

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**  
**MISCELLANEOUS CAUSE NO. 06 OF 2014**  
**IN THE MATTER OF SECTIONS 34(a) & 42(1)(a) OF THE JUDICATURE ACT CAP 13**  
**AND**  
**IN THE MATTER OF AN APPLICATION BY ROXANE TURNER AND JOYCE**  
**NALUBOWA FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM IN RESPECT**  
**OF MUDONDO AZIZA TURNER AND ACHIPA ROSE TURNER (BOTH INFANTS)**  
**BEFORE LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This application was brought under Article 23(9) of the Constitution of the Republic of Uganda, section 34(a) of the Judicature Act cap 13, and rule 3(b) & (c) of the Judicature (Habeas corpus) Rules SI 13 – 6.

The applicants **Roxane Turner and Joyce Nalubowa** sought the issuance of a writ of *habeas corpus ad subjiciendum* in respect of two infants **Mudondo Aziza Turner** and **Achipa Rose Turner**. This court issued a writ of *habeas corpus* directing the Attorney General, the Inspector General of Police, the SIU Kireka Kampala, Gloria Musiime, and any other person or organization or agency acting on their behalf to produce the two children in court. The writ was returnable on 02<sup>nd</sup> April 2014 at 2.30 pm. This court also directed the writ to be served on the said persons so that they respond to it and the application is heard *inter partes* on the merits.

The writ was served on the respondents but they did not produce the two children on 02<sup>nd</sup> April 2014. Counsel Kukunda Clare from the Attorney General's Chambers requested for more time to follow up the matter, get returns, and produce the children. In the interests of justice, and in a bid to have this serious matter heard *inter partes*, this court granted the request, but it directed the SIU Kireka and Musiime Gloria, who had failed to appear in court, to explain their disobedience of the court order.

The matter was adjourned to 07<sup>th</sup> April 2014. Mr. Olugu Francis, the SIU Kireka, appeared in court on that day without the two children. He explained that the children were in a boarding school sitting examinations, and that he feared for their safety and their being interfered with as they were witnesses in a case of aggravated defilement against a one Bery Glaser at Masaka High Court. The applicant's counsel prayed for the detention of Mr. Olugu for failure to produce the children. This court appreciated Mr. Olugu's explanation about the children sitting an

examination, but it rejected Mr. Olugu's fears about the children being interfered with, since they would still be under his control when brought to court. The matter eventually proceeded on 22<sup>nd</sup> April 2014 when the two children were finally produced in court by Mr. Olugu.

When it emerged from the respondents' affidavit evidence and submissions that they were challenging the 2<sup>nd</sup> applicant's legal guardianship of the two minors, this court sent for and perused the entire court record of in **Miscellaneous Applications 022 & 023/2010** Family and Children Court Kalangala to enable it effectively dispose of all the issues arising from this matter.

I did not agree with the submissions of the applicants' counsel that a formal application was required for cancellation of the guardianship order. Section 83 of the Civil Procedure Act provides that the High Court may call for the record of any magistrate's court, and if that court appears to have, among other things, exercised a jurisdiction not vested in it, or acted in the exercise of its jurisdiction illegally, or material irregularity or injustice, may revise the case and make such order in it as it thinks fit.

There is no specific form in which the court is to be moved to revise proceedings of magistrate's courts. Any appeal, complaint or application resulting from such proceedings is cause for and may result in revision. In any case, as was held in **Cardinal Nsubuga & Another V Makula International Ltd [1982] HCB 11**, an illegality, once brought to the attention of court, overrides all questions of pleading, including any admissions made thereon. It is for that reason that I called for the files of the Kalangala Family and Children Court.

Section 83(d) of the Civil Procedure Act provides that no power of revision shall be exercised unless the parties are given the opportunity of being heard. In this case the 2<sup>nd</sup> applicant's guardianship order was challenged by the respondents in the affidavit of Francis Olugu. The applicants had a right of reply by filing an affidavit in rejoinder but they chose not to. Instead their lawyers made the submissions highlighted above on the issue. They thus forfeited their right to be heard on the matter by choosing not to file an affidavit in rejoinder. Court will proceed to determine the issue on basis of the evidence adduced before it.

The remedy of *habeas corpus* is available where there is a deprivation of personal liberty without legal justification. The object of the writ is not to punish but to ensure release from unlawful detention. It is the fact of detention, and nothing else, which gives the court jurisdiction. See **Grace Stuart Ibingira & Ors V Uganda [1966] EA 306; Monica Rwaheiguru V Nyebare James & 3 Others Miscellaneous Application No. 259/2013**. Under section 34(a) of the Judicature Act a Judge before whom the writ of *habeas corpus ad subjiciendum* is returnable shall inquire into the truth of the facts set out in the affidavit(s) and may make any order as the justice of the case requires. Article 23(9) of the Constitution of the Republic of Uganda provides that the right to an order of *habeas corpus* shall be inviolable and shall not be suspended.

