

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE 285 OF 2013
IN THE MATTER OF WAMALA GASTER (CHILD)

AND

**IN THE MATTER OF AN APPLICATION TO BE APPOINTED AS THE LEGAL
GUARDIANS OF WAMALA GASTER (AGED THIRTEEN YEARS) BY KERRI ANN
SMITH AND JEFFREY NOAH SMITH**

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; and sections 3, 4, & 5 of the Children Act. The applicants are seeking the following orders:-

1. Kerri Ann Smith and Jeffrey Noah Smith be appointed legal guardians of Wamala Gaster.
2. The child be allowed to immigrate to USA to live with Kerri Ann Smith and Jeffrey Noah Smith.
3. Costs of this application be provided for.

The grounds of the application are that:-

1. The child is a single orphan his biological mother having died.
2. The biological father of the child is a peasant with no source of income to take care of the child.
3. The surviving relatives of the child having been unable to look after him surrendered the child into the custody of the children's home.
4. The applicants wish to provide the child with a home, parental love and care.
5. This application is for the welfare and benefit of the child.

The application is supported by the statutory declarations of the applicants; plus the affidavits of Kiyaga Joseph country director M/S The Suubi Project where the child is staying, Kasozi Livingstone the biological father of the child, Nanteza Ruth maternal grandmother of the child, Lwanga Eriasafu the local council 1 chairperson Kamuli Kikamulo Nakaseke district, and Luswata Joan senior probation and social welfare officer Nakaseke district.

Wamala Gaster is a child of Nabukalu Ephrance and Kasozi Livingstone. He lost his biological mother Nabukalu Ephrance in May 2005. His biological father has no job and was previously imprisoned at Luzira prison. Nabukalu Ephrance (deceased) left the child under the care of his maternal grandmother Ruth Nanteza. Nanteza had the child placed under the care of the Ssubi Project because she had no source of income. The applicants got to know about Wamala Gaster through Cheryl Sargent of the Ssubi Project. They seek this court to grant them legal guardianship of the child and to allow him to immigrate and live with them in the United States of America (USA).

In his written submissions, learned Counsel Charles Majoli for the applicants reiterated the facts and grounds of the application. He submitted that the applicants' legal guardianship of Gaster Wamala would be in the best interests of the child, and that the applicants are suitable to adopt the child. He cited *Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011*; *Evelyn Atukwase Brianne Gamelin (infant) FC 118/2010*; *In the matter of Francis Palmer (an infant) Civil Appeal 32/2006*; and *Re Man infant SCCA No. 22/1994* to support the application.

The Children Act does not specifically provide for guardianship orders. However, 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, as well as in various international conventions ratified by Uganda concerning the rights of children.

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.

The applicants are applying for legal guardianship of Wamala Gaster, including being allowed to travel with him to the United States of America. The Court of Appeal in *Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011*, when addressing a similar situation, emphasized the importance of the welfare principle and the need for applicants to travel with the children to their home countries.

The evidenced on record shows that Wamala Gaster is a single orphan who lost his mother. The biological father of the child is a peasant with no source of income to take care of the child. The

surviving relatives of the child were unable to look after him and they surrendered him into the custody of Ssuubi children's home. The child's biological father and the child's relatives have given evidence that they consent to this application. The child, currently aged 15 years, after being determined by this court to be of understanding age, testified on oath before this court that he appreciates the nature of the application and he is agreeable to it.

It is evident Wamala Gaster is in need of a family to grow in and be cared for. The Ssuubi Project which has legal custody of the child is an institution which cannot provide a permanent home for him. The affidavit evidence on record reveals that the applicants desire to parent the child. The applicants, who are American citizens, are a married couple. They have two children aged 25 and 20 years. They have been found to be suitable parents by Jenna Howard LMSW a social study specialist of M/S Legacy Adoptions and Surrogacy whose home study on the applicant is annexed to the 1st applicant's affidavit as **D**. Kerri Ann Smith is employed a dental hygienist by Drs Irving, Stephenson and Curtis in Mansfield Texas USA as per annexure **B** of her affidavit. Jeffrey Noah Smith depones in his statutory declaration that he is employed by Circle S of Burleson Texas USA as the chief operator. The reference letter from his employer he referred to as annexure **C** to his affidavit is not on the court record. However, the home study report already referred to states on page 8 that the applicants have the necessary financial resources to provide for an additional child or children.

The applicants have also been recommended by Luswata Joan the senior probation and social welfare officer Nakaseke district (from where the child hails) in her report annexed as **B** to her affidavit. The reports from Mansfield Police Department, Texas, USA, annexed to the applicants' respective statutory declarations as **E**, reveal that she has no criminal record. The health reports attached to the 1st and 2nd applicants' respective statutory declarations as **F** and **D** reveal the applicants to be free of communicable diseases.

The Children Act defines "guardian" to mean a person having parental responsibility for a child. It was stated in *Nabyama Moses alias Nabyama Abasa Family Cause No. 76/2011* 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 father or relatives are unable to care for him, and where they are showing no interest in looking after him, the applicants are the next best suited persons to look after him. On basis of the adduced evidence, the applicants meet the requirements of legal guardianship. Denying them to look after the child would deprive him of the available opportunity of being in a home where he 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

he is currently enjoying temporarily at the Ssuubi Project. It will be in his best interests to allow this application if the child is to enjoy the said basic needs permanently in the course of his growing up.

I accordingly make the following orders on terms I consider fit for the welfare of the child:-

- a) Kerri Ann Smith and Jeffrey Noah Smith are appointed legal guardians of Wamala Gaster.
- b) The child is allowed to immigrate to USA to live with Kerri Ann Smith and Jeffrey Noah Smith.
- c) The legal guardians are directed to obtain a Ugandan passport for the child using his 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 he 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; and 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 17th day of March 2014.

Percy Night Tuhaise

Judge.