

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE 256 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 HOPE NANKYA (CHILD)

AND

**IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY KEVIN
ROSS NICHOLS AND ERIN CHATELAINE NICHOLS**

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application for legal guardianship 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 to the Children Act; section 98 of the Civil Procedure Act cap 71; and Order 52 rules 1 & 3 of the Civil Procedure Rules. The applicants are seeking the following orders:-

1. Kevin Ross Nichols Erin and Erin Chartelain Nichols be appointed legal guardians of the child Hope Nankya.
2. The applicants be permitted to travel with the child outside Uganda and complete the adoption process in the United States of America (USA).
3. Costs of this application be provided for.

The grounds of the application are that:-

1. Hope Nankya was abandoned in Nsambya West on or about the 11th day of March 2013.
2. The child was picked by a good Samaritan, a one Ekikwenza Aisha, who reported the abandonment to Katwe police station.

3. A case file was opened at Katwe police station vide SD REF 24/11/03/2013 before the child was forwarded to the Probation office of Makindye.
4. The Probation office of Makindye subsequently referred the child to Nsambya Babies Home where she has been up to date.
5. Efforts to trace the child's relatives have been futile.
6. Hope Nankya is in need of a permanent home, parental love, care and protection.
7. Besides the applicants, no one is ready and willing to provide Hope Nankya with a permanent home, parental love, care and protection.
8. It is in Hope Nankya's best interests that this honourable court be pleased to grant this application.

The application is supported by the affidavits of the two applicants as well as those of Haji Majwega local council chairperson Nsambya West, Justine Mpagi administrator Nsambya Babies Home, and Stella Nabalamba a social worker Nkwanga & Partners Advocates.

The two applicants were in court when the application came up for hearing. The infant, Hope Nankya, the subject of the application, was also in court.

The background is that Hope Nankya was abandoned by her mother to Ekikwenza Aisha sometime last year. As Aisha was heading home, a one Grace Mukiga called her and requested her to help the child's mother since they were of the same tribe. Ekikwenza took the child and the mother to her home and gave them breakfast. When she woke up from a nap, the child's mother had disappeared with Aisha's bag of clothes, leaving the child behind. In March 2013 she reported the abandonment to Katwe police station where file SD REF 24/11/03/2013 was opened. The child was forwarded by the Katwe police to the Probation office of Makindye. The Probation office of Makindye referred the child to Nsambya Babies Home where she has been to date. Efforts to trace the child's relatives have proved futile. The applicants, who are husband and wife, got to know about Nankya through Bethany Christian Services, a licencing child placing agency based in the USA. They seek this court to grant them legal guardianship of the child for eventual adoption in the USA.

Learned Counsel Victoria Katamba for the applicants filed written submissions and orally highlighted to court that there is evidence of Hope's mother intending not to return, that institutions are not the best places for children, and that the applicants have been evaluated in their own country and found to be suitable adoptive parents. In her written submissions she cited ***Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011***; and ***Civil Application 38/2012*** to support the application.

The High Court has unlimited original jurisdiction in all matters as stipulated in Article 139(1) of the Constitution and section 14 of the Judicature Act. 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, as stipulated in Article 34 of the Constitution, the Children Act and various international conventions ratified by Uganda concerning the rights of children.

Section 3 of the Children Act, read with its first schedule, 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.

The applicants are applying for guardianship of Hope Nankya so that they are permitted to travel with her outside Uganda and complete the adoption process in the USA. This situation was put to rest by the Court of Appeal in ***Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011*** where, when addressing a similar situation, the court emphasized the importance of the welfare principle and the need for applicants to travel with the children to their home countries. In ***Civil Application No. 38/2012***, which arose from the same appeals, the same court stated that the intention of their judgment could not be fully implemented unless they deleted the condition requiring legal guardians to come back and file adoption applications in Uganda.

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, and all applicable laws highlighted above, I find as follows:-

It is evident the child's mother abandoned the child to Aisha Ekikwenza. Aisha stated on oath to this court, in addition to her sworn affidavit, that she did not know the child's mother before she was referred to her by Grace Mukiga, and that she is not in contact with her. Justine Mpagi the social worker at Nsambya Babies Home reveals in her affidavit that all efforts to trace Hope Nankya's relatives have proved futile. Copies of the newspaper advertisements that were placed in newspapers and receipts of local radio announcements calling upon the relatives to come and claim Nankya are attached to her affidavit.

It is evident the infant is in need of a family to grow in and be cared for. Nsambya Babies Home which has legal custody of the child is an institution which cannot provide a permanent home for her. The affidavit evidence on record reveals that the applicants desire to parent the child and eventually adopt her in their home country. The applicants are married to each other. They have three children aged 9, 7, and 4 years. They have been found to be suitable parents by Kim a Bilski of Bethany Christian Services whose home study on the applicants is attached to the 2nd applicant's affidavit. Kevin Ross Nichols Erin has been employed at Spectrum Health since 2007. Erin Chartelain Nichols is a stay at home mother.

The applicants have been recommended by the social worker who prepared the home study as competent to provide a safe, loving and nurturing home environment for a child. The reports from the Walker police department, Michigan, USA, within whose jurisdiction the applicants reside, reveal that they have no criminal record. The banker's account activity summaries for March 2013 and employer's letter attached to the 1st applicant's supporting affidavit portrays him as financially stable. The health reports attached to their respective affidavits reveal the couple to

be in good and healthy condition. They also have favourable recommendations from the 2nd applicant's mother, their friend and neighbor, and their lead pastor.

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 was stated in *In the matter of Nabyama Moses alias Nabyama Abasa Family Cause No. 76/2011*, Mukiibi J, 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. 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.

In this case, I find that where the child's biological parents are unable to care for her, and where neither her parents nor other relatives are showing interest in her, the applicants are the next best suited persons to look after her. On basis of the adduced evidence, the applicants meet the requirements of legal guardianship. Denying them to look after the child would deprive her of the available opportunity of being in a home where she is loved and 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 temporarily at Nsambya Babies Home. It will be in the child's 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. Kevin Ross Nichols Erin and Erin Chartelain Nichols are appointed legal guardians of the child Hope Nankya.
- b. The applicants are permitted to travel with the child outside Uganda and to complete the adoption process in the USA.
- 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; and Bethany Christian 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 10th day of December 2013.

Percy Night Tuhaise

Judge.

- [High Court](#)
- [Add to Significant Recent Additions](#)