

**THE REPUBLIC OF UGANDA**

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

**FAMILY DIVISION**

**FAMILY CAUSE 002 OF 2015**

**IN THE MATTER OF NANSUBUGA JESSICA KATRINA KIRABO (A MINOR)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR A GUARDIANSHIP ORDER IN RESPECT OF THE MINOR BY ALLAN TURINAWA AND CATHERINE SEMPEBWA TURINAWA**

**BEFORE LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This is an application for legal guardianship brought by notice of motion under section 44(1)(b) of the Succession Act cap 162; sections 3, 4(1) & the First Schedule of the Children Act cap 59; section 98 of the Civil Procedure Act cap 71; and Order 52 rule 1 of the Civil Procedure Rules (CPR). The applicant is seeking orders that:-

1. A Guardianship Order in respect of the minor be granted to Mr. Allan Turinawe & Mrs. Katherine Sempebwa Turinawe.
2. Such other orders as this honourable court may deem fit.

The grounds of the application are that:-

1. The applicants have custody of the minor since November 2013.
2. The minor's biological mother Linda Esther Sempebwa Nsubuga "the deceased" passed away on 20<sup>th</sup> October 2013.
3. Katherine Sempebwa Turinawe, a paternal cousin to the deceased and Allan Turinawe (her husband) are desirous of being appointed legal guardians of the minor.

4. The circumstances of the minor's conception are such that it is in the minor's best interests for her to remain in the custody of the applicants.
5. The husband of the deceased (Victor Nsubuga hereinafter referred to as "Victor") has since the death of the deceased not shown a keen interest in permanently taking care of the minor as his own.
6. Victor has since established that the minor was not begotten of him but by another man to wit Herbert Nfanshingabo Ruyanje, and is not keen on taking care of the minor neither is he capable of doing so in the best interests of the child.
7. The biological father of the minor has since shown no interest in taking custody of the child and has no objection to the applicants being appointed as legal guardians.
8. The minor has found a peaceful, tranquil and nurturing home in the home of the applicants where she can be raised up (sic) lovingly as their own daughter.
9. The minor and applicants are resident at Bukasa, Muyenga within the local limits of jurisdiction of this honourable court.
10. It is in the minor's best interests that this application be granted.

The application is supported by the affidavits of the applicants, Allan Turinawe and Katherine Sempebwa Turinawe, which reiterate the grounds of the application. The affidavits of Herbert Nfanshingabo Ruyanje and Clare Catherine Sempebwa Seruwagi are also on court record. The applicants, the minor, the minor's biological father, and the husband to her late mother attended court when the application was heard. All of them, excluding the minor who is aged two years and therefore not capable of appreciating the application, were examined on oath by this court. The applicants also availed court with originals of the documents annexed to the affidavits, which court compared with the annexed photocopies and found them to be similar. In other circumstances, certified true copies of the annexed documents were availed. Court also requested for, and was availed other relevant additional documents not mentioned in the affidavits, namely the police clearance, the area Local Council Executive recommendation of the applicants, and the minor's birth certificate including other hospital documents relating to the child's birth.

The application was brought under section 44(2) of the Succession Act and section 98 of the Civil Procedure Act (CPA). Section 44(2) of the Succession Act provides that if there is no person willing or entitled to be a guardian under sub section (1)(a) to (e) the court may, on the

application of any person interested in the welfare of the infant, appoint a guardian. Section 44(2) of the succession Act formerly left out female relatives of the child in as far as applying for statutory guardianship was concerned. The Constitutional Court however, in ***Law & Advocacy for Women in Uganda V The Attorney General, Constitutional Petition Nos. 13/2005 & 15/2006***, declared the leaving out of the female relatives to be inconsistent with the provisions of the Constitution and therefore void. This implies that female relatives of a child can now also apply to be statutory guardians of that child where his/her parents have not appointed one. Section 98 of the CPA also empowers the High Court to invoke its inherent powers to grant remedies where there are no specific provisions.

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 and in various international conventions ratified by Uganda concerning the rights of children. Section 3 read with the first schedule to the Children Act sets out the guiding principles in making decisions relating to children. Court shall have regard to 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 relevant circumstances; any harm 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.

The Children Act defines "guardian" to mean a person having parental responsibility for a child. 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; should be able to exercise powers of control over the child; should ensure that the physical well being of the child is cared for, and that its legal rights are protected; and should be a person who can reasonably be expected to take whatever action may be necessary or desirable on behalf of an infant. See ***Nabyama Moses alias Nabyama Abasa Family Cause No. 76/2011***.

