

**THE REPUBLIC OF UGANDA**

**HIGH COURT OF UGANDA AT KAMPALA**

**(FAMILY DIVISION)**

**FAMILY CAUSE NO. 331 OF 2013**

**IN THE MATTER OF JOVAN SSENIONJO .....INFANT**

**AND**

**IN THE MATTER OF AN APPLICATION**

**FOR LEGAL GUARDIANSHIP ORDER BY**

**LUTHER HORN WOLFF AND AVERY CHEVES**

**WOLFF.....APPLICANTS**

**BEFORE HON LADY JUSTICE CATHERINE BAMUGEMEREIRE**

**RULING**

This was an application for Legal Guardianship brought by Notice of Motion supported by Affidavit pursuant to Articles 139(1) of the Constitution; section 14

of the Judicature Act; sections 2,3,4,5,6 and 7 of the Children's Act, Cap 59; and Order 52 rules 1 and 3 of the Civil Procedure Rules. The applicants are seeking orders that:

1. Luther Horn Wolff and Avery Cheves Wolff be appointed legal guardians of the child Ssenyonjo Jovan with full parental rights and responsibilities.
2. The applicants be allowed to emigrate with the child to their home country to fulfill their parental responsibilities.

The grounds for the application were follows:

1. The child was under the care of his single mother, who does not have the means to care for the child adequately.
2. The application has not been objected to despite the advertisement of the motion.
3. The Applicants are ready and willing to care for the child in their home country.
4. The Applicants were found to be suitable parents by Lifeline Children's Services an Adoption Agency in United States of America.

5. It was in the best interest of the child that the Applicants be granted legal guardianship.

The application was supported by eight affidavits: The two Applicants, the child's mother, the child's two paternal uncles, the child's maternal grandmother, a Probation and Social Welfare Officer, and a Community Development Officer with Banda Environment and Health Community Organisation.

The facts deduced from the record were that the child has been living with his mother, Nanyondo Annet, since his birth on the 1<sup>st</sup> of March 2013 in Busimba village, Kyengonza Parish, Kyengonza Sub County, Gomba District. The child's father, Mulevu Emmanuel, died on the 6<sup>th</sup> September 2012 when Nanyondo Annet was three months pregnant. Nanyondo Annet is unemployed and has been receiving support and shelter by the child's paternal uncle, Bulenga Peter.

In March 2013, Katongole Ronald, a Community Development Officer with Banda Environment and Health Community Organisation, met Nanyondo Annet and her child, Ssenyonjo Jovan, in the course of his work in the community. In July 2013, Katongole Ronald approached Nanyondo Annet telling her about the Applicant's intention of supporting the child as legal guardians. All the relatives of the child

consented to the application for legal guardianship of the boy because they did not have adequate income to look after the child. An announcement was made in the newspaper as notice of the application, but no one came forward to object. A probation report was made in support of the application. This report recommended the applicants be granted legal guardianship because the child was sickly and living in poverty.

The Applicants learned of the child's circumstances through their adoption agency, Lifeline Children's Services and now seek this court to grant them legal guardianship over the boy.

I have carefully evaluated all the evidence submitted by the Applicants and their learned counsel. 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, I find as follows:

**1. The child is not in need of a home, has never been abandoned or mistreated by his caretakers and is not eligible for legal guardianship**

Section 4 of the Children's Act, Cap 59 provides that a child is entitled to live with her parents or guardians, but where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate the child from the parents, the best substitute care available shall be provided for the child. In the Matter of Nassozi Immaculate, Misc App. 208/2014, arising from FC 37/2014. When discerning if it is in the best interest of the child to be separated from his or her parents the court considers the child's physical, emotional and educational needs; the likely effects of any changes in the child's circumstances; the child's age, and background; any harm the child has suffered or is at the risk of suffering; and the capacity of the child's parents or others involved in meeting his needs. In the Matter of Jackline Namubiru, FC 203/2013.

This child has been living with his mother since the day of his birth. He has never been abandoned, he has a parent who is concerned with his well-being, and he has family members that have been supporting him, although they admit financial strain and hardship. The Applicants seek legal guardianship to give the child a home, however, this boy already has a home with his biological mother. Although the child's mother is uneducated and impoverished she continuously, throughout this boy's life made sure that he was cared for. She never attempted to abandon

him and in fact, the application for legal guardianship only surfaced after she was approached by an officer of an environmental organisation. If Katongole Ronald had not solicited her acquiescence to such an application, the child would never have been involved in such proceedings and would have remained with his mother indefinitely. There is no evidence to suggest the child is malnourished, mistreated, or otherwise neglected. This child is not eligible for legal guardianship because he has biological caretakers dedicated to his well-being and he has the right to remain with those relatives. Separating him from his family could inflict emotional damage and is not justified or necessary when considering the best interest of the child.

