

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CONSOLIDATED MISCELLANEOUS/ FAMILY CAUSE NO. 278 OF 2012
AND 279 OF 2012**

**IN THE MATTER OF KAWALA JOY (AN INFANT) 1ST INFANT
AND
IN THE MATTER OF AN APPLICATION BY**

- 1. KENNETH S. BROWN**
- 2. JENNIFER K. BROWN APPLICANTS**

AND

**IN THE MATTER OF NANDUDU ANNET (AN INFANT)
.....2ND INFANT**

AND

IN THE MATTER OF AN APPLICATION BY

- 1. KENNETH S. BROWN**
- 2. JENNIFER K. BROWN APPLICANTS**

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

Kenneth S. Brown and Jennifer K. Brown, (herein after the Applicants), nationals of the United States of America (USA), are a married couple and residents of Mecklenburg County, North Carolina state, USA. They have moved this Court in an application seeking an order to be appointed the legal guardians of Kawala Joy and Nandudu Annet Ugandan minors with an additional order that they may be permitted to travel with the infants to the USA, their county of residence so as to fulfill their obligations as legal guardians. Both applications were presented under S. 14(1) Judicature Statute, Sections 4, 5, and 6 and 1st schedule of the Children Act!

At the first hearing, an application for the consolidation of the two applications was made and granted. I allowed the application under 0.11 Rule 1(a) CPR after being satisfied that the facts and legal issues raised with respect to the infants in both applications were so similar and related to warrant a consolidation. In particular, the applicants are the same and the two infants are born to the same mother and were in the care of the same institution. The consolidation was aimed at expediting hearing of both applications at a minimum cost and time.

Having perused the applications, and the documents presented with them and counsel's submissions, on 20th December, 2014, I granted the guardianship order. I undertook then to give the detailed ruling in both matters, and do so now.

The grounds stated in the first application briefly were that;

IST CHILD;

1. The child's mother has been proved to be mentally unstable, HIV positive and unable to take care of the child.
2. The child's father is also not in a position to take care of the child since he only does casual jobs when they are available and has seven other children whom he is struggling to take care of.
3. The child is currently under the care and custody of Arise and Shine Uganda Children's home in Jinja.
4. The applicants are married, willing and able to provide parental love and care and all necessities of life for the child.

The application was supported by the affidavits of Kenneth S. Brown the 1st applicant, Jennifer K. Brown the 2nd applicant, Salamula Richard the biological father of the child, Sharon Nyanjura the Director of Arise and Shine Uganda and Wangoda James a private investigator working with Tight Securities Limited.

2ND CHILD;

1. The child's mother has been proved to be mentally unstable, HIV positive and unable to take care of the child.
2. The father of the child unknown.
3. The child is currently under the care and custody of Arise and Shine Uganda, a Children's home in Jinja.
4. The applicants are married, able and willing to provide parental love and care and all necessities of life for the child.

The second application was supported by the affidavits of Kenneth S. Brown the 1st applicant, Jennifer K. Brown the 2nd applicant, Sharon Nyanjura the Director of Arise and Shine Uganda and Wangoda James a private investigator working with Tight Securities Limited. Significantly, the private investigator compiled a report which in addition to giving a background of the children and their families included some scientific evidence in the form of DNA and other tests to confirm parentage of the children and the physical and mental health of their mother.

Present at the hearing were; both applicants, the 1st child Kawala Joy), Richard Salamula father of the 1st child, Ayidi alias Betty Namuli mother of both children, Lagu John LC 111 Chairperson Walukuba Masese Jinja District, Nyanjura Sharon, Wangoda James and Joy Malaika representative of Children of All Nations, State of Texas USA. This gave me the opportunity to interview some of those present to confirm contents of their affidavits and to supplement the application generally.

Submissions in both applications were made both orally and in writing. Briefly counsel argued as follows:-

1. That in addition to information obtained from the institutions supporting the infants, a private investigator was contracted to dig into the background of

the families of both infants. The findings which were incorporated in a report dated 10/2/2013, showed that the first child's names were Naisagala Ketty but that she is more commonly known as Joy Kawala. The 2nd child's was given the name Annet Nandudu because the mother believed that a one Butaka Fred was the biological father but paternity tests that were carried out confirmed to the contrary.

