

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
MISC CAUSE NO. 120 OF 2013**

**IN THE MATTER OF AKWIA VIRGINIA (INFANT) AND IN THE MATTER OF AN
APPLICATION FOR LEGAL GUARDIANSHIP BY TOKWARO TOSKIN OFOYORU
MATERNAL UNCLE TO THE UNCLE**

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This is an ex parte application seeking an order for the applicant to be appointed the legal guardian of the child Akwia Virginia and costs to be provided for. The application is presented under rule 5 of the Family and Children Court rules, Section 33 of the Judicature Act, the Children Act, and Section 98 CPA. The application was supported by two affidavits sworn by the applicant on 20/12/13 and 29/4/14 respectively. The grounds relied on can be briefly summarized as follows;

1. The infant's mother one Pamela Adongo is deceased and was the sister of the applicant. He is therefore the maternal uncle of the applicant.
2. In 2009 Kumakech Godfrey the biological father of the infant abandoned her at the applicant's home.
3. The applicant has since 2009 met all the needs of the infant. He is gainfully employed with a sufficient income to support the child.
4. The applicant is married with two female children of the same age group as the infant. His wife has consented to his decision to be appointed legal guardian of the infant.
5. The child is in need of love and attention to overcome the trauma of the demise of her mother.
6. It is in the best interests and welfare of the infant that the order is made.

The facts of this application as can be discerned from the pleadings and all testimonies are that the child was born to Kumakech Godfrey and Adongo Pamela and at the time of filing the application she was aged five years. That the infant's mother died in February 2013 and before

her demise, Kumakech Godfrey dumped both the deceased and the infant at the home of the applicant and the whereabouts of Kumakech were unknown. That the applicant and his wife have had defacto *custody* of the child and met all her needs since early 2009. That the applicant was not opposed to the biological father having access to the child, as long as he does not interfere with her welfare.

At the first hearing of 11/12/13, the court inquired into the whereabouts of Kumakech Geoffrey the biological father of the child and it came to be known that he is resident in Kirinya prisons. I was of the opinion that it was imperative for him to be made part of the proceedings so that his views with respect to this application are known. Also, upon interviewing the infant at length, she stated that she is well treated by the applicant and his partner whom she referred to as “dad” and “mommy”, but at the same time she stated she misses her father.

Although she is only five years, old I found her to be very articulate and clear of her situation. I was therefore inclined to believe that she has the need to interact with her existing biological parent. For that reason, I ordered that Kumakech Godfrey be served with a hearing notice and he became part of the proceedings from his first attendance on 20/12/13

A guardian is defined in Section 1 of the Children Act to be a person having parental responsibility for a child. I am aware that currently there is no express provision of the law to grant legal guardianship in respect of infants. Indeed, many applicants for guardianship orders have remedied these lacunae by proceeding under Section 33 Judicature Act which empowers the High Court to grant any kind of remedy in any action properly brought before it in order to meet the ends of justice. Previously, this court has liberally used this section to grant guardianship orders to applicants who seek to administer property for infants. Such orders have also been given to applicants who require to take formal custody of children who are to be removed from the jurisdiction of Uganda with or without contemplation of following it up with formal adoption (see for example **In the matter of an application by Dustin and duster Pitman (Misc. Appl. No.4/05 – Fort Portal)**).

The applicant seeks to be appointed legal guardian of the infant because according to him, the biological father has abandoned her at a time when she is suffering trauma and needs psychological and financial support to meet her needs. Therefore, in the present circumstances

he neither requires to carry the child out of jurisdiction or to manage her property. Instead, he alleges that he wishes to save this child from difficult circumstances which may prove harmful to the child. With due respect, the proper procedure in such circumstances would have been for the applicant to proceed under part V (in particular Sections 19-21) of the Children Act which make provision for children in need of care and protection by the state or individuals. Therein the steps to be taken by such an applicant are well streamlined and in particular, it may have been necessary for him to first have obtained a care order under Sec. 27-33 of the same Act.

The above notwithstanding, the failure of the applicant to follow the correct procedure means that his application is only lacking in form but not in substance. I am fully aware that in all matters where a decision is to be made with regards to the welfare of a child, the welfare of such a child shall be paramount and even supersede issues of procedure. I shall therefore continue to consider the application on its merits as placed before me.

