

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSES 144, 145 & 146 OF 2013
IN THE MATTER OF THE CHILDREN ACT (CAP 59)

AND

IN THE MATTER OF AN APPLICATION BY MARSHALL PIERRE LIM AND RAFFAELLA MARIA MARCANTONIO FOR THE LEGAL GUARDIANSHIP OF ISINGOMA EMMANUEL, KATUSIIME GRACE AND NYAKATO EVAS.

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

These are three consolidated applications for legal guardianship presented *ex parte* 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 3, 4 & 5 and the first schedule of the Children Act cap 59; section 98 of the Civil Procedure Act cap 71; and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR). The applicants, as gathered from the three applications, are seeking the following orders:-

1. The applicants be declared legal guardians of Isingoma Emmanuel Katusiime Grace and Nyakato Evas.
2. The applicants be charged with the responsibility of taking up the children into their personal care and custody and provide for their physical, social and spiritual needs and generally look after the minors as guardians would reasonably be called upon to perform that role.
3. Costs of the application be borne by the applicants.

There were initially three separate applications but, on the application of the applicant's counsel, this court exercised its jurisdiction and consolidated them. This was because the applicants in each of the three applications were the same and the children, the subjects of the application, were siblings, two of them being twins.

The grounds as set out in the three applications are that:-

- 1) The three children Isingoma Emmanuel, Nyakato Evas, and Katusiime Grace are abandoned, needy and vulnerable.
- 2) The three minors were abandoned in a rented house in Mwitanzige by their father and mother.
- 3) The three minors by virtue of a care order are now in the custody of Oasis Children's Home, Makindye Division Kampala District.
- 4) The said care giver is providing temporary care and does not have the capacity to continue caring for the infant and her siblings.
- 5) The applicants are willing to take the children into their custody and provide them with a home and warmth of family and are therefore applying to this court for the necessary orders.
- 6) The applicants are American citizens who were introduced to the children through Americans for African Adoptions (AFAA) and Oasis Children's Home and are willing and able to take care of the children as guardians.

The applications are supported by the affidavits of the two applicants as well as those of Evas Kunihira, Gidudu Paul, Ngondwe Ponsiano, Allen Kizito, Katusabe Asera, and Twinomujuni Julius. There was also a report by the probation and social welfare officer (PSWO), the international home study report, and various character recommendations.

The two applicants were in court when the application came up for hearing. The three infants were also in court, together with their paternal aunt Evas Kunihira, Allen Kizito Director of Oasis Children's Home, Gidudu Paul police officer Mwitanzige, Ponsiano Ngondwe PSWO Mwitanzige, Asera Katusabe the vice chairman/secretary for children affairs Mwitanzige, and Twinomujuni Julius LCI chairman Mwitanzige. Court interviewed Evas Kunihira on oath as additional evidence to her sworn affidavit.

The background is that the infants, Isingoma Emmanuel, Katusiime Grace and Nyakato Evas were abandoned by their parents in a rented house at Mwitanzige trading centre. They were rescued from the abandoned house by the local council executives of the area and the police, and were taken to Kakindu Health Centre 4 for treatment. The vice chairperson of the area and his wife cared for the children for a while but later contacted Allen Kizito Director of Oasis Children's Home who agreed to take them on. The infants were eventually placed in the care of Oasis Children's Home. The Children's Home continued to search for the infants' relatives. They located Evas Kunihira their paternal aunt who however was not in position to look after them. The applicants, who are husband and wife, got to know about the infants through Americans for African Adoptions (AFAA) and Oasis Children's Home. They are willing to take care of the children. They seek this court to grant them legal guardianship of the three children.

Learned Counsel Ahmed Mayanja for the applicants filed written submissions which he highlighted to court orally. The submissions were on four issues, namely:-

- 1) Whether the High Court is seized (sic) with jurisdiction to entertain the matter.
- 2) Whether the applicants qualify to be appointed the legal guardians of the three children.
- 3) Whether the application is made in the best interests of the three children.
- 4) Whether the applicants can be permitted to migrate with the three children to the USA.

This court will address them in the order in which they were raised and submitted on by counsel.

Issue 1: Whether the High Court is seized with jurisdiction to entertain the matter.

Learned Counsel referred to various statutes and submitted that this court has the powers to grant the orders sought by the applicants.

The Children Act does not specifically provide for guardianship orders. However, the constitutional and other statutory provisions empower this court to award guardianship orders. This is seen in Article 139(1) of the Constitution, read with section 14 of the Judicature Act, cap 13, which 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. Issue 1 is answered in the affirmative.

Issue 2: Whether the applicants qualify to be appointed the legal guardians of the three children.

The applicants' counsel submitted that the guardians though non Ugandans, can be granted a guardianship order in respect of the three children, and that they meet the tests of a guardian.

Section 1 of the Children Act defines "guardian" to mean a person having parental responsibility for a child. In the case of ***In the matter of Nabyama Moses alias Nabyama Abasa Family Cause No. 76/2011***, Mukiibi J stated 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.

The affidavit evidence on record reveals that the applicants are American citizens. The applicants are married to each other. They have one biological child. They desire to parent the

three children and provide them with the warmth of family by taking them in their custody and providing for their needs, including adequate diet, clothing, shelter, medical attention, material spiritual and emotional needs. They have been found to be suitable adoptive parents by Family Connections Inc. an adoption agency which conducted a home study on them and compiled a report annexed the 1st applicants' affidavits as **RM9**. They are co owners and employees of a business called Natural Health Choices as per annexures **RM3** to the 1st applicant's affidavits.

