

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
FAMILY CAUSE NO 02 OF 2016
IN THE MATTER OF EMANUEL KISAKYE (CHILD)

AND

IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY
MICHAEL CANE ICARDI, JR AND LAURA JEAN ICARDI

BEFORE: HON JUSTICE DR ZEIJA FLAVIAN

RULING

Applicants

The applicants MICHAEL CANE ICARDI, JR AND LAURA JEAN ICARDI are United States Citizens. They are holders of Passports Number 504019279 and 461277215 respectively. The Passports were issued on the 11th day of April 2013 and 8th day of October 2009 respectively. Their passports are still valid. They expire in 2023 and 2019 respectively. Copies of passports were attached to their respective affidavits. They are married, having solemnised their marriage on the 30th day of July 2005 in Oviedo Florida. They attached a marriage certificate to their application. They have two Biological children, i.e. Ella Jane (5 years) and Michael Cane, Jr (3 years). Michael is gainfully employed with Innovative Emergency Management (IEM) as manager, Urban Area Preparedness since 2008. Laura is a stay at home mother and a home school teacher for her children. She enjoys taking care of the children.

They have a home that can accommodate an additional child. They attached photos of their residence and a mortgage deed for their house. They are also financially stable. They attached evidence to the effect that the first applicant earns US\$137,000 per annum. They attached to their application copies of bank statements and financial returns as well as evidence of employment.

The Child

The child is named Kisakye Emanuel. He was named by the police upon being presented to the police Child and Family Protection unit. The child is aged 2 years and 4 months. He is estimated to have been born on the 20th February 2014 (No clear date since the child is a foundering). A short birth certificate was attached. The child was abandoned at the house belonging to Mrs Tebunakya Edith at Masaka referral hospital where she operates a restaurant. A lady believed to

be the biological mother of the child on the morning of 17th April 2014 came to the restaurant and requested Edith to allow her put her child to sleep in her sitting room on one of the chairs. Edith accepted but instead allowed her to put the child in one of the bedrooms. The child looked malnourished and the mother was covering him all the time. Shortly after that, she said she had a patient to see in the hospital and left. Edith did not anticipate that she would not return. She did not return. Edith tried to trace the mother of the child in the hospital after the child woke up but in vain. Edith reported the child to police and was recorded vide SD MSK 04/23/04/2014. The police handed over the child to The Probation and Welfare Officer who in turn handed over the child to Okoa Refuge, an NGO that specialises in caring for children of that nature. The handover took place on the 18th of April 2014. Okoa refugee subjected the child to various medical tests. The child was found to be in good health though malnourished. Under Application No 86/2014, a care order to Okoa Refuge was issued by the Masaka Family and Children Court holden at Masaka on the 15th of July, 2014. Various announcements were run on radio Buddu. Print announcements were also run in the Bukedde newspapers dated March 18th 2015 and 20th February 2015. No claimant has surfaced to claim the child.

The Probation and Social Welfare Officer's report

The probation officer (Nagawa Mariam) gave a brief report. It should be noted that the probation officer was the one who referred the child to the Home after police referred the child to the Probation and Welfare office. This was upon registering the child under the above reference number. She stated that Kisakye was abandoned in Masaka Regional Referral Hospital on the 18th of April 2014 by a lady believed to be her biological mother. The child at the time of Abandonment was 2 months old. A child abandonment case was recorded under SD REF: 41/18/04/2014. Temporary placement was secured by Senior Probation and Social Welfare Officer of Masaka in Okoa Refuge Children's home in Nyendo Kayirikiti Masaka District. Inquiries were made through radio and print media but nobody has turned up to claim the child. She recommended to court that court should decide what is in the best interest of the child.

Okoa Refuge Report

There is an affidavit in support of the application by Ayub Kintu of Okoa Refuge. He states that he is a social worker with Okoa refuge. Okoa refuge is a Registered NGO that takes care of

orphaned and abandoned children. He states that they received a child Kisakye Emanuel on the 18th day of April, 2014. He was estimated to be 2 weeks old. After receiving the child, they obtained a care order through the Probation office Masaka from the Family and Children Court at Masaka Vide care Application 86/2014 on the 15th of July 2014. The Care order was annexed to the affidavit. He explained that they have attempted to find a foster care or domestic adoption placement within Uganda for the child but failed. Okoa refuge believes that it is in the best interest of the child to be raised in a loving, careering household with two parents that can give a child individual attention. The applicants got to know about the child through Living Hope Adoptions that has interacted with Okoa Refuge before.