Substantially, the applicant seeks this court to award him guardianship of the infant and thereby oust the parental rights of Kumakech Godfrey the biological father. The right of any parent to care for his child is a creation of statute and in this land, no less than the Constitution which provides in Article 31 (4) that it is the right of parents to care for and bring up their children. Further, in Article 31(5), if any child is to be separated from their family, or person entitled to bring them up against the will of their family then it must be done in accordance with the law. Therefore, if I am to make an order that would ultimately deprive or disentitle the biological father of this constitutional right, then I must do so strictly within the ambit of the law. Further according to Section 4 of the Children Act, should a child be separated from her parents or guardians, then the court shall ensure that she is placed in the best substitute care available.

The Children Act and nearly all authorities now on record in this land have entrenched the principal that the welfare and best interests of any child shall be paramount in any decision that will affect such a child. In the decision I will take, I am enjoined to consider the principles laid down in the 1st Schedule of the children Act, in particular;

1. The ascertainable wishes of the child in light of her age and understanding.
2. Her physical, educational and emotional needs.
3. Any likely effects of any change to her circumstances.

4. Her age, sex, background and any other relevant factor in the matter.
5. Any harm she has suffered or at risk of suffering.
6. The capacity of the biological parent in meeting her needs.

The gist of the application is that the child is in need of love and protection. That the biological father abandoned her soon after the death of her mother when she was only five years old. He left her with the applicant when the child was in poor health. That even before that, he had failed to provide for her and her mother and did not even turn up for Ms Adongo's funeral. That at the time of filing the application, his whereabouts were unknown and he never bothered to check up on the child after the death of her mother. That, the biological father is now residing in Jinja and his family situation is not conducive to the upbringing of the child. This is because he has many other children born to him and different women some of whom are out of school. That at the time the applicant took over control of the child; she was in a very sorry state with body sores all over her body.

On the other hand, the applicant lives under much better circumstances that would enhance the welfare of the child. He lives in a rented house (single room) with his wife and two daughters aged five and six years respectively. He hopes to move into a better residence in Kira Town Council so that the infant and his children attain better accommodation. That he is employed as an Assistant Programme Manager with USAID Respond Project and earns a gross monthly pay of about Shs. 3million. From this income, he can comfortably support the infant and has even placed her in a good nursery school (Haggai Nursery School) in Kololo. He has also arranged for medical insurance for the child and his family is very receptive of admitting the child into their family. That his children who are of approximately the same age as the infant will afford her adequate companionship. The applicant provided proof of his employment showing that he earned an annual income of shs.38,988,039/-, a medical card for the child under the US Mission, school fees receipts for Haggai Nursery school and proof that he had paid rent to one Dr. Mutebi for the period December, 2013 to April 2015. However, during the proceedings the applicant admitted that he is not formerly married to Twijukye Mary Patience his current partner but that they are cohabiting. Nonetheless, that Twijukye Mary has no objection to bring up the infant.

On the other hand, Kumakech Godfrey the biological father who was allowed to give an oral testimony, claims that he strongly objected to the application. That his understanding was that

this application was meant for the applicant to offer medical insurance to the infant to which he had no objection. He testified that he was legally married to Ms Adongo the mother of the infant with whom he had disagreements before her demise. That notwithstanding that fact, his separation with the infant, his child, was never of his making because after Ms Adongo's death and burial, he had some difficulty settling with the child in Jinja and thus left the child with the applicant and other relatives of the deceased. That he was made to believe by the applicant's family they would peacefully return the child to him, but since they had been no communication between him and them, this has not materialized. He apologized for any wrong he had done to the deceased or her family and was prepared to start a new.

He admitted that he had six children five of whom were resident with him in Jinja. That they are all in school and he is also prepared to place the infant in a good private school. His children are aged between 9 and 18 years and would be very happy to be reunited with their sister. He further testified that he is employed by the Uganda Prison Service (attached to Kirinya Prison) earning a basic salary of Shs.530,000/- per month. That he supplements his income with agricultural farming which brings in about Shs.1million per month, and collects rent of about Shs.200,000/ per month from rentals, he owns in Aura District. Further, that he has access to health care at the Health Centre III in Kirinya which will also be available to the child. He produced for this court a copy of his identity card to confirm the status of his employment as an assistant superintendent of Prisons of the Uganda Prisons service. He also provided his letter of appointment and admission into pensionable service of the Government of Uganda as well as proof that he was paying life insurance to M/s Sanlam Life Insurance (U) Ltd for the benefit of the infant and three other persons.