Learned Counsel Tom Mbalinda submitted that this court has jurisdiction to hear the application, and that it is in the best interests of the minor to allow her remain in her current abode where she is staying with the applicants. He cited ***Deborah Joyce Alitubeera & Richard Masaba Civil***

*Appeals No. 70 & 81/2011;* and *In the matter of Howard Amani (Little) CA 33/ 2006*, to support the application.

The affidavits and oral testimonies on oath of the applicants, and those of Victor Wasswa and Herbert Nfanshingabo Ruyanje, reveal that the child was born on 11/02/2013 to Linda Esther Sempebwa Nsubuga who was at the time married to Victor Wasswa. Linda Esther Sempebwa Nsubuga passed away on 20<sup>th</sup> October 2013 when the minor was only seven months old. The applicants immediately took over custody of the minor as agreed in a family meeting. The deceased had an extra marital relationship with a one Herbert Nfanshingabo Ruyanje which resulted in the birth of the minor.

It was later established through a DNA test that Herbert Nfanshingabo Ruyanje was indeed the biological father of the minor. The DNA report which establishes this fact is on record. Victor Wasswa has been very passive and not shown any interest in the minor. He had, even before the DNA, always suspected the minor to be a child of Herbert Nfanshingabo Ruyanje. The child's biological father Herbert Nfanshingabo Ruyanje, is not ready and willing to take up parental responsibility of the child because he is married and his wife is not ready to raise a child that is not hers. The applicants have raised the child as their own, taking care of all her needs, and they intend to continue doing so.

The adduced evidence also shows that Herbert Nfanshingabo Ruyanje has no objection to the minor being raised by the applicants. He deponed an affidavit in support of the application, renouncing all parental claims and rights to the minor in favour of the applicants. He states in the affidavit that he did a DNA test with the minor which established he was the minor's biological father. He was also examined on oath by this court where he reiterated the same statements. Victor Wasswa Nsubuga was also examined on oath by this court and he reiterated the facts as stated by the applicants. He informed court that he is not staying with the minor because she is not his biological child.

The evidence on record shows that the child is living with and being cared for by the applicants with the acquiescence of her biological father Herbert Nfanshingabo Ruyanje, and her step father, Victor Wasswa, even before the filing of this application. The applicants are a married couple, as indicated in their marriage certificate. They have a seven year old daughter Alana

Rukundo Turinawe. They have never committed any criminal offence, as indicated in their respective certificates of good conduct issued by the Uganda Police Force. They are related to the minor in that Katherine Sempebwa Turinawe, the 2<sup>nd</sup> applicant, is a maternal aunt to the minor. The 1<sup>st</sup> applicant Allan Turinawe is related to the minor by his marriage to the 2<sup>nd</sup> applicant. The applicants were recommended by the Local Council Executive of Kijjwa Village Urban Council 1, Bukasa Ward, Makindye Division where they reside. All the adduced evidence confirms that the applicants, together with their seven year old daughter, live with the minor as one family.

The affidavit evidence and sworn oral testimonies are supported by various documents annexed to the supporting affidavit, and or requested for by this court. The documents include the minor's short birth certificate; Hospital documents from St. Francis Hospital Nsambya where the child was delivered; the deceased Linda Edith Sempebwa's death certificate; the DNA test report in respect of the minor and Herbert Nfanshingabo Ruyanje; photographs showing the minor in the applicants' family surroundings; the minor's medical examination report by Kampala Family Clinic; the recommendation from the Local Council Executive Kijjwa Village Urban Council; and a certificate of good conduct in respect of the two applicants issued by the Uganda Policed Force, among others.

In this case, I find that where the applicants have been living with the minor and catering for all her needs, and where the child's biological father and step father, who are not willing to look after the child, have consented to the applicants' continuing to live with the child, this is an appropriate case where guardianship should not be refused. The minor needs a loving home to grow in. Her mother is dead. Her biological father and step father are not willing to take her on as part of their respective families. The applicants, who are also related to the child have availed the minor a loving home and are willing to be her legal guardians.

In my opinion, having considered all the evidence on record and the law applicable, the applicants are suitable to be legal guardians of the minor Jessica Katrina Kirabo. It will be in the minor's best interests to allow this application so that the minor gets a home where her parents are not willing to avail her one. I accordingly make the following orders on terms I consider fit for the welfare of the child:-

1. The applicants are appointed legal guardians of the infant Jessica Catrina Kirabo.
2. The legal guardians 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.
3. The Registrar of the High Court shall furnish a copy of the orders in this ruling, together with the address of the legal guardian to the Ministry of Justice and Constitutional Affairs of Uganda.
4. The legal guardians shall immediately communicate any changes of addresses to the authorities mentioned above.
5. Costs of this application will be borne by the applicants.

**Dated at Kampala this 24<sup>th</sup> day of November 2015.**

**Percy Night Tuhaise**

**Judge.**