

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

**IN THE MATTER OF AN APPLICATION FOR CUSTODY AND MAINTAINANCE BY
TSEHAYALEM ARAYA TSEYU AND CARDON HABTAMU KASSO**

AND

IN THE MATTER OF SARA PAULOS KIDANE AGED 9 YEARS (MINOR)

FAMILY CAUSE NO 224 OF 2014

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application by notice of motion brought under section 14 of the Judicature Act Cap 13, section 73 and 76 of the Children Act Cap 76 and Order 50 rules 1 & 3 of the Civil Procedure Rules (CPR), for orders that a custody order be granted, that the applicants be allowed to travel with the minor to the United States of America (USA); and for costs of the application.

The application is supported by the affidavits of the applicant **Tsehayalem Araya Tsefu**, and of **Tsehayalem Araya Tesfu**, the applicant's sister. The grounds of the application are briefly, that:-

1. The applicant is the natural and biological mother of the minor.
2. The child's father, Paulos Kidane Kafil, is deceased.
3. On 23rd September 2014 at Kampala Uganda the applicant contracted a civil marriage with Cardon Habtam Kasso a citizen of the USA.
4. The child is of tender years and her welfare will be best catered for in our custody and care.
5. It is in the best interests and welfare of the child if a custody order is granted to the applicants.

In addition, this court interviewed the applicant, and the minor on oath, after the minor was found to be of understanding age. Learned Counsel Francis Katabalwa filed written submissions for the applicant.

Section 3 and the first schedule of the Children Act provide that the welfare principle shall be of paramount consideration when making decisions concerning children. The court shall in particular have regard to the ascertainable wishes and feelings of the child concerned considered in light of his/her age and understanding; the child's physical, emotional and educational needs; the likely effect of any changes in the child's circumstances; the child's age, sex, background and any 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 the care of the child in meeting his/her needs.

The Constitution of Uganda and the Children Act also stipulate that a child has a right to have a home and be cared for. Section 4 of the Children Act stipulates that a child is entitled to live with her parents or guardians.

The evidence, as adduced from the supporting affidavits plus the applicant's and the minor's sworn testimonies, show that the applicant, an adult Eritrean, was previously married to Paulos Kidane Kafil, now deceased, with whom they had a daughter called Sara Paulos Kidane (minor), the subject of this application. The minor's father died in war in Eritrea. The applicant relocated to Uganda as a refugee. She contracted a civil marriage with Cardon Habtamu Kasso a citizen of the USA who is willing to take up responsibility for the minor. The minor is aged 9 years. The applicant intends to travel to the USA with the minor to live with her new husband.

There is also evidence that the applicant is the biological mother of the minor who has been catering for all her needs. The minor testified on oath before this court, after being found to be of understanding age, that her father is dead; that she stays with her mother who looks after her; that she has a step father Cardon Habtamu Kasso; and that she would choose to stay with her mother among all her relatives.

The applicant annexed the minor's birth certificate to her affidavit as **C**. She also, on request, availed court copies of her passport, that of her new husband and of the minor, her first husband's (Paulos Kidane Kafil) death certificate, her marriage certificate with Cardon Habtamu

Kasso, DNA test reports showing her to be the minor's biological mother, certificate of good conduct issued by the Uganda Police in respect of the applicant, medical reports regarding the applicant and the minor, recommendation letters by the local council executive of the area where the applicant resides, the consent of Cardon Habtamu Kasso that he is willing to live with the minor as family, and documents from the US Citizenship and Immigration Services showing approval of Cardon Habtamu Kasso's visa petitions in respect of the applicant and the minor. All the foregoing documents corroborated the affidavit evidence as well as the applicant's and minor's sworn testimonies.

In the circumstances, based on the adduced evidence and the law applicable, where the minor's father is dead and the applicant is the minor's biological mother taking care of her, the applicant is legally entitled to have the minor's custody. Conversely, the minor is legally entitled to live with the applicant since she is the surviving parent after her father passed on. I therefore agree that this application is in the best interests of the minor, and that her biological mother should be granted custody of the said minor to enable her travel with her and live with her in the USA where she intends to live with her new husband as a family.

It is accordingly ordered as follows:-

- i) A custody order be granted to the applicant in respect of her biological child Sara Paulos Kidane (minor).
- ii) The applicant be allowed to travel with the minor to the United States of America (USA).
- iii) Costs of the petition shall be provided for by the applicant.

Dated at Kampala this 18th day of August 2015

Percy Night Tuhaise

Judge.