In view of the above evidence, my duty now is to evaluate whether allowing the child to continue living with the applicant and stripping the biological parent of his parental rights will be in the best interests of the infant.

I am aware that I am enjoined under Section 20 of the Children Act to obtain and rely on a report of a probation and social welfare officer on the current situation of the child. For that reason on 13/1/13, I issued an order for counsel for the applicant to arrange for the officers in the relevant jurisdictions visit the families of the applicant and the biological father and compile reports that would assist court. Only the report for the applicant was filed and undertakings by counsel to

follow up and file the other report came to naught. In such circumstances, it would be unfair to consider only one report, and in any case, the report compiled by Ms Nakazibwe Mary, the Ag. Senior Probation and welfare Officer, Wakiso District, indicated that it was with respect to an adoption order and not a guardianship order. This is so because on Page 3 of the report, she mentions that she informed the applicant of the effects of the adoption order and then on Page 4. recommended that the applicant be granted an adoption order. The report is thereby not useful to this court as it is for a different purpose from what was being sought by the applicant of in this application.

Nonetheless, I must still make a finding on this application with or without a Probation and Social Welfare Officer's report.

It is clear that the applicant is in a superior financial situation than the biological parent. He also has a younger and smaller family with the presence of a female adult who can nurture the child. However, it has previously been held by the High Court, and I agree, that financial superiority of a party cannot be used as an advantage in matters of custody of children. I noted also that the adult children of the biological parent can equally assist him in caring for the infant. Beyond that, I see no other strong point presented by the applicant to be appointed the guardian of the child. His main contention appears to be the fact that the applicant may have mistreated his deceased sister when she was alive and refused to support her during her illness or even to turn for up for her burial. No evidence was adduced to show that the biological parent had or has been cruel towards the infant save for the fact that at one time, he may have neglected her to the point that she was in poor health. He did admit some shortcomings as a parent and he was prepared to improve and look after the child. Further, the presence of Ms Twijukye Mary in the applicant's family gives him no advantage because the relationship is not permanent and can end any time. In any case, all throughout the hearing, Mr. Kumakech demonstrated himself to me as a person who was willing to reconcile with his in-laws and bring up the child in his custody but with their participation. He has undertaken to bring up the child with her siblings, place her in a good school and provide her with all the necessities of life including health, food and shelter. His income may be modest if compared to that of the applicant, but I believe, it is sufficient to provide adequate support for the infant.

According to the Court of Appeal in **Rwabuhemba Musinguzi Vs Harriet Kamakumi (Civil Application No.142/2009)** it was held that both parents have similar and equal rights with regard to their child. In my view, if one parent is deceased the surviving parent should be allowed the parental rights in full. The court of Appeal went on to say that even where such child initially joined the family of a wealthy relative by consent of one of the parents of the child, (in this case the deceased mother) the other parent cannot be denied their rights. Similarly, I find that parental rights being constitutional rights are placed at a pedestal so high that no other interests (in this case that of a relative) should override such a rights except in circumstances where the infant is faced with grave harm if such parental rights are not denied. Nothing has been shown by the applicant that this child has suffered or is at risk of suffering grave harm if she is allowed to be reunited with her biological father. If there was any such fear in 2009, it is now allayed by the father who stated in court that he has reformed and has put in place an environment which will cater for the welfare of the infant.

I therefore find no merit in this application; it stands dismissed with the following orders;

1. The applicant shall surrender *de facto* custody of the infant back to the biological father Kumakech Godfrey with effect from today. Such handover shall be made as peacefully and amicably, as possible to protect the child from any acrimony.
2. The applicant will continue accessing the child at least once every month at a place and time to be agreed upon between him and the biological father of the infant. This order will continue for a period of 12 months and thereafter, upon a report of the Probation Officer (with jurisdiction over the area in which the child shall be resident at the time) such visits shall cease and only continue at the discretion of the biological father.
3. Kumakech Godfrey the biological father will for a period of 12 months after this order submit himself under the supervision of the Probation and Social Welfare Officer in charge of the area where he is resident. The Probation and Social Welfare Officer shall visit Mr. Kumakech and the infant at their residence at least once every three months and compile a report which shall be filed with the Registrar of the Court and the LC in charge of Children's affairs with the same jurisdiction.
4. The applicant shall meet the costs of this application.

I so order.

EVA K. LUSWATA
JUDGE
8/4/14