The applicants' affidavit evidence is that the 1<sup>st</sup> applicant is the maternal grandmother of the two children whose mother died in 2004 without revealing the children's biological father. In 2010, the children, with the consent of the 1<sup>st</sup> applicant and her husband Fred Lutaaya, were taken over by the 2<sup>nd</sup> applicant vide guardianship orders issued by the Chief Magistrate's court of Masaka. On 29<sup>th</sup> November 2013, Gloria Musiime, an acquaintance of the 2<sup>nd</sup> applicant, asked the 2<sup>nd</sup> applicant who allowed her to take the two children for a weekend of fun on condition that they would be returned to school after the said weekend. Gloria Musiime picked the two children from their school, St Agnes Primary School in Entebbe. Unknown to the applicants, Gloria Musiime involved the two children in investigations concerning a case of Bery Glaser.

When the 2<sup>nd</sup> applicant inquired about the children's whereabouts and well being, Gloria Musiime threatened her and asked her to contact the Inspector General of Police. The 2<sup>nd</sup> applicant was eventually informed through her lawyers that the children are being cared for under the hospices of the Uganda Police. The applicants' efforts to contact the children or secure their release have been futile. They contend that the continued detention/retention of the two children by the Uganda Police is illegal and unconstitutional, and that without the writ of *habeas corpus ad subjiciendum* against them, the respondents will continue to refuse to deliver up the children.

The respondents' affidavit evidence is contained in the affidavit of Olugu Francis the Investigating Officer of Criminal Investigations Unit, Special Investigations Division, Kireka. He avers that he knows the two minors who are victims of alleged aggravated defilement under CID HQTRS E/421/13; that he has never known Joyce Nalubowa, the 1<sup>st</sup> applicant, to be the grandmother of the minors; and that under the Constitution of Uganda, it is his duty as a police officer to ensure safety and order and protect the life on an individual deemed to be in danger.

It was also his evidence that the two minors are safe in boarding school within Kampala; that the 2<sup>nd</sup> applicant is a close associate to Bery Glaser a suspect in a defilement case; that if she is allowed access to the two children, she will influence and indoctrinate them negatively to interfere with the defilement case and divert the minors' minds and attention; that the 2<sup>nd</sup> applicant has no place of abode in Uganda as required by the adoption and guardianship laws which was why she handed over the children to Bery Glaser; that her guardianship over the minors is illegal; that Bery Glaser claimed legal guardianship over the two minors though he was keeping them in an unapproved home; and that other victims of the defilement case were repossessed by the suspect Bery Glaser and have been indoctrinated into hostility at his unapproved children's home in Kalangala. He prayed this court to revoke the guardianship order granted to Roxane Turner, the 2<sup>nd</sup> applicant, and to dismiss the application with costs.

It was submitted for the applicants that the applicants are entitled to the care and custody of the two children; that the witness protection scheme under which they are being detained is unknown, illegal and a creature of the Uganda Police. They prayed this court to declare it illegal and unconstitutional since it denies the applicants rights that are clearly stipulated in the

Constitution and the Children Act. The respondents' counsel on the other hand submitted that the children were simply being protected by the Uganda Police for their own safety as state witnesses in a high profile case involving a suspected pedophile.

Article 23 of the Constitution of the Republic of Uganda provides that no person shall be deprived of personal liberty except under circumstances including execution of a court order, or for the purpose of bringing that person before court, or of preventing the spread of an infectious or contagious disease, and, in the case of a person below the age of eighteen years, for the purpose of the education and welfare of that person. Article 31(5) of the Constitution stipulates that children may not be separated from their families or persons entitled to bring them up against such families' wishes except in accordance with the law. Article 34(1) of the Constitution provides that it is the right of children to know and be cared for by their parents or those entitled to bring them up. The same provisions are reflected in section 4(1), 45 and 46 of the Children Act.

The respondents' affidavit evidence does not show that the children were being held under any of the circumstances set out by the Constitution of Uganda. It was the respondents' evidence that the children were being held under a witness protection scheme. This scheme is not known. It was not availed to this court by the respondents even after court requested for it from the respondents. Though the respondent's evidence shows that the two children are safe in school, it is my opinion that they are in the said school by default. The manner in which they are being kept does not conform with the requirements of the Constitution of Uganda. It is thus my opinion that the detention and retention of the two minors was illegal and unconstitutional.

Without prejudice to the foregoing, however, this matter would still be unresolved if this court does not address the issue of whether the 2<sup>nd</sup> applicant's guardianship of the two minors is legal, since the said guardianship is challenged by the respondents. The court record in **MISC. FCC 022/2010** and **FCC 023/2010** Kalangala FCC shows that the respective applications for legal guardianship of Aziza Mudondo and Rose Achipa, who also happen to be the subject of this application, were made by Ms Roxane Turner (the 2<sup>nd</sup> applicant in the instant application) to a magistrate grade 1 in the Family and Children's Court of Kalangala. The two applications were by notice of motion supported by the affidavits of Roxane Turner. Both application hearings were attended by the applicant, the children, the children's grandmother, Willy Lugolobi the District Probation Officer, and Bery Glaser.

