

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
MISCELLANEOUS CAUSE 001 OF 2014
IN THE MATTER OF DAVID AKENA (ADULT/BENEFICIARY)
AND
IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY LILLIAN
BEATRICE OCHEN THE BIOLOGICAL MOTHER
BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application by Notice of Motion, under sections 14 and 39 of the Judicature Act, cap 13, section 98 of the Civil Procedure Act cap 71, and Order 52 rules 1 & 3 of the Civil Procedure Rules. The applicant is seeking an order that she be appointed guardian of David Akena (adult/beneficiary).

The grounds of the application are that:-

1. The applicant is the biological mother of the beneficiary and is fully responsible for the beneficiary's welfare.
2. On the 3rd of March 2013 the beneficiary was involved in a serious accident on Jinja Road involving a motorcycle in which he was a passenger and a motor vehicle Toyota Premio.
3. As a result of the accident, the beneficiary has been paralyzed half way, he is unable to talk, walk, write, he is totally incapacitated.
4. The beneficiary has undergone several surgeries and therapies to enable him restore his faculties and the costs therein have been borne by the applicant where he has been living since time immemorial and even after the accident the beneficiary has been wholly under the constant care and supervision of the applicant.
5. The applicant is a suitable person and has the capacity to take care of the beneficiary.
6. It is in the interests of the beneficiary that the application is allowed.

The application is supported by the affidavit of the applicant Lillian Beatrice Ochen.

The background is that the adult beneficiary was involved in a serious accident on Jinja Road while travelling as a passenger on a motorcycle. He was paralyzed half way, and cannot talk, walk, or write. He has undergone several surgeries and therapies to enable him restore his

faculties. The beneficiary has since been wholly under the constant care and supervision of the applicant, who is his biological mother.

Learned Counsel Bailey Ociba for the applicant filed written submissions which, in addition to highlighting the affidavit evidence on record, stated that the applicant is a fit and proper person to be appointed legal guardian of David Akena. She also submitted that though the doctor's report does not indicate that David Akena has any unsoundness of mind as to place him under the Administration of Estates of Persons of Unsound Mind Act cap 155, his incapacity in communicating his intentions or thoughts due to lack of speech and immobility would make him a suitable person to be placed under guardianship.

Guardianship in Uganda relates to minors (children). A guardian is not only a trustee of that minor's property, as in an ordinary case of a trustee, but he or she is also the guardian of the infant with many duties to perform. In Uganda, these duties are spelt out in the Constitution and the Children Act. As regards persons of unsound mind, the Administration of Estates of Persons of Unsound Mind Act cap 155 provides for appointment of managers for purposes of administration of the estate of the person of unsound mind.

This application presents peculiar and unique circumstances. The subject of the application is an adult aged 33 years, having been born on 30/09/1980. He is therefore not a child to qualify for guardianship under the Children Act. The medical evidence on record also shows that he is not a person of unsound mind to justify an application to appoint a legal manager for administration of his estate. There are no legal provisions catering for adult persons being subject of guardianship orders in Uganda. Some foreign jurisdictions, which can only be persuasive in this matter, do address such situations. In the state of Georgia in the United States of America (USA) for instance, a probate court has powers to grant guardianship of an adult resident who is found by court to lack sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety, or conservatorship where such adult lacks the capacity to make or communicate significant responsible decisions concerning management of his or her property. See *William J. Self, Judge: Handbook for Guardians and Conservators of Adults in Georgia, at page 6, published by Georgia Council of Probate Court Judges, Atlanta Georgia.*

Section 33 of the Judicature Act empowers this court, in exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, to grant absolutely or on such terms and conditions as it thinks just all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it. This is such that, as far as possible all matters in controversy may be completely and finally determined and all multiplicities of legal proceedings concerning those matters avoided. Section 98 of the Civil Procedure Act empowers this court to invoke its inherent powers to make such orders as may be necessary for the ends of justice. Section 14(2)(c) of the Judicature Act provides that where no express law or rule is applicable to any matter in issue the High Court shall exercise its jurisdiction in conformity with the principles of justice, equity and good conscience.

The applicant's affidavit evidence is that the beneficiary's faculties in terms of motion, speech, or ability to write, are not functioning. The neuro surgeon's medical report, annexed to the applicant's affidavit as **B**, shows that he requires assistance to do the basics in life and his disability is assessed at 85%. His incapacity in communicating his intentions or thoughts is due to lack of speech and immobility. He has been wholly under the constant care and supervision of the applicant who is his biological mother. Their relationship is evidenced by a copy of the beneficiary's birth certificate annexed to the applicant's affidavit as **A**. The applicant's evidence is that she is an adult female Ugandan of sound mind. There is also evidence that the beneficiary was an employee of ECO Bank. He is to recover from the life policy and workman's compensation under the bank's insurance policy to enable him pay for his medical bills and fees for the therapy he is undergoing

Guardianship of adults is a deprivation of individual rights and, in my opinion, should be sought sparingly and only as a last resort. It is clear that the beneficiary, in other countries referred to as a ward, has a physical impairment which has rendered him incapable to, among other things, communicate. A physical disability alone would ordinarily not require him to have a guardian. However, where that disability impacts on the person's functional ability to make decisions that are important to his health and safety, or where it necessitates protecting and using his property for his support, justice equity and good conscience would require a guardian to be appointed for such adult person.

In his current state of health and vulnerability, David Akena needs his mother more than ever to take responsibility for him, particularly to take decisions on recovering his entitlements and benefits from his employers and utilizing them for his medical treatment and therapy, including addressing his safety issues. This, in my opinion, covers aspects of the person and the estate. This would render the beneficiary/ward a suitable person to be placed under the applicant's guardianship, limited to those aspects where the beneficiary is incapacitated to make his own decisions, concerning the person and the estate.

I am satisfied that this is a proper case for grant of guardianship. The guardianship is in the interests of the beneficiary/ward for his care and protection. However I take it that when guardianship is ordered by court, the named guardian becomes an officer of the court and is subject to the oversight of the court.

Before I take leave of this matter, I am inclined to state, in view of such unfortunate circumstances, that this country needs to cater for such situations which at times become realities, by amending the Children Act or the Administration of Estates of Persons of Unsound Mind Act, or enacting legislation that provides for guardianship of adults who are incapacitated in taking decisions by themselves.

I accordingly make the following orders for the welfare and best interests of the beneficiary/ward:-

1. The applicant Lillian Beatrice Ochen is appointed guardian of David Akena, limited to those aspects concerning the person and the estate where David Akena is incapacitated to make decisions or take action for himself.
2. The guardian will submit a written report annually to the Registrar of this court on the physical and health condition of the beneficiary/ward.
3. The guardian will execute a bond, not cash and no sureties, of Uganda shillings two million (U.shs 2,000,000/=) to this court for due execution of her duties as a guardian.
4. The guardian will present to this court an annual budget and initial inventory of the beneficiary/ward's employment entitlements and benefits.
5. The guardian will present an annual accounting to this court of the beneficiary's assets or entitlements and expenditure of the same.
6. Costs of this application will be met by the applicant.

Dated at Kampala this 6th day of March 2014.

Percy Night Tuhaise

Judge.