

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE 37 OF 2014

**IN THE MATTER OF ARTICLE 139(1) 34(1) & (2) OF THE CONSTITUTION OF THE
REPUBLIC OF UGANDA AND SECTIONS 14, 33 & 39 OF THE JUDICATURE ACT**

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 &
3 OF THE CIVIL PROCEDURE RULES SI 71 – 1**

AND

IN THE MATTER OF NASSOZI IMMACULATE (CHILD)

AND

**IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY
SHERWOOD ZIMMERMAN AND LISA ZIMMERMAN**

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 2, 3, 4, 5 & 6 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. The applicants are seeking the following orders:-

1. Sherwood Zimmerman and Lisa Zimmerman be appointed legal guardians of the child Nassozi Immaculate.
2. The applicants be permitted to travel with the child outside Uganda to fulfill their parental responsibilities and complete the adoption process in the United States of America.
3. Costs of this application be provided for.

The grounds of the application are that:-

1. The child's parents are dead and the said child is in dire need of care and protection.

2. The child is staying at Greenhouse orphanage home.
3. The child was brought to Greenhouse orphanage home with the consent of her relatives.
4. The relatives are not in position to take care of the welfare needs of the child.
5. The welfare of the said child will be better served if the child is placed under the guardianship and custody of the applicants.
6. The applicants met the child when they had come to volunteer at the orphanage.
7. The child is in need of a permanent home, parental love, care and protection.
8. The applicants are suitable persons and have the means to cater for the child.
9. Besides the applicants, no one is ready and willing to provide the child with a permanent home, parental love, care and protection.
10. It is in the best interests of the child that this honourable court be pleased to grant this application.

The application is supported by the affidavits of the applicants plus those of Kalibbala Kevin, Kakembo Charles, Namulindwa Resty, Nabalwanyi Florence and Nalunga Alice.

Learned Counsel Richard Rugambwa submitted that the applicants' legal guardianship of Nassozi Immaculate would be in the best interests of the child, and that the applicants are suitable to adopt her. He cited *Re M (an Infant) Adoption Cause 9/1995; Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011; and Civil Application 38/2012* to support the application.

The Children Act does not specifically provide for guardianship orders. However, article 139(1) of the Constitution and 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, and in various international conventions ratified by Uganda concerning the rights of children.

Section 3 read with the first schedule to the Children Act sets out the guiding principles in making decisions relating to children. Court shall have regard to 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 relevant circumstances; 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 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.

The application for legal guardianship of Nassozi Immaculate includes a prayer that the applicants be permitted to travel with the child outside Uganda to fulfill their parental responsibilities and complete the adoption process in the United States of America (USA). 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. Further, in ***Civil Application No 38/2012***, the same court reviewed their decision in the same cases and 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.

The evidence on record shows that the child was born to Nagita Rose and Kafuuma Emmanuel on 1st July 2005. Her parents are both dead. After the burial of her father, the child first stayed with Nalunga Alice until the latter was unable to care for her. The child's other relatives were not in position to take care of the welfare needs of the child. They gave her up to the Greenhouse orphanage in whose favour a care order was eventually issued by Mwanga II Family and Children Court, Mengo on 14th December 2012. The child, aged 8 years, after being determined by this court to be of understanding age, testified on oath before this court that she appreciates the nature of the application and is agreeable to it.

It is evident Nassozi Immaculate is in need of a family to grow in and be cared for. The Greenhouse orphanage which has legal custody of the child is an institution which cannot provide a permanent home for her. She is a total orphan and her remaining relatives have consented to the application, in addition to testifying that they cannot afford to look after the child.

The applicants desire to parent the child. They are American citizens and a married couple. They have two biological children. They have been found to be suitable parents by M/S Hope for Adoption whose home study on the applicants is on the court record. Sherwood Zimmerman is Assistant Special Agent in Charge at Treasury Inspector General for Tax Administration as per the employment letter attached to his affidavit. Lisa Zimmerman is a registered nurse with Beyond Today Counseling Center as per employment letter attached to her affidavit. The home study report on the applicants states that they have the necessary financial resources to provide for the child.

The applicants volunteered at the Greenhouse orphanage in Kampala Uganda for a month where they interacted and bonded with the child. They have been recommended by Mukiibi Ronald the probation and social welfare officer (PSWO) Ssisa sub county Wakiso district. The home study

report and other reports on the applicants reveal that they have no criminal record. They are portrayed by the medical reports on the court record to be healthy. The home study report and other attached documents testify to the couple as being mature, well adjusted, and financially stable.

In this case, I find that where the child is a total orphan, and where her relatives are unable to care for her, or are showing no interest in looking after her, the applicants are the next best suited persons to look after her.

On basis of the adduced evidence, I find that the applicants meet the requirements of legal guardianship. Denying them to look after the child would deprive the child 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 she is currently enjoying temporarily at the Greenhouse orphanage. It will be in her 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:-

1. Sherwood Zimmerman and Lisa Zimmerman are appointed legal guardians of the child Nassozi Immaculate.
2. The applicants are permitted to travel with the child outside Uganda to fulfill their parental responsibilities and complete the adoption process in the United States of America.
3. The legal guardians are directed to obtain a Ugandan passport for the child using her 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 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.
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; and the Ministry of Justice and Constitutional Affairs of Uganda.
6. The legal guardians shall immediately communicate any changes of addresses to the authorities mentioned above.
 - a) Costs of this application will be met by the applicants.

Dated at Kampala this 11th day of April 2014.

Percy Night Tuhaise

Judge.