2. Investigations also revealed that the true names of the mother of the children are Namuli Betty though she is commonly known as Ayidi. That she has a mental illness associated with HIV/AIDS which has resulted in her inability to manage her day to day activities including taking care of the children.
3. That the first infant's biological father is a casual laborer who has seven other children thus unable to take care of the infant and he consented to the order being granted.
4. That currently the children are in the care and custody of Arise and Shine children's home in Jinja. However the probation officer recommended in his report that it is not in the interest of the children to grow up in an institution but in a loving family which will cater for their welfare. It is clear that the biological parents cannot provide that environment and thus the applicants have applied to take over that responsibility.
5. That the applicants are married with two children. The 1st applicant's job as a pastor gives him flexibility to have time for his family. The 2nd applicant as a registered nurse has the experience of taking care of young children and works two nights a week only thus will be available to care for the children. The applicants are responsible people.
6. In conclusion, it was argued that in making the decision, the court should consider the welfare of the two children as paramount.

According to Section 4 of the Act, every child has the right to stay with their parents or guardians. However, the same Act provides that in the event that a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate him or her from his or her parents or parent, the best substitute care available shall be provided for the child.

The power of courts to grant an order for legal guardianship are provided for in the **Constitution of the Republic of Uganda 1995 (as amended)**, the **Judicature Act Cap 13** and the **Children Act Cap 59**. Running through all those laws and precedents of this and higher courts is that the welfare of the child in issue should be of the highest concern and consideration.

The first schedule to the Children Act reiterates and elaborates on the ‘Guiding principles in the implementation of the Act’ when it makes provision that “*Whenever the state, a court, a local authority or any person determines any question with respect to:-*

- (a) *The upbringing of a child*
- (b) *The administration of any child’s property or the application of any income arising from it,*

Further, Section 5 of the Act enjoins as a duty for every parent, *guardian or any person having custody of a child to maintain that child and, in particular, that duty gives a child the right to-*

- (a) *Education and guidance;*
- (b) *Immunization;*
- (c) *Adequate diet;*
- (d) *Clothing;*

- (e) *Shelter; and*
- (f) *Medical attention.*

Again, Section 5(2) of the Act provides that “*any person having the custody of a child shall protect the child from discrimination, violence, abuse and neglect.*”

“ It is further provided that In determining any question relating to circumstances set out in the Act, the court shall have regard in particular to:-

- (a) *The ascertainable wishes and feelings of the child concerned, considered in the light of his or her age and understanding;*
- (b) *The child’s physical, emotional and educational needs;*
- (c) *The likely effect in any changes in the child’s circumstances;*
- (d) *The child’s age, sex, background and any circumstances relevant in the matter;*
- (e) *Any harm that the child has suffered or is at the risk of suffering;*
- (f) *Where relevant, the capacity of the child’s parents, guardians or others involved in the care of the child in meeting his or her needs.”*

In considering the above principles, Justice Chigamoy Owiny Dollo **In the matter of David Twesigye (an infant) and in the matter of an Application by Dawn Pittman and Dustin Pittman HCMA No. 0004 of 2008 (at page 4, 5 and 6)** held that “*...while the primary right of a child is to grow up under the tutelage of his or her parents, or parent, for the obvious reasons of emotional attachment; if it is shown to the satisfaction of a competent authority, and in this case the court, that vesting legal guardianship of the child in the applicants, it would serve the best interest of the child, then it would be proper for this court to make an order removing such child from the parent. Court has to weigh the emotional loss of staying with ones parents against the*

opportunities that would come with the relocation away from the hands of the parents. Therefore, in determining whether or not to vest legal guardianship in the applicants herein as sought, the issue of education and guidance, health care and medical attention, and shelter which the child would benefit from vis-à-vis the situation of the child before the grant of the guardianship, are principal factors for considering such grant...Therefore, the court has to be satisfied that in the circumstance of this case, the child will not become a victim of any form of prejudice from the society he is headed for....”

I shall therefore keep close to mind the above provisions and persuasive authority of my learned brother as I make my decision in these two matters.

My task therefore is to establish whether on the facts given in the cases, a legal guardianship would be the most justified order and that it would be in the best interests of the two children. The children are relatively young, being aged 2 years and 4 years respectively. The Court is therefore unable to ascertain their wishes and feelings. I am therefore left with the other evidence presented which I admit, is quite substantial.

Ms Namuli Betty the children’s biological mother was presented as one suffering from a mental illness associated with HIV/AIDS. That she and the father reside in a very unhygienic and congested environment in mud and wattle walled houses. Her mental disability and HIV status are supported by medical reports. According to a report from Arise and Shine Uganda, attempts had been previously made to assist her acquire a trade in tailoring but because of her mental state, she was unable to learn much or even hope to earn from it. According to the report from the Butabika hospital, Ms Namuli was reported to suffer from memory loss, melancholy, insomnia confusion and is at times violent. She often takes to

wandering aimlessly and cannot manage her own day to day activities, has multiple social vulnerability factors and cannot take care of a child.

