

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**  
**FAMILY CAUSE 220 OF 2013**

**IN THE MATTER OF ARTICLES 139(1), 34(1) & (2) OF THE CONSTITUTION OF  
THE REPUBLIC OF UGANDA AND SECTIONS 14, 33 AND 49 OF THE JUDICATURE  
ACT**

**AND**

**SECTIONS 2, 3, 4, 5, 6 AND THE FIRST SCHEDULE TO THE CHILDREN ACT CAP  
59 AND SECTION 98 OF THE CIVIL PROCEDURE ACT AND ORDER 52 RULES 1  
AND 3 OF THE CIVIL PROCEDURE RULES**

**IN THE MATTER OF PETER KALEMA (CHILD)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY DAVID  
WILLIAM KAINES AND MARY PIERSON SMARTT KAINES**

**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; sections 2, 3, 4, 5 and 6 of the Children Act; 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. David William Kaines and Mary Pierson Smartt Kaines be appointed the legal guardians of Peter Kalema.
2. The applicants be permitted to travel with the child outside Uganda to fulfill their parental duties and obligations and to complete the adoption process from there.
3. Costs of the application be provided for.

The grounds of the application are that:-

1. The child now known as Peter Kalema estimated to be about one and a half years old was abandoned at the Old Taxi Park near the Namugongo stage by an unknown person on the 8<sup>th</sup> day of February 2013.
2. The child was abandoned at the kiosk belonging to Abdalla Ahmad.

3. The matter was reported to the Old taxi park police post by Kemigabo Immaculate.
4. The matter was later referred to the Central police station for further management vide ref. no. SD42/9/2/013.
5. The child was found with a note referring to a one “Margaret Kantiti” of Jethro Kawanda.
6. The said Margaret claims she has no relationship with the child nor his parentage.
7. The child is currently under the custody of Nsambya Babies Home.
8. All efforts to trace his family have proved futile.
9. Besides the applicants, there is no one who is willing and ready to offer the child a permanent loving home and family.
10. The child is in need of parental love and care.
11. It is in the best interests of the child that this application be granted.

The application is supported by the affidavit of the applicants and those of Abdala Ahmad at whose kiosk the child was abandoned, Immaculate Kemigabo a food vendor who reported the child’s abandonment to the police, Justine Mpagi social worker Nsambya Babies Home where the child was placed for custody and care after abandonment, Margret Awor, referred to as “Margret Kantiti” in the note found on the child, and Jerome Mwebesa Social Worker Nkwanga and Partner who carried out investigations to ascertain the child’s parentage.

The applicants were in court when the application came up for hearing. The infant, Peter Kalema, the subject of the application, was also in court.

The background is that Peter Kalema was abandoned on 8<sup>th</sup> February 2013 at the kiosk of Abdala in the Old Taxi Park. Abdala sought the assistance of Immaculate Kemigabo who took the child to the Old Taxi Park police post. A note found by Kemigabo on the child read, among other things, that the child should be taken to “Margret Kantiti” at Jethro Primary School Kawanda. The child was eventually referred to Nsambya Babies Home with a covering letter from the Central Police Station. The police and Nsambya Babies Home eventually traced “Margret Kantiti” who in actual fact was Margret Awor, nicknamed “Kantini” because she ran a canteen business. Margret Awor *a.k.a* “Margret Kantiti” denied any knowledge of the child. Advertisements were placed in a local newspaper and radio but they have yielded no results. The applicants, who are spouses, seek this court to grant them legal guardianship of the child where they intend to adopt him with the same love, care and concern with which they are raising their biological children.

Learned Counsel Victoria Katamba for the applicants filed written submissions on the matter. I considered the application along three issues.

***Issue 1: Whether this honourable court has the jurisdiction to entertain this matter.***

The applicant’s counsel submitted on this issue that this court had the jurisdiction to hear and dispose of this application.

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 are suitable to be appointed legal guardians of the child.***

The applicants' counsel submitted that the applicants are financially and able to care for the child, are healthy with no history of alcoholism, have no criminal record and their home has been cleared for adoption.