Suitability to be guardians

Suitability to be guardians and eventual parents in inter-country adoptions in my view should be determined from the following prerequisites:

- (a) Stability of the Applicants marriage
- (b) Financial Status of the applicants
- (c) A stable place of abode (Home)
- (d) Criminal Records and assessments of the applicants
- (e) Recommendations from Government institutions and persons who are well acquainted with applicants in their home country.

The applicants in my view satisfy these criteria for suitability as guardians due to the following reasons:

- **They are legally married:** There is a marriage certificate attached to the application from the state of Florida dated 8/8/2005. Since this marriage is still subsisting, I presume it is stable. The applicants appeared in court together.
- **They have a stable home:** There is a report from America World Adoption attached to the affidavit of Laura Jean Icardi one of the applicants. The report indicates that the home is of a 2,000 square foot size which they have owned since 2012. It has two levels and a basement. It is spacious enough to accommodate the child in issue.
- **Stable income:** One of the Applicants, Michael Icardi annexed to his affidavit proof of employment with Innovative Emergency Management (IEM). He earns a gross salary of US\$137,000 pa.

- **Character Reference:** They have 4 letters of character reference recommendations from persons they are well known to regarding their suitability to adopt. These letters were annexed to the affidavit of Laura, one of the applicants
- **Criminal Record:** The applicants have criminal clearances attached to their affidavits in support and have a clean criminal record. The commonwealth of Virginia Department of State Police report shows that the applicants have no criminal record. These records are dated 3rd November 2015.
- **Personal Assessment:** The applicants were thoroughly assessed through personal interviews, review of their paper work and were counselled concerning adopting a foreign born child. They completed 10 hours of pre-adoptive education of Hague compliant adoptive parent education training. They have also done a series of online courses on adoption

On the facts availed to me on record, the applicants pass the test of suitable guardians as well as adoptive parents.

Does the law have enabling provisions?

This application was filed on the 20th day of May 2016. There is a new law that came in force in the month of July 2016 which amends the Children Act Cap 59.(The Children (Amendment) Act No 9 of 2016). It was assented to by the president on the 20th day of May 2016. It commenced on 2 day of July 2016 by a statutory instrument. However, as the interpretation act provides under ,S.17 (4)

“A statutory instrument made and published on the date of commencement of the Act under which the instrument is made shall be deemed to come into force simultaneously with that Act”.

This Act, therefore, was not law until 2nd day of July 2016 when it came into force.

The most relevant provision of the Children (Amendment) Act of 2016 is S. 12 which prohibits guardianship of children by non Ugandans.

I shall not apply this law to this situation. The Court of Appeal in the case of **Tom Butime Vs Muhumuza David and Anor**, Election Petition Appeal No. 11 of 2011 held that:

“the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication that such was the intention of the legislature.” See PHILIPS V EYRE [1870] I LR 6 Q B 1.

In the case of *Pulborough School Board Election (1894) 1 Q.B.D. 725*, Lopes, L.J., said:

It is a well-recognised principle in the construction of Statutes that they operate only on oases and facts which come into existence after the Statutes were passed, unless a retrospective effect is clearly intended.

In the case of *Colonial Sugar Refining Co. v. Irving [1905] A.C. 369* the Judicial Committee of the Privy Council stated that if an Act touches a right in existence at the passing of an Act, no retrospective effect should be given to the Act unless a clear intention to that effect is manifested.

Ended, the Interpretation Act S. 13 thereof mirrors the above authorities.

In filing this application, the applicants new they had a right to guardianship of the child they have worked so hard to make theirs. They must have incurred costs to the advocates since they are represented. It would be unjust to apply the new law to a case that was filed before the law took effect. I shall therefore apply the position of the law as it was before this amendment, since the new law has no retrospective provisions.

This application was brought under article 139 (1), 34 (1) and (2) of the Constitution of the Republic of Uganda, Sections 14, 33 and 39 of the Judicature Act Cap 13, Sections 2,3,4,5,6 and the first schedule of the Children Act Cap. 59, Section 98 of the CPA and O. 52 r 1 and 3 of CPR. It was seeking for orders that:

- (a) The applicants Michael Cane Icardi, Jr and Laura Jean Icardi be appointed Legal Guardians of the Child Emanuel Kisakye

(b) That the applicants be permitted to travel with the child outside Uganda to fulfil their parental responsibility and complete the adoption process in the United States of America.

