

REPUBLIC OF UGANDA

HIGH COURT

FAMILY DIVISION

FAMILY CAUSE No. 0297 of 2013

IN THE MATTER OF **ANNA TUMUSIME**AN INFANT

AND

IN THE MATTER OF

JOSIAH DANIEL HEPPNER

AND LISA MARIE HEPPNER.....APPLICANTS

BEFORE HONOURABLE LADY JUSTICE CATHERINE BAMUGEMEREIRE

RULING

This Application for Guardianship is brought under Article 34, 139(1) of the Constitution of Uganda 1995, Sections 14, 33, and 39 of the Judicature Act Cap 13, Sections 3,4,5 and the 1st Schedule of the Children Act Cap 59, Section 98 of the Civil Procedure Act CAP 71 and Order 52 rules 1 and 2 of the Civil Procedure SI 71-1.

The two Applicants seek for orders that:

1. This Honourable Court Declares the applicants legal guardians of the aforementioned infant
2. This Honourable Court permits the applicants to immigrate with the infant to the United States of America where the applicants normally reside and work
3. This Honourable Court permits the applicants to apply for adoption of the infant in the United States of America or alternatively but without prejudice to the above to return to Uganda after 36 months and make an adoption application

The Applicants Josiah Daniel Heppner and Lisa Marie Heppner both Americans aged 29years and 26years are residents of 1110 26th Avenue South Moorhead, Minnesota 56560 USA. Josiah Heppner is in full time employment as a Field Engineer for Enclave Developments whilst his wife Lisa is a Stay at home mom who runs a floral design business seasonally. The couple are Christians and have one birth named Levi Daniel Heppner they are also guardians of a Ugandan

child named Mark John Kunihira. The family lives in a single four bedroom house and have Blue Trust Health Insurance in Minnesota. The record show that they he have no criminal history and were cleared by their home state; Moorhead Police in Minnesota and Child protection services. They come highly recommended by Church, friends and family.

On the other hand the infant Anna Tumusiime is approximately four years now, A Female Ugandan. Her date of birth is in doubt since none of her parents is alive to tell and the least the carers can do is simply estimate it. There is no doubt however that the Infant is a double orphan. The father was Mbonigaba Omuhereza died 20th August 2010. The mother, Anna Tushemerwire died on 2nd February 2011. The infant was then taken on by her maternal uncle Baker Byamugisha. Byamugisha has six other children to look after including two of the infant's older sister and brother. Whereas Byamugisha took her on willing, it soon occurred to him that he could no longer take care of the young child. He gave her up for care.

In his submissions Counsel for the respondents raised the following issues:

1. Whether the Court is seized with the jurisdiction to entertain this matter?
2. Whether the applicants qualify to be appointed the legal guardians of the child?
3. Whether the Application is made in the best interest of the child?
4. Whether the applicants can be permitted to migrate with the child to the United States of America?

There is no specific provision in the Constitution of the Republic of Uganda which mentions the word Guardianship. Notably the main law regarding children is the Children Act CAP 59. Indeed besides for s1(k) of the Children which broadly defines who a guardian is and s.5 of the Children Act which mentions de facto guardianship in passing, there is, in Uganda, no known law and procedure which regulates the whole area of guardianship. It is for this reason that the High Court invokes its inherent powers to proceed under sections 14,33 and 39 of the Judicature Act CAP 13) and section 98 of Civil Procedure Act. Further the Constitution under Article 139 confers upon the High Court unlimited original Jurisdiction. This Court may lawfully invoke its inherent powers to grant just and equitable remedies where there are no specific provisions. These applications are normally made by notice of motion supported by affidavit. Indeed this application was supported by five affidavits including the two applicants, Josiah Daniel and Lisa Marie Heppner. The application was further supported by character recommendations in support of the applicants, probation and social welfare report and an international home study report.

There is nothing under the law therefore that prohibits this court from presiding upon this application.

Whether the applicants qualify to be appointed legal guardians of the child?

