

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE NO 148 OF 2013
IN THE MATTER OF THE CHILDREN ACT CAP 59

AND

IN THE MATTER OF JUSTUS BYAMUKAMA (AN INFANT)

AND

**IN THE MATTER OF AN APPLICATION BY DAVID ARMISTEAD VICTORIA
SUZAN BENNET - ARMISTEAD TO BE APPOINTED LEGAL GUARDIANS OF THE
SAID MINOR.**

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application for legal guardianship presented *ex parte* by notice of motion under Articles 139(1) and 34(1) & (2) of the Constitution; sections 14 and 39 of the Judicature Act, cap 13; sections 3 of the Children Act cap 59; section 98 of the Civil Procedure Act cap 71; and Order 52 rules 1 & 2 of the Civil Procedure Rules (CPR). The applicants are seeking the following orders:-

1. David Armistead and Victoria Suzan Bennet Armistead be appointed legal guardians of Justus Byamukama.
2. The applicants be charged with the responsibility of taking up the child into their personal care and custody and provide for its physical, social and spiritual needs and generally to look after the minor as guardians would reasonably be called upon to perform in that role.
3. The applicants be granted leave to take the child into their custody and live with him at their perpetual place of residence at # 42 Broadway # 5 Bangor, Maine 04401 USA.
4. The costs of the application be borne by the applicants.

The grounds of the application are that:-

- 1) The said minor Justus Byamukama is an abandoned, needy and vulnerable child whose mother is deceased.
- 2) The said minor's father is unknown.
- 3) The said minor is now in the custody of Oasis Children's Home, Makindye Division, Kampala District.

- 4) The said caregiver is providing temporary care and does not have the capacity to continue caring for the child.
- 5) The applicants are willing and able to take the child into their custody and provide him with a home and warmth of family and are therefore applying to this court for the necessary orders.

The applications are supported by the affidavits of the two applicants as well as those of Twebaze Agatha, Allen Kizito, and Ngondwe Ponsiano Kiiza. There is on record a social welfare inquiry report conducted by Oasis Children's Home annexed to Allen Kizito's affidavit as **AK-4**. The report of the probation and social welfare officer (Ponsiano Ngondwe) is also on the court record as annexure **JB-10** to Ponsiano Ngondwe's affidavit.

The 1st applicant was in court when the application came up for hearing. The infant Justus Byamukama was also in court, together with Allen Kizito Director of Oasis Children's Home, Agatha Twebaze who cared for the child when his mother died, Ponsiano Ngondwe (PSWO), and Tumwujukye.

The background is that the infant Justus Byamukama lost his mother who was a single parent. A one Twebaze Agatha volunteered to care for the child. This did not go well with Twebaze's husband, resulting into domestic violence. Twebaze sought the intervention of the local council chairman who referred the matter to the PSWO Kibaale. The child is currently in the custody Oasis Children's Home. The applicants, who are husband and wife, got to know about the child through Oasis Children's Home. They are willing to take care of the child. They seek this court to grant them legal guardianship of the child.

Learned Counsel Ahmed Mayanja for the applicants filed written submissions which he reiterated 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 child.
- 3) Whether the application is made in the best interests of the child.
- 4) Whether the applicants can be permitted to migrate with the child to the USA.

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

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. 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. Issue 1 is answered in the affirmative.

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

The applicants' counsel submitted that the guardians though non Ugandans, can be granted a guardianship order in respect of the child, 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. 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 affidavit evidence on record reveals that the applicants are American citizens. They desire to be appointed legal guardians of the infant and provide him with the warmth of family by taking him into their custody and provide for his needs, including adequate diet, clothing, shelter, medical attention, material spiritual and emotional needs. The applicants are married to each other. They have four children, two of whom are biological and two adopted. They have been found to be suitable adoptive parents by MAPS Adoption & Humanitarian Aid who conducted a home study on them and compiled a report annexed to the 1st applicants' affidavit as **JB-9**. David Armistead works as a Principal and Academic Dean with St. John Baptist High School. Victoria Suzan Bennet Armistead is Associate Professor of early literacy in the College of Education & Humanitarian Development, University of Maine in Orono, as per annexure **JB-3** to the 1st applicant's affidavit.

The report attached to the 1st applicant's affidavit as **JB-7** states that they have no criminal record. The financial information on the applicants, as stated in annexure **JB-6** to the 1st applicant's affidavit certifies their financial status as able to sustain an extra member of the family. The health reports attached to the 1st applicant's affidavit as annexure **JB-4** reveal the couple to be in a healthy condition. They have shown readiness to take on the child as he is, without any prejudices.

There is a recommendation of the applicants by the PSWO in charge of Kibaale district contained in his report. The report is stated in his affidavit to have been annexed as **JB-5** (this was an error - it is marked **JB-10**). The PSWO stated in paragraph 9 of his affidavit that he placed radio announcements in the hope that the child's father would claim him but no one claimed him. He also stated that copies of the said receipts were annexed as **JB-10**. However, the only document annexed as **JB-10** is his report. There are no such copies of receipts. Secondly,

though **JB-10** initially talks about Justus Byamukama as the subject of this application, it ends up recommending the applicants for grant of a guardianship order “for the three children”.

