

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE 277 OF 2013
IN THE MATTER OF NANYONGA SHANITA (CHILD)

AND

**IN THE MATTER OF AN APPLICATION BY KATHERINE ANN FEW FOR
APPOINTMENT AS LEGAL GUARDIAN OF NANYONGA SHANITA (CHILD)**

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; section 14 of the Judicature Act, cap 13; sections 3, 4 & 5 of the Children Act; section 98 of the Civil Procedure Act cap 71; and Order 52 rules 1 & 2 of the Civil Procedure Rules. The applicant is seeking the following orders:-

1. Katherine Ann Few be appointed the legal guardian of Nanyonga Shanita.
2. The child be allowed to immigrate to the United States of America to live with the applicant.
3. Costs of the application be provided for.

The grounds of the application are that:-

1. The child's paternity is not known.
2. The child's mother Namuli Priscilla has not taken responsibility over the child and has no reliable income.
3. The child's great grandmother who had sole responsibility over the child is also not able to provide for the child due to her illness.
4. The child is currently in the temporary care of M/S God's Mercy Children's Home.
5. No one else has come up as ready and willing to provide for the child save for the applicant.
6. The child's known relatives consent to this application.
7. The applicant wishes to provide for the child including her emotional health and psychological needs and to give her a home in USA where she can effectively fulfill her parental obligations.

The application is supported by the affidavit of the applicant as well as those of Namuli Priscilla the child's mother, Nansubuga Deziranta the child's great grandmother, Jackson Wasswa Kafeero the child's maternal grandfather, Ssali Brian the child's maternal uncle, Sematimba Erukana the local council 1 chairperson of Wankyayiraki Kayunga, and Hilary Basereka founder member of M/S God's Mercy Children's Home.

The applicant was in court when the application came up for hearing. The infant, Nanyonga Shanita, the subject of the application, was also in court.

The background is that Nanyonga Shanita, aged four years, was born to Namuli Priscilla on 15th May 2009 at Nakatovu Health Centre iii in Kayunga district. Namuli cannot identify the father of the child because she had many sexual partners. She abandoned the child to her paternal grandmother (Nansubuga Deziranta) at Wankyayiraki when the child was four months old. She purportedly got a job as a shop attendant. Her visits to her grandmother were brief, with no assistance to the child. Nansubuga Deziranta struggled to care for the child with the financial support of Brian Ssali her grandson, but her health failed her. The local council authorities of the area eventually arranged with Hilary Basereka to have the child placed with M/S God's Mercy Children's Home. A care order in respect of the child was issued by Kayunga Family and Children's Court on 19th June 2013 in favour of M/S God's Mercy Children's Home where the child is staying.

The applicant got to know about Nanyonga Shanita through the coordinators of Journeys of the Heart in the United States of America. She seeks this court to grant her legal guardianship of the child where she intends to live with her and provide her with a home, parental love and care.

Learned Counsel Dora Mirembe for the applicant filed written submissions along the following issues:-

- 1) Whether this honourable court has the jurisdiction to entertain this matter.
- 2) Whether the applicant is suitable to be appointed legal guardian of the child
- 3) Whether the application is in the best interests of the child.
- 4) Whether the applicant can immigrate with the child to the USA.

I will address the issues in the order in which they were framed and submitted on by the applicant's counsel.

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

The applicant's counsel submitted 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 applicant is suitable to be appointed legal guardian of the child.

The applicant's counsel submitted that the applicant's credentials and financial status makes her suitable to be appointed legal guardian of the child. She cited ***Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011*** to support the application.

The Court of Appeal in ***Civil Appeal Nos. 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 applicant intends to live with the child in USA where she can provide her with a home, parental love and care, and eventually adopt her. Her home has been recommended as being fit for adoptive purposes, as stated in the international home study report annexed to the applicant's affidavit as **C**. She is employed as an elementary teacher by Sisters School District, State of Oregon, as revealed in annexure **B** to her affidavit. She has no criminal or child abuse record as revealed by annexures **D** and **E** to her affidavit. She states in clause 14 of her affidavit that she is financially stable. The health reports annexed to her affidavit as **F** reveal her to be in good and healthy condition. On basis of the adduced evidence, and the law applicable, the applicant meets 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 applicant's counsel, citing various case decisions, submitted that it is in the best interests of the child to allow the application. The child is currently in an institution and the people in her life are not able to provide for her, yet the applicant is ready and willing to do so.

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.

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 applicant, 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's mother (Namuli Priscilla) abandoned the child to her paternal grandmother (Nansubuga Deziranta) at Wankyayiraki when the child was four months old. Nansubuga Deziranta could not look after the child due to her failing health and advanced age. She attended court during the hearing of this application and she looked too old and frail to look after a four year old child. The child's mother, in addition to her affidavit evidence testified on oath before this court that she cannot financially look after the child. There is evidence from herself and the other relatives that she does not know the child's father because she used to have multiple sex partners. The other relatives are not able or not willing to look after the child, and they agree to the arrangement of the child being put up for guardianship.

It is evident Shanita Nanyonga is in need of a family to grow in and be cared for. M/S God's Mercy Children's Home which has legal custody of the child is an institution which cannot provide a permanent home for her.

In this case, I find that where the child's parents or relatives are unable to care for her, or where neither her parents nor other relatives are showing interest in her, the applicant is the next best suited person to look after her. Denying her to look after the child would deprive the child of the available opportunity of being in a home where she 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 her nurturing and development in life which she is currently enjoying temporarily at M/S God's Mercy Children's Home. It will be in her best interests to allow this application if she is to enjoy the said basic needs permanently in the course of her growing up.

Issue 3 is answered in the affirmative.

Issue 4: Whether the applicant can immigrate with the child to the USA.

The applicant's counsel submitted that it is the duty of a guardian to maintain the child and provide for her, and that she can ably fulfill the said obligations if allowed to immigrate with her to the USA.

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 applicant is applying for guardianship of Shanita Nanyonga so that she is permitted to travel with her outside Uganda. In ***Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011*** the Court of Appeal, 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) Katherine Ann Few is appointed the legal guardian of Nanyonga Shanita.
- b) The child is allowed to immigrate to the United States of America to live with the applicant.
- a) The legal guardian is directed to obtain a Ugandan passport for the child using her current names.
- b) The legal guardian 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 she 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 applicant.

Dated at Kampala this 22nd day of January 2014.

Percy Night Tuhaise

Judge.

