

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE 203 OF 2013

**IN THE MATTER OF ARTICLES 139(1), 34(1) & (2) OF THE CONSTITUTION OF
THE REPUBLIC OF UGANDA, AND SECTIONS 14, 33 AND 39 OF THE
JUDICATURE ACT CAP 13**

AND

**SECTIONS 2, 3, 4, 5, 6 AND THE FIRST SCHEDULE OF THE CHILDREN ACT CAP
59 AND SECTION 98 OF THE CIVIL PROCEDURE ACT AND ORDER 52 RULES 1
AND 3 OF THE CIVIL PROCEDURE RULES**

IN THE MATTER OF JACKLINE NAMUBIRU (CHILD)

AND

**IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY
BENJAMIN RYAN BIGGERSTAFF AND JENNIFER ERIN BIGGERSTAFF**

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; sections 2, 3, 4, 5, 6 and the first schedule of the Children Act; section 98 of the Civil Procedure Act cap 71; and Order 51 rules 1 & 3 of the Civil Procedure Rules. The applicants are seeking the following orders:-

1. **Benjamin Ryan Biggerstaff** and **Jenniffer Erin Biggerstaff** be appointed legal guardians of the child Jackline Namubiru.
2. The applicants be permitted to emigrate with the child to their home country to fulfill their parental responsibilities.
3. Costs of the application be provided for by the applicants.

The grounds of the application are that:-

1. The child was abandoned by persons suspected to be her parents in a house they have been renting in Kazo central zone, Nansana, Wakiso district in 2010.
2. The efforts to locate the child's parents have proved futile.

3. The child is now in need of a family which only the applicants are ready to provide.
4. The applicants are financially stable, have no criminal record, have a stable family, and have been assessed and found to be capable of looking after the child.
5. It is in the best interests of the child that the application be granted.

The application is supported by the affidavits of the two applicants **Benjamin Ryan Biggerstaff** and **Jennifer Erin Biggerstaff**, Betty Wuzu of Action for Children, Kirwana Janat Nantume secretary for Kazo central zone, and Bogere Nassan assistant defense officer Kazo central zone.

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 on request availed originals of the documents annexed to the affidavits.

The facts, as deduced from the record, are that the child Jackline Namubiru was a child of Alex Senono a former tenant of Haji Ndiwalana in Kazo central zone. Senono lived with his wife Roy Namukwaya the stepmother to Jackline Namubiru, and five of their children. Namubiru was malnourished due to mistreatment by her stepmother. This prompted the residents to report the matter to the general secretary Kazo central zone. The local council executives of the area, after assessing the situation, reported the case to the police. The child's biological parents told the police that the child was a curse since they were of the same clan. The child's mother was also sickly and she has since shifted and cannot be located or contacted on phone. Senono and his family have also since shifted and cannot be located or contacted on phone. The child is currently under the care and custody of Queen Esther Palace Transition Centre by virtue of a care order. There were efforts to trace the child, including advertisements in the newspaper, but to date no one has claimed the child.

The applicants, who are husband and wife, learnt of the child's plight through Holt International Children's Services which shares an adoption programme with Action for Children. They seek this court to grant them legal guardianship of the child to give her a home.

In his submissions, learned Counsel Isaac Mugume for the applicants reiterated the facts and grounds of the application and prayed court to allow the application. He cited ***Kirabo Jeremy by Anthony Joseph Griego & Megan Suzanne Griego FC 54/2012; Jessica Hadija Nabirye by Christopher Allen Wood & Chandice Marie Wood FC 08/2013*** to support the application.

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 and the Children Act and various international conventions on the rights of children ratified by Uganda.

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. These are 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:-

There is evidence on record that the child is currently under the care and custody of Queen Esther Palace Transition Center after her biological parents and her stepmother neglected her. The parents relocated after the child's case was referred to the police, and attempts to locate them have failed. No one has responded to the newspaper advertisements to claim the child or offer to look after her.

The child is clearly in need of a family to grow in and be cared for. Queen Esther Palace Transition Center which has legal custody of the child is an institution which cannot provide a permanent home for her. There are case decisions that such an institution is a temporary residence for a child pending the availability of a suitable home in which the child can be raised. See ***In the matter of Deborah Joyce Alitubeera Civil Appeal No 70/2011: In the matter of Richard Masaba Civil Appeal No.81/2011***. Sections 6 and 27 of the Children Act, to my understanding, also 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 on record that the applicants desire to parent the child. The applicants are married to each other. They have one child now aged four years, having been born on 4th April 2009, as per the birth certificate annexure **D** to the 1st applicant's affidavit. Benjamin Ryan Biggerstaff is a sales associate at Wood Cycle & XC Ski and also serves as associate pastor at Common Ground Christian Church, as per annexure **E** to his affidavit. Jenniffer Erin Biggerstaff is a full time physician at St. Alphonsus Health System as per annexure **C** to her affidavit. They do not have a criminal or child abuse record, as revealed in annexures **J, H** and **K** to the 1st applicant's affidavit. They are financially stable, in good and healthy condition as per annexure **L** to the 1st applicant's affidavit.

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. He/She should be able to exercise powers of control over the child. A guardian should ensure that the physical well being of the child is cared for, and 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***, Mukibi 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. On basis of the adduced evidence, the applicants clearly meet the requirements of legal guardianship. Denying them their prayer to look after the child would deprive her the opportunity of being in a home where she is parented. This is a proper case where, through a guardianship order, the child will get a home, love, care and basic needs for her nurturing and development in life which she is currently enjoying at a children's home. 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. **Benjamin Ryan Biggerstaff** and **Jennifer Erin Biggerstaff** be appointed legal guardians of the child Jackline Namubiru.
- b. The applicants be permitted to emigrate with the child to their home country to fulfill their parental responsibilities.
- c. The legal guardians are directed to obtain a Ugandan passport for the child 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 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.
- 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
- 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 2nd day of December 2013.

Percy Night Tuhaise

Judge.

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