**2. Poverty is not a justification for a legal guardianship order and the child's health is not endangered in his current circumstances.**

The Probation Officer's report gives the opinion that legal guardianship should be granted to the applicants because the child is sickly and lives in an impoverished environment.

Although the Probation Officer's report states that the child is sick with malaria often and had a cough and flu, his medical report submitted by Rift Valley Medical

Centre indicates just the opposite. In fact, the child tested negative for any illness and was determined to be in “good general condition.” As such, the Probation Officer’s findings in her report are unsubstantiated by an actual medical evaluation.

The Probation Officer’s report also indicates that legal guardianship should be granted because of the impoverished living conditions of the child and his mother. However, learned counsel fails to bring forth any case or law that allows an affirmative legal guardianship ruling on the basis of poverty. Learned counsel submitted numerous cases to support the application, however, all these cases have children that were either abandoned by their primary caretaker or the caretaker was a known drunkard who posed a danger to the child. Neither of these circumstances are present in the instant case. The child was never abandoned by his mother and the mother has done nothing to suggest she is a danger to the child’s well-being.

Learned counsel quotes Bromley’s Family Law, 8<sup>th</sup> Edition, at page 338 in his submissions to say, “In applying the welfare principle the court must act in the child’s best interest...it should be appreciated that a judge is not dealing with what is ideal for the child but simply with what is the best that can be done in the circumstances...” In asking this court to grant legal guardianship in this case

learned counsel is asking court to abandon the very principle he quotes. This court is not in a position to grant legal guardianship to give a child an idyllic upbringing, but to give children who have been neglected or mistreated a home to which they would otherwise not have. Poverty is not a reason to take a child from a family where he is loved and kept in good health.

### **3. Family members of the child do not appreciate the permanent result of a legal guardianship order**

There is evidence on the record that the family of the child did not fully understand what they were giving up if legal guardianship is granted. During the testimony of the child's mother, court explained the meaning of guardianship and adoption. The mother responded by saying, "But I remain the mother of the child." Clearly Nanyondo Annet does not comprehend the implications of legal guardianship and that it will extinguish all her parental rights. Furthermore, when the paternal uncle of the child, Vincent Kaddu, testified court explained the full import of the application for legal guardianship and adoption. He responded that he needed time to understand what was going on. The Court adjourned to give counsel the time to explain the implications to him, but when the witness returned he said that he supported the application so the applicants could "assist" the child. Similarly, the



other paternal uncle, Peter Bulega, testified and said he supported the application because “Jovan found benefactors who are here to take him and to give assistance.” None of the witnesses testified that the Applicants were to parent the child or give the child a home which he does not have, but only that Jovan is to receive assistance from this couple. This testimony reveals that the family did not appreciate the severity of an application for legal guardianship leading to adoption. It is this court’s finding that the family members of the child did not intelligently consent to the permanent extinguishment of their rights.

#### **4. The child still has biological relatives dedicated to his well-being**

If it is found in the circumstances that the child’s biological parents are unable to care for the child, or where neither the parents nor other relatives are showing interest in the infant, the applicants have the opportunity to show they are the next best suited persons to care for the child. See In the Matter of Jackline Namubiru, FC 203/2013. Applicants for legal guardianship may show they are the next best suited to care for the child by establishing that they are ready and willing to carry out the parental responsibilities for the child. The applicants in the instant case have submitted all the necessary documents, including numerous recommendations for their candidacy for legal guardianship. They have proved that they are ready

and willing to care for the well-being of the child as a parent with adequate resources. They are absolutely suitable to carry out the responsibilities implicit in a grant of legal guardianship for a child in need of a home. However, the child in the instant case is not in need of a home and is not an appropriate child for consideration of legal guardianship. The child's biological mother is still caring for the child along with the support of other relatives. Although they struggle financially, they have not demonstrated that they have no interest in caring for the child. It is not in the best interest of a healthy child to be taken away from his biological mother who has cared and nurtured him since his birth simply because his mother is impoverished and uneducated. Poverty is not ground for removal of a child from the care and protection of his parents.

Consequently I find that this is not a proper case for the award of a guardianship order. The application for legal guardianship is hereby denied.

Catherine Bamugemereire

Judge