The Court of Appeal in ***Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011*** noted that non citizenship *per se* is not a bar to obtaining guardianship orders. The court observed that it is possible for non Ugandans to obtain guardianship orders in respect of Ugandan minors, unlike in adoption matters where conditions are imposed by section 46 of the Children Act. The discretion is left to court to impose conditions it deems appropriate in the best interests of the child.

The affidavit evidence on record reveals that the applicants intend to adopt the child and live with him. Their home has been recommended as being fit for adoptive purposes, as stated in a home study report annexed to the applicants' affidavits. Mary Pierson Smartt Caines is a home maker. Her husband David William Caines is employed as president at Kenco Logistics in Chattanooga, Tennessee. The applicants have no criminal or child abuse record as revealed in the report of Walker County Sheriff's Office annexed to their affidavits. They are financially stable. The health reports annexed to their affidavits reveal them to be in good and healthy condition. On basis of the adduced evidence, and the law applicable, the applicants meet the requirements of legal guardianship.

Issue 2 is answered in the affirmative.

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

The applicants' counsel submitted that it is in the best interests of the child to allow the application to provide an opportunity to the child get a permanent family which can offer love, happiness and basic needs for his healthy development.

In all matters concerning children, the best interests of the child shall be the primary consideration. This is stipulated in Article 34 of the Constitution and section 3 of 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.

I have carefully analyzed and evaluated the affidavit evidence on the court record. During the hearing, I observed the applicants, the infant and all those who supported this application. Bearing in mind the welfare principle, or the best interests of the infant, and all applicable laws highlighted above, I find as follows:-

It is evident that the child was abandoned at the Old Taxi Park where Immaculate Kemigabo took him on and eventually placed him with Nsambya Babies Home where he currently lives. There is affidavit evidence that the whereabouts of the child's parents are not known. Advertisements placed on radio and a local newspaper have not yielded results in tracing the parents or relatives. It is evident that Peter Kalema is in need of a family to grow in and be cared for. Nsambya Babies Home which has custody of the child is an institution which cannot provide a permanent home for him.

I find that where the child was abandoned and such child's parents or relatives cannot be traced, the applicants are the next best suited persons to look after him. Denying the applicants 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 for his nurturing and development in life which he is currently enjoying temporarily at Nsambya Babies Home. It will be in his best interests to allow this application if he is to enjoy the said basic needs permanently in the course of his growing up.

Issue 3 is answered in the affirmative.

***Issue 4: Whether the applicant can travel with the child to the USA to fulfill their parental duties and obligations and complete the adoption process there.***

The applicant's counsel submitted that the child should be given an opportunity to grow in a stable home setting which the applicants are willing to provide, and that completion of the adoption process in USA will ensure the child has access to all the rights accruing to the applicants' biological children.

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 applicants are applying for guardianship of Peter Kalema so that he is permitted to travel with them outside Uganda. This situation was put to rest by the Court of Appeal in ***Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011*** where, 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. In ***Civil Application No. 38/2012***, which arose from the same appeals, the same court 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.

In my opinion, based on the foregoing authorities, a guardian can only be enabled to fulfill his/her obligations effectively if he/she is enabled to travel and live with the child to whom he/she has been granted legal guardianship.

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

- a) David William Kaines and Mary Pierson Smartt Kaines are appointed legal guardians of Peter Kalema.
- b) The applicants are permitted to travel with the child outside Uganda to fulfill their parental duties and obligations and to complete the adoption process from there.
- a) The legal guardians are directed to obtain a Ugandan passport for the child using his current names.
- b) 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.
- c) 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; the Ministry of Justice and Constitutional Affairs of Uganda.
- d) The legal guardian shall immediately communicate any changes of addresses to the authorities mentioned above.
- e) Costs of this application will be met by the applicants.

**Dated at Kampala this 20<sup>th</sup> day of January 2014.**

**Percy Night Tuhaise**

**Judge.**