The applicants have been recommended by the PSWO in charge of Kibaale district in his report attached to his affidavits. The report of John C. Askey the chief of police in the American police department attached as **RM7** to the 1st applicant's affidavits states that the applicants have no criminal record. Their attached Bankers' reports (**RM6** to 1st applicant's affidavit) portray them as financially stable. The health reports (**RM4** to 1st applicant's affidavits) reveals the couple to be in good and healthy condition. They have, in their respective affidavits, shown readiness to take on the three infants as they are without any prejudices.

I find that where neither the three infants' parents nor other relatives are showing interest in them, the applicants are the next best suited persons to look after them. On basis of the adduced evidence, the applicants meet the requirements of legal guardianship. Issue 2 is answered in the affirmative.

Issue 3: Whether the application is made in the best interests of the three children.

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, as well as in various international conventions ratified by Uganda concerning the rights of children.

The Children Act and its first schedule set 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.

It is evident the three children were abandoned by their biological parents as deduced from the affidavits of Ponsiano Kiiza, Gidudu Paul, Evas Kunihira and Twinomujuni Julius. Allen Kizito stated in her sworn affidavits that Oasis Children's Home continued to search for the infants' relatives and located their paternal aunt Evas Kunihira. Kunihira stated on oath to this court, in addition to her sworn affidavits, that she is not in position to look after the children. Ponsiano Kiiza the PSWO stated in his affidavits that he put out radio announcements on a local FM radio

in the hope that the parents would claim the children to no avail. However, the relevant receipts he stated to be attached as **A** to his affidavits, were not attached as stated. So I did not rely on this aspect of evidence. Nevertheless, the evidence of Kunihira, who is the easiest link between the infants' parents as their relative, is that she does not know where the parents are. The affidavit evidence of Gidudu Paul also confirms that the search for the parents who were known to him yielded no results.

The infants are in need of a family to grow in and be cared for. Oasis Children's Home is apparently looking after the three children on arrangements between themselves and Ponsiano Kiiza the PSWO who applied for and was granted care orders in respect of the children. The said Home is an institution temporarily looking after the three children. It cannot avail a permanent home for them.

In my opinion, it is a godsend that the three children, who are siblings, are, through this application, accorded an opportunity to grow up in the same home, since the applicants, who are spouses, intend to live with them as part of their family. This would be in the children's best interests and for their welfare. Denying the applicants to take on the three needy and vulnerable children would deprive them of the available opportunity to be under one roof in a home where they are loved and parented. This is a proper case where, through a guardianship order, the three children will get a home, love, care and basic needs for their nurturing and development in life. They are currently at Oasis Children's Home where their stay is temporary and their future is not certain. It will be in their best interests to allow this application if the three children are to enjoy the said basic needs permanently in the course of their growing up. Issue 3 is answered in the affirmative.

Issue 4: Whether the applicants can be permitted to migrate with the three children to the USA.

This issue was framed by the applicants' counsel in his written submissions. It is not reflected anywhere in the application. It is neither in the prayers nor the grounds of the application. I also note that learned counsel for applicants framed prayers in his submissions which, apart from the first prayer, were different from the prayers set out in all the three applications. I addressed myself only to the prayers made by the applicants in the three applications, since, in my opinion, consolidation means all the consolidated matters are handled as one rather than setting up a new case. With due respect I failed to see where learned counsel got the prayers regarding permitting the applicants to immigrate with the infants to the USA and to be permitted to apply for adoption of the infants in the USA, or alternatively, to return to Uganda after thirty six months and make an adoption application. The two prayers do not feature anywhere in the three applications or in the applicants' affidavits. I can only consider them to be evidence from the Bar. This court cannot accept such evidence. That renders the 4th issue

irrelevant. It will be speculative for this court to address it. From the nature of the application however, it will not affect the outcome of the application.

Before I take leave of this matter, I must state that I find it perturbing that Counsel, in his written submissions, departed from two of the prayers and grounds set out in the three consolidated applications and formed his own prayers and grounds on which he proceeded to make submissions. This in effect rendered the application *his own*, as opposed to it being *the applicants'*, yet he was merely representing them as legal counsel. The submissions also consequently raised issues that were strange to the application. I am of the considered opinion that counsel should have restricted his submissions to the prayers and grounds set out in the three consolidated applications rather than framing his own prayers and grounds and submitting on them.

Nonetheless, I make the following orders on terms I consider fit for the welfare of the three children:-

1. The applicants are appointed legal guardians of Isingoma Emmanuel Katusiime Grace and Nyakato Evas.
2. The applicants are charged with the responsibility of taking up the three children into their personal care and custody and provide for their physical, social and spiritual needs and generally look after them as guardians.
3. The legal guardians are directed to obtain a Ugandan passport for the three children using their current names.
4. The legal guardians shall submit once a year, photographs and a report on the state of health, progress and welfare of the three children to the Registrar, Family Division of the High Court of Uganda at Kampala until each of them attains 18 (eighteen) years of age or until directed otherwise.
5. 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 Family Connections Inc.
6. The legal guardians shall immediately communicate any changes of addresses to the authorities mentioned above.
7. Costs of this application will be met by the applicants.

Dated at Kampala this 20th day of December 2013.

Percy Night Tuhaise

Judge.