(c) That costs of this application be provided for

The leading authorities I could find on this matter is the Court of Appeal decision in the case of *In the Matter of Francis Palmer an Infant, Civil Appeal No. 32 of 2006, In the matter of Howard Amani Little, an infant, Civil Appeal No.33 of 2006 In the Matter of Deborah Joyce Alitubeera (Civil Appeal No 70/2011) and in the Matter of Richard Masaba, (Civil Appeal No 81 of 2011).*

What is important from these authorities however is that the High Court has Jurisdiction to determine issues of guardianship of a child. The fundamental point is that the High Court has unlimited Jurisdiction conferred on it by Article 139 (1) of the Constitution of the Republic of Uganda. This is reinforced by S. 14 of the Judicature Act which provides that the High Court has inherent powers to make such orders as are necessary in the interest of Justice. The Civil Procedure Act reinforces this position by providing (S. 98) that the High Court has powers to grant remedies on such terms as it thinks fit. Given that the applicants are non citizens of Uganda, S 44(1)(b) of the Children Act Cap 59 granted jurisdiction to the High Court to deal with matters of this nature. This jurisdiction has been maintained in the new law of 2016.

From the above provisions, it is clear that this court is clothed with jurisdiction to handle this application

Is it in the best interest of this Child to grant legal guardianship to the applicants?

The first schedule to the Children Act Cap 59, S. 3(1)(b) enjoins courts to have the welfare of the child in mind while making decisions concerning children. It provides:

3. Criteria for decisions.

In determining any question relating to circumstances set out in paragraph 1(a) and (b), the court or any other person shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;

(b) the child's physical, emotional and educational needs;

- (c) the likely effects of any changes in the child's circumstances;
- (d) the child's age, sex, background and any other circumstances relevant in the matter;
- (e) any harm that the child has suffered or is at the risk of suffering;
- (f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.

I have already stated above that the child is less than 3 years. He is incapable of expressing his wishes and feelings. My observation in court, however, is that the child was happy with the applicants. They appeared with the child in court and *prima facie*, the child was happy. The child's physical, emotional and educational needs cannot be met by an orphanage/Home. We should note that in an orphanage/home, there is no specific parent for the kids. This child has an opportunity to grow in a home with the care of two parents and fellow kids to play with. As earlier noted, the applicants have two kids that will give this child company while growing up. The likely effect on the child is positive in the sense that he is leaving a parentless home which is temporary to an actual home. The child has no known parents and therefore this is an opportunity for him. There are no Ugandans willing to take care of him. No one has come up to claim the child. Given that the applicants were properly assessed by the relevant bodies, I anticipate no harm to the child. The applicants have sufficient resources to take care of this child.

The well fare principal was further buttressed in the case of *In the Matter of Deborah Joyce Alitubbera (Child) Civil Appeal No 70 of 2011 and in the matter of Richard Masaba (Child) Civil Appeal No 81 of 2011*. The judges emphasised that in making decisions of this nature, the welfare of the child is paramount. The judges of the court of appeal authorised the grant of guardianship to US citizens to travel with the children and complete adoption processes in the United States. I shall not depart from this decision.

In the premises, I am satisfied that it is in the infant's best interests to grant rather than refuse this application. What this child needs is a home and tender loving care from parents. No one understands the life of living in a home that is not home. To insulate the child against the unknown, I make the following orders:

1. Michael Cane Icardi, JR and Laura Jean Icardi are hereby appointed Guardians to the Child Emanuel Kisakye
2. The applicants are hereby permitted to travel with the child to the United States of America to complete the adoption proceedings there.
3. The Applicants are authorised to obtain a Ugandan Passport for the child to enable her travel out of the country
4. By this order, the Biological Parents (if still alive) of the child do hereby lose Parental rights over this child under all circumstances.
5. The applicants shall register this order with the United States Embassy in Kampala and the office responsible for children and family welfare in their home State.
6. The Applicants shall register this order with the Registration Services Bureau in Kampala and Interpol office in Kampala.
7. The applicants shall file annual reports about the development of the child to the Ugandan Embassy in United States of America by any means whether electronic or otherwise until the child is 18 years.
8. The Applicants shall pay the costs of this application

I SO ORDER

Dr Flavian Zeija

Judge

13/7/2016