The abundance of decisions that have been made in favour of alien applicants means that there is wealth of authority in this area. In two cases Howard Amani Little (Infant and) and Mrs Rebecca Little and that of Francis Palmer (an infant) and Mrs Michelle Louise Palmer Civil appeals 33 and 32 of 2006, respectively, the Court of appeal presided over by Deputy Chief Justice Laetitia Kikonyogo as she then was, found that the Applicants though citizens of the US accepted to take care of the infants and were willing to provide for them a home thus saving the infants from getting institutionalised in the children's homes. Further in R Michael (An Infant and Morse Richard Paterson and Prickett Teresa Renee Family Cause no. 72 of 2009(Family Division) the Applicants who were liens were granted an order of guardianship in respect of M an infant who was found abandoned at Jinja Taxi Park by unknown persons. Similarly in Re Mary Gimono an Infant and Jimmy Wayne Renslow and Gayla Deonne Resnlow guardianship was handed to foreign nationals because in that instance it would present an opportunity for the infant to grow up in a loving family environment provided by the applicants and further that there was no offer from a local family to take care of this infant and provide a home for him here.

In the case now before me it is clear that the infant was a double orphan who happened to be in urgent need of care. In these applications the test is whether the decision is in the best interest of the child.

The welfare principle as known is enunciated in our Constitution and well articulated in the children Act as follows:

Article 34 1. Welfare principle.

Whenever the State, a court, a local authority or any person determines any question with respect to—

- (a) the upbringing of a child; or
- (b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be of the paramount consideration.

In Addition the first schedule to the Children Act clarifies the best interest of the child:

3. Criteria for decisions.

In determining any question relating to circumstances set out in paragraph 1(a) and (b), the court or any other person shall have regard in particular to—

- (a) the ascertainable wishes and feelings of the child concerned considered in the 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, sex, background and any 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 the care of the child in meeting his or her needs.

The welfare principle is the overarching standard to be applied and is stipulated under s.3 the Children Act. Further in the first schedule to the Act quoted above the details what considerations must be born in mind. In all decision regarding the child, his desires and opinion, age, sex, racial and social background, physical, emotional and health needs among others.

In this case before me now it would appear that the current applicants are best placed to provide a loving and nurturing relationship with the child. Whereas this Court would be more comfortable if the Guardian of this child brought her up here in Uganda and further this Court would have desired that the child has family which understands the norms and customs prevailing here, this was not possible in the circumstances of this case. It is indeed very sad that no Ugandan has shown willingness to take care and custody of this infant. This Court must therefore reluctantly permit an alien national to do so.

Having considered the special circumstances of this case this Court is convinced that the infant Anna Tumusiime, a double orphan, is in dire need of care. Additionally that there is no person within Uganda who has shown any interest in taking care of this vulnerable child; Moreover this Court notes that institutional care is not in the best interest of this child due to the negative effects it causes on minors which scar them for life. Further I note that the applicants appear to be persons, able and willing to take care of this infant and to provide him with a home.

The Court Orders as follows:

1. The applicants, Josiah Daniel Heppner and Lisa Marie Heppner of 1110 26th Avenue South Moorhead, Minnesota 56560 are hereby appointed legal guardians of the aforementioned infant, Anna Tumusiime until the infant attains the age of 18years or until other lawful orders:
2. This Court permits the applicants, Josiah Daniel Heppner and Lisa Marie Heppner, to travel with the infant to the United States of America where the said applicants are normally resident and where they are gainfully employed.
3. This Court Further orders that the applicants, Josiah Daniel Heppner and Lisa Marie Heppner, shall return to Uganda after thirty six (36) months and make an application for adoption here in Uganda.

Although the following were not prayed for, I find that it is in the best interest of the Infant to further order that:

4. The Applicants, Josiah Daniel Heppner and Lisa Marie Heppner, are directed to ensure that the infant retains his Uganda citizenship in addition to any other citizenship he may acquire.
5. The above said Applicants are directed to submit progressive reports of the infant every six months to the Probation and Welfare Officer of Kibaale, to the Registrar of the Family Division of the High Court of Uganda; to Oasis Homes; to the Chief Registrar of the Courts of Judicature and to the Ugandan Embassy in Washington DC USA
6. The Applicants are ordered to return the infant to Uganda and produce him before the Registrar of the Family Division every five years until he attains the age of 18years.
7. The Applicants must deposit with this Court all manner of address including physical address, email addresses, phone numbers for home, office and mobile.
8. Any change of Address or change of circumstances of the Applicants must be immediately communicated to the Probation and Welfare Officer of Kibaale, to the Registrar of the Family Division of the High Court of Uganda; to the Chief Registrar of the Courts of Judicature, to the Ugandan Embassy in Washington DC USA and to Oasis Homes.

It is so ordered.

Catherine Bamugemereire

Judge

19/12/2013