I was able to confirm the state of her environment from the photographs presented to court. In addition, I had a short discussion with her. She appeared quite healthy and clean but she was evidently slow in speech and thought. She confirmed to me that she knew the applicants and had no objection to their intentions. In my observation and the evidence presented, she has no capacity to cater for the children's physical, emotional and educational needs now or in the foreseeable future.

The first child's biological father was also briefly interviewed. He appeared quite conversant of the proceedings and he also gave his consent to the guardianship of his child. He confirmed to court that he is not able to cater for his daughter's needs considering the meager income that he gets and the other seven children he has to take care of. In any case, it would not be conducive to this child's welfare to be introduced into this family at this point in time.

The second infant's biological father and paternal relatives are unknown thus the only person who can cater for her needs is her biological mother who I have already found, is not capable of doing so.

It was reported that the two children were taken up by Arise and Shine Uganda when they were in a very poor condition, speech delayed and malnourished and have since been under the care of that Children's home. In my estimation, a children's home should only be a last resort alternative. Any child's welfare will be

better catered for in a home with loving parents who can meet all their physical, psychological and social needs. The Court of Appeal rightly held in **theMatter of Howard Amani Little (An Infant) and In the Matter of Legal Guardianship by Kevin Little and Rebecca Little (Civil Appeal No. 33 of 2006) and In the Matter of Francis Palmer (An Infant) and In the Matter of an Application for Legal Guardianship by Noel Adam Palmer and Michelle Louise Palmer (Civil Appeal No. 32 of 2006)** that “...*The children’s homes do a commendable job to care for those abandoned and destitute children but they cannot offer the same care and attention to the children due to the numbers and limited resources...*”

The applicants herein who are American nationals are domiciled in the USA. They are willing and ready to provide the children with a home, parental care and responsibility and thus would greatly change the circumstances of the children. Currently in Uganda, there is no bar against foreigners who are found suitable to act as legal guardians for Ugandan children. See for example the cases of **IntheMatter of Howard Amani Little (An Infant) and in the Matter of Legal Guardianship by Kevin Little and Rebecca Little** (supra) and **Inthe matter of Wazdala Hassan Adam (Infant) and in the matter of an application for appointment as the legal guardians of Wazdala Hassan by Andre’ Dees and Margaretha Helena Dees-Schouten HCMC No. 21 of 2012 (Jinja)**.

The applicant’s are a married couple with a fixed place of abode in Mecklenburg County, North Carolina state, USA. They have two biological male children aged six and three years respectively who are looking forward to receive the children herein as their sisters. Both applicants are employed with a stated joint annual income of about USD 135,000, life insurance and some assets. They are thus financially capable to meet the needs of the children and their employment is

flexible enough to allow them time to care for the two new members of their family.

They have filed a Replacement Assessment report in which their past and current credentials and status as prospective parents are given. They have no criminal record, are deeply religious and have shown that they have the facilities and inclination to cater for the increased number to their family. The reasons to foster the children stems from the fact that they have always wanted a large family but were unable to achieve it as the 2nd applicant had medical complications that led to her undergoing an hysterectomy in 2009. I have noted that although the applicants have been stated to be experienced parents, they have in addition prepared themselves through some instruction in child adoption. The fact that the 2nd applicant is trained as a children's nurse should be an asset in caring for these children who are quite vulnerable and will need extra care and attention.

I must state that I was impressed by the efforts of the applicants and their counsel to obtain more reliable information on the children and their families through serious investigations and DNA science. This means that the Court has a chance to make a decision based on quite reliable evidence. Further, the Probation Officer of Jinja who met both applicants and visited the children in their environment highly recommended them as capable parents. I totally agree with the Probation Officer and add that preventing the guardianship would be working against their interests. The applicants have promise of a better future for these children with the possibility of good education, nutrition and moral upbringing.

This court considering the factors above and the consent of the children's biological mother, consent of the 1st child's biological father and the report from the probation and social welfare officer- Jinja District is in no doubt that the grant

of the order vesting legal guardianship of Kawala Joy and Nandudu Annet to the applicants would be in the best interests of the said children. I therefore order as follows:-

ORDER:

- 1) The applicants are jointly granted the guardianship of the children Kawala Joy and Nandudu Annet.
- 2) The applicants are allowed to travel with the said children to the United States of America where they reside in order for them to fulfill their obligations as legal guardians.
- 3) The grant of the order shall remain in force until when both children have attained the age of 18 years.
- 4) The applicants shall avail their address and contact to the Registrar, High Court Kampala; the Ministry of Foreign Affairs Uganda; and the embassy of Uganda at Washington D.C. in the USA.
- 5) The applicants shall file with this court at least once every year (until the children attain the age of 18 years), a report showing the progress of both children.
- 6) The applicants shall meet the costs of this application.

I so order.

EVA K. LUSWATA
JUDGE
10/01/2014