The affidavit evidence of Roxane Turner in both applications was similar. It was to the effect that the two children were introduced to her by a one Bery Glaser, a colleague at Sesse Humanitarian Services, together with their biological grandmother. The grandmother explained to Turner that the children were total orphans, and she the grandmother was their only proximate relative. Turner accepted to be their sponsor. She applied to be their legal guardian to enable her provide them more and better care and love. The trial magistrate, after interviewing Roxane Turner and the children's grandmother, allowed both applications and granted legal guardianship

of the two children to Roxane Turner. In both applications Roxane Turner testified that she was an American Citizen volunteering in Kalangala. Her affidavit to support the instant application also indicates the same averments.

The two court records from Kalangala court discredit the applicants' evidence that the guardianship orders were granted by a Chief Magistrate of Masaka Court. The record shows they were granted by a Magistrate Grade 1 at Kalangala Family and Children Court. They lied when they averred that it was granted by a Chief Magistrate of Masaka Court. The record also corroborates the respondents' evidence that the 2<sup>nd</sup> applicant is a close associate to Bery Glaser.

One of the main contentions in this matter is whether the guardianship order granted by the Magistrate Grade 1 Kalangala Family and Children Court is unlawful. Section 14 of the Children Act provides that a Family and Children Court shall have power to hear and determine criminal charges against a child under sections 93 and 94 of the same Act, applications relating to childcare and protection, and any other jurisdiction conferred on it by this or any other written law.

The Children Act is silent on which court has jurisdiction to handle legal guardianship. Courts have been invoking Articles 139(1) and 34(1) & (2) of the constitution; sections 14, 33, 39 of the Judicature Act; section 98 of the Civil Procedure Act; and Order 52 rules 1, 2, and 3 of the Civil Procedure Rules to grant guardianship orders. Thus, the High Court invokes its unlimited original jurisdiction and inherent powers conferred on it by the foregoing legal provisions to handle guardianship matters, particularly those involving non citizens of Uganda applying for legal guardianship of Ugandan children. The Family and Children Court, or any magisterial court, does not have jurisdiction to entertain such matters.

It is my finding therefore that the Kalangala Family and Children court presided over by a Magistrate Grade 1 exceeded its jurisdiction when it granted a legal guardianship order in respect of the two children to the 2<sup>nd</sup> applicant who is a non Ugandan. This was clearly an illegality and this court cannot be a silent spectator of the same. It was held in ***Cardinal Nsubuga & Another V Makula International Ltd [1982] HCB 11*** that an illegality, once brought to the attention of court, overrides all questions of pleading, including any admissions made thereon.

On that basis I have no option but to revoke the guardianship order granted to Roxane Turner, the 2<sup>nd</sup> applicant on grounds that it was illegally granted by the Magistrate Grade 1 of Kalangala Family and Children Court in Miscellaneous applications 22 and 23 of 2010. She deserves no compensation from the respondents because she has no legal basis to claim it.

The children were under the care of their maternal grandmother before the grant of the illegal guardianship order. In my opinion, that is where they should be returned, since, as stated above, even their being currently held by the respondents, is illegal and unconstitutional, despite their apparently noble intentions for the two children. Secondly, the Constitution and the Children Act make it a right of children to know and be cared for by their parents or those entitled to bring

them up. In any case, though it is apparent from the Kalangala Court record that the said grandmother willingly participated in the legal guardianship proceedings, the illegalities of the court that issued the order should not be visited on her. The children's grandmother is the closest known relative to the said children.

This takes me back to the overall issue of granting a *habeas corpus* order against the respondents. It is already a finding of this court that the respondents have not shown that the children were being held under any of the circumstances set out by the Constitution of Uganda. The witness protection scheme which they used to justify their continued detention of the two children was not well articulated to this court, despite this court's request, in terms of adducing the required evidence, leaving this court to speculation. Though the respondent's evidence shows that the two children are safe in school, it is my opinion that they are in the said school by default. The manner in which they are being detained does not conform with the requirements of the Constitution of Uganda. Their detention and retention is illegal. It violates their liberties under the Constitution. This is so, despite the apparent noble intentions of the respondents or the Police to protect the two children. They should be released back to the home of their maternal grandmother where they are legally entitled to stay in as children.

I therefore partly allow the application, and accordingly make the following orders:-

- a) The legal guardianship orders granted to Roxane Turner, the 2<sup>nd</sup> applicant, by the Magistrate Grade 1 Kalangala Family and Children Court in respect of Aziza Mudondo and Rose Achipa, both children, on 06/07/2010, are revoked.
- b) The revoked guardianship orders should be surrendered to this court for cancellation.
- c) The Investigating Officer of Criminal Investigations Unit, Special Investigations Division, Kireka, Olugu Francis, is ordered to immediately release the two children Aziza Mudondo and Rose Achipa to the 1<sup>st</sup> applicant Joyce Nalubowa who is their maternal grandmother.
- d) The Probation and Social Welfare Officer of Kalangala should assist in ensuring the two children are reunited with their maternal grandmother.
- e) I make no order as to costs to facilitate cooperation and civility between the respondents and the applicants in ensuring safe transition of the two children back to their known closest relative.

**It is so ordered.**

**Dated at Kampala** this 3<sup>rd</sup> day of July 2014.

Percy Night Tuhaise

**Judge.**