

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0008 OF 2016
IN THE MATTER OF AN APPLICATION BY MESHAK ADRIKO (THE BIOLOGICAL
FATHER OF THE MINOR)
AND
IN THE MATTER OF ADRIKO REUBEN (A MINOR)

Before: Hon. Justice Stephen Mubiru

RULING

This is an application for guardianship by a father in respect of his biological son aged fourteen years.

The background to the application is that some time during May 2010, the applicant acquired land comprised in Leasehold Register Volume 4101 Folio 20, Plot 3, 21st Close Namuwongo, being 0.033 hectares at Namuwongo, Kampala District. He decided to have the land jointly registered in his names and those of his son; Adriko Reuben (a minor until 2024). The registration was effected on 20th May 2016 and the duplicate certificate of title was issued to him on that day. He has custody of the title deed and in paragraph 3 of his affidavit in support of the application claims to be the sole caretaker and guardian of that child.

Being desirous of disposing of that property and using the proceeds of sale for his well-being and that of his said son, in which case the grant of a guardianship order is a prerequisite, the applicant filed this application by way of notice of motion under the provisions of section 98 of *The Civil Procedure Act, cap 71* and Order 52 rules 1, 2, and 3 of *the Civil Procedure Rules*, SI 71-1. He was self-represented (appeared *pro se*) at the hearing of the application whereupon he reiterated the facts and prayers contained in the application and the supporting affidavit.

By the nature of the registration indicated on the certificate of title Annexures “B” and “C” to the affidavit supporting the application, the applicant is a joint tenant of the property together with his child (a minor). Under section 56 of the *Registration of Titles Act, cap 230*;

Two or more persons who are registered as joint proprietors of land shall be deemed to be entitled to the land as joint tenants....

As joint tenants together with his father, the infant has the same interest in the land, accruing under the same conveyance, commencing at the same time and held under the same undivided possession. The applicant could have unilaterally decided to sever the joint tenancy but he has not. The result is that at the time of this application, his interest in the land is inextricably interwoven with that of his infant son. The court is required to determine whether in these circumstances, the applicant is a "fit and proper person" or a "suitable person" to be appointed a guardian of the child.

The court is mindful of the fact that based on his pleadings and submissions before court, the grant sought by the applicant is not one that confers on him power with regard to the personal affairs (health, education and welfare) of his son (which in any case he already has by virtue of being his biological father with physical custody and therefore his natural guardian), but rather one that confers on him powers with regard to the real and personal property of the child.

In matters of this nature, where the legal property rights of a child are involved, yet by virtue of his status as a legal incompetent, the child does not have the capacity to safeguard those rights on his own, courts are expected to exercise a *parens patriae* authority. A judge is required to make an independent assessment of these interests, to prioritize them above the competing interests of adult claimant, and to make orders most likely to safeguard and promote these interests. Accordingly, a child in whose name property is registered has a cognizable proprietary right that need not be claimed by way of right of audience before the court. The Judge acting as *parens patriae* is responsible for protecting the interests of children in matters that come before him or her. The Judge is obligated to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child accordingly.

When appointing a guardian of this sort, court ought to consider; - (a) the capabilities and (b) potential conflicts of interest of the proposed guardian. Regarding capability, ordinarily the child's parents are considered the natural guardians until a replacement or substitute is needed. In this case, there is nothing to suggest that the applicant is not a suitable guardian of his child. In any case, article 31 (4) of the *Constitution of the Republic of Uganda, 1995*, confers a right and

duty on parents to care for and bring up their children. I find therefore that the applicant does not need to be replaced or substituted. He meets the capability test.

With regard to conflict of interest, the court is in this case not determining rights as between a parent and child but is cognizant of the fact that being joint owners of the property in issue, there *prima facie* is a potential conflict of interest between the applicant and the child. The applicant might potentially deal with the property in a manner that is inconsistent with the rights and interest of the child therein. An inability to put the child's interests ahead of his own in the co-owned property yet this is a case where he would have a duty to make certain decisions on the children's behalf in accordance with the children's rights.

On the other hand, denial of guardianship on that account would require him to sever his son's interest from his (which is doubtful considering that the land is only 0.033 hectares) or result in, as a natural consequence, denying him the opportunity to enjoy and exercise his proprietary rights under the same undivided possession. Paragraph 6 of his affidavit of supporting the application indicates he plan to dispose of the property and use the proceeds to help support the child and himself. He is thus cognizant of the child's interest in the proceeds of sale.

This court has to enable the applicant enjoy of his proprietary interest in the property but without exposing the child to the dangers of decisions he might take in respect of the property. Being cognizant of his potential inability to put the child's interests ahead of his own in dealings relating to the property, this court will grant him a conditional guardianship, in furtherance and protection of the child's best interests.

The application is granted with power conferred on the guardian to deal with the property provided that in all dealings the guardian should not waste the property and should, in the event of disposing it off, preserve, invest, expend and / or use for the benefit of the child, such a proportion of the proceeds as represents the child's interest in the property. There is no order as to the costs of this application.

Dated at Arua this 13th day of July, 2016.

.....

Stephen Mubiru
Judge.