properly made out. He prayed this court to allow the application for the welfare of the infant to alleviate her suffering and secure her future in a learning home environment. He cited **Deborah Joyce Alitubeera Court of Appeal Civil Appeals 70/2011, Richard**

Masaba Court of Appeal Civil Appeal 81/2011, In the matter of Jane Namukasa (an infant) Miscellaneous Civil Application No 78/1991, and In the matter of Howard Aman Little (an infant) & Francis Palmer (an infant) Court of Appeal Civil Appeals 32 & 33/2006, 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 to be the ascertainable wishes and feelings of the child in light of his or her age and understanding; 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.

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

The evidence on record shows that the child Carol Gift Nakilinya does not live with her biological parents. She was chased away with her mother from her father's home by her step mother. Neither her mother nor her maternal grandmother can afford to look after her. Her father clearly does not care about the child and her mother. Wekulwagana's affidavit reveals that he did nothing to avail shelter or maintenance to the child and her mother when they were chased away from his home by his wife Margret. Nakilinya's biological parents have failed

to look after her. This is revealed in the affidavits of Madina Kyolaba, Chysostom Wekulwagana, and Aida Musibika Aliziki. The child is in the care of Dr. Babiiha who in his affidavit states that he helped the child on a temporary basis, and that the applicants have been meeting the child's education and medical care and upkeep. This is evidenced by annextures **D** and **E** to Dr. Babiiha's affidavit.

The infant is clearly in need of care and a home. Dr. Babiiha who has legal custody of the child has no intentions of keeping her permanently. There is evidence on record that the applicants desire to help the child and provide her with a loving home environment. They were providing school fees, medical and other expenses for the child's well being during her stay with Dr. Babiiha. The applicants are married to each other. They have three daughters aged 18, 15, and 9 years. They have been found to be fit adoptive parents by M/S Children's Connections Inc. based in Texas USA, which conducted a home study on the applicants and their report is attached to the 1st applicant's affidavit marked **G**. John David Adams is a Computer Analyst and Business Owner of HR Focal Point, which deals in human resources and payroll systems. Dara Anne Adams is a housewife/stay at home mother fully occupied in raising her children.

The applicants have been cleared by the United States Citizenship and Immigration Services as being able to furnish proper care to orphans, as indicated in annextures **J** and **I** to the applicants' respective affidavits. Annexixture **G** to the applicants' respective affidavits indicates at pages 4 and 6 that John David Adams admits he has a prior conviction of driving under the influence of alcohol, which he is not proud of, while his wife Dara Anne Adams has never been arrested, detained or convicted of any crime.

The Children Act does not specifically provide for guardianship orders. However, 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. A guardian 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. He/She 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**, Mukiibi J.

In the circumstances, I find that where the child's biological parents are unable to care for the child, or where neither the parents nor other relatives are 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, 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. 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 is currently enjoying at Dr. Babiha's on a temporary basis. It will be in her best interests to allow this application if she is to enjoy the said basic needs permanently in the course of her growing up.

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

- a) Legal guardianship of **Carol Gift Nakilinya** be granted to the applicants **John David Adams** and **Dara Anne Adams**.
- b) The legal guardians are directed to obtain a Ugandan passport for the child using her current names.
- c) The legal guardians shall submit once a year, photographs and a report on the state of health, progress and welfare of the child 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.
- d) 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 Children's Connections Inc.

- e) The legal guardians shall immediately communicate any changes of addresses to the authorities mentioned above.
- f) Costs of this application will be met by the applicants.

Dated at Kampala this 11th day of November 2013.

Percy Night Tuhaise

Judge.