The PSWO states in the report annexed to his affidavit that the applicants have four biological children. The applicants do not state anything about their children in their affidavits, but the home study report about the applicants states that they have two biological children (Tim aged twenty two and Dawson aged nineteen), and two adopted ones (Violet aged twelve and Ababu aged ten). The PSWO, on page 1 of the report states that the child’s father was unknown but on page 2 of the same report, he states the father’s name as Byamugisha Christopher. These are serious inaccuracies and inconsistencies which put in issue the credibility of the affidavit evidence of the PSWO.

On basis of the adduced evidence, though the applicants have good intentions and clearly meet the requirements of legal guardianship, there are serious questions regarding which infant the PSWO is recommending for guardianship, and the circumstances of Justus Byamukama are not well articulated before court.

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

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 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 affidavit evidence on record shows that the child lost its mother Peace Mukazi. The affidavit of Twebaze Agatha (paragraph 4) and the report of the PSWO (key field finding 1) show that Peace Mukazi died in or about February 2012 after a long illness. However, the death certificate of Mukazi Peace issued on 13th March 2013 by the office of the sub county chief Kisiita shows that Peace Mukazi died on 4th Dec 2012 of after - birth complications. If this was the case then the care order (annexture **AK3** to Allan Kizito’s affidavit) in respect of the child was issued before its mother died, since the said order was granted on 2nd April 2012.

The care order of 2nd April 2012 granted in respect of the child shows Twebaze Agatha as the applicant. Agatha and Ponsiano Ngondwe in their affidavits state that the care order was granted to Oasis Children’s Home. Allen Kizito the director of the Home on the other hand stated in her

affidavit that the care order was granted to Agatha. The court order itself is handwritten on the very application made by Agatha Twebaze, in the words “*care order granted*” and sealed with a seal the Court of the Magistrate’s Court of Kibaale. This could explain the inconsistencies in the affidavit evidence regarding in whose favour the care order was granted. Amazingly, there is another undated care order on the court record showing Ponsiano Ngondwe to be the applicant. This prompted this court to further inquire the circumstances of the care order through its Assistant Registrar who confirmed that it was an authentic order.

Allen Kizito stated in her sworn affidavit that Oasis Children’s Home sent a team to Kibaale to investigate about the welfare and information pertaining to the child. A copy of the report annexed as **AK-4** to her affidavit recommended newspaper advertisements to be placed in widely read newspapers to trace Byamukama’s relatives. There is nothing on the court record to show that this was done. The PSWO claims in paragraph 9 of his affidavit that he placed radio announcements in the hope that the child’s father would claim him but no one claimed him. He stated that copies of the said receipts were annexed as **JB-10**. However, the only document annexed as **JB-10** is his report. There are no such copies of receipts. This creates the impression that no attempts were made to locate the child’s father or relatives. The same report refers to Justus Byamukama’s birth certificate. The birth certificate was eventually availed to court in original form. The birth certificate, issued on the declarations of Allen Kizito as foster mother, shows that both the mother and father of the infant are unknown. This glaringly conflicts with the affidavit evidence on record, including that of Allen Kizito, that the infant’s mother, now deceased, was known as Peace Mukazi. It also somehow conflicts with the report of the PSWO which in key field finding no. 2 names the child’s father as Byamugisha Christopher. The report of Ponsiano Ngondwe Kiiza the PSWO initially talks about Justus Byamukama as the subject of this application, but it ends up recommending the applicants for grant of a guardianship order “for the three children”.

I consider the foregoing to be disturbing contradictions and inaccuracies. In particular, the affidavit evidence that attempts were made to locate the child’s father is too full of contradictions and gaps to be safely relied on by this court. Secondly, the PSWO, who would be primarily concerned with the welfare of children in his area, in his report, recommends different children for guardianship by the applicants, and not infant Justus Byamukama. With respect, the report is confusing, talking about infant Justus Byamukama in some parts, and “three children” in others. I consider the PSWO to be vital link between court and the children under his jurisdiction. His report is therefore vital in guiding court to determine the child’s circumstances before deciding whether or not to grant the guardianship. It is important that the report of the PSWO precisely focuses the subject of the application and his/her conditions rather than mixing it up with other infants who may have been on the officer’s list of possible children to be considered for guardianship.

In my opinion, the highlighted gaps go beyond technicalities and touch on issues of substantive justice, particularly questions of whether or not the child’s circumstances were well articulated

by those concerned to enable court make an objective evidence based decision. In my opinion, this was not done to the satisfaction of court.

The welfare of the infant is the overriding principle in all applications of this nature. It was stated in *Nakaggwa V Kiggundu [1978] HCB 310* that court has a duty to act as a wise parent would do when considering the welfare and best interests of the child. The welfare principle dictates that every circumstance surrounding the child must be taken into consideration by court to ascertain whether it is in the child's best interests or welfare to grant the order sought.

In this case, aspects of vital information concerning the child are missing, particularly the evidence of attempts to trace the child's father or relatives. Secondly, while it is clear on the part of the applicants as to which child they want to give a home to, there are contradictions regarding which child is being recommended for guardianship evident in the report of the PSWO. There are also contradictions or inaccuracies regarding the mother's death. In the given circumstances, in the best interests of the child, however well intended and fit the applicants happen to be, I would not safely rely on the evidence on the record to order for guardianship of the child.

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

Having answered issue 3 in the negative I find it not relevant to address this issue as it has been rendered merely academic and redundant.

In the premises, I would be hesitant to grant a legal guardianship order in respect of the infant where I have doubts that his circumstances were well articulated before this court. This application is dismissed.

Dated at Kampala this 20th day of January 2014.

Percy Night Tuhaise

Judge.