

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

ADOPTION CAUSE NO.09 OF 2017

**IN THE MATTER OF THE CHILDREN ACT (CAP 59) AS AMMENDED BY ACT
16/2016**

AND

**IN THE MATTER OF A PETITION FOR THE ADOPTION OF VICTORIA BABIRYE
NAMUTOSI BY JOHNNY WALTERS JR AND CHERYL ANN WALTERS.**

BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JUDGE HIGH COURT

RULING

This is a Petition for adoption of the child Victoria Babirye Namutosi herein after referred to as the child brought by Jonny Walters JR and Cheryl Ann Walters herein after referred to as Applicants.

The Petition is brought under the provisions of the children Act Cap 59 as amended by the children (Amendment) Act 2016, Act No.9.

Isaac Mugume of Mugume and Company Advocates represented the petitioners. The Petition seeks for Orders that:

- (a) An Order for the adoption of the child Babirye Victoria Namutosi by Johnny Walters Jr and Cheryl Ann Walters be made under the children Act Cap 59 and the Amendment Act No.9 of 2016.
- (b) That the costs of this Petition be provided for by the Petitioners.
- (c) That such further and other Orders be made as the nature of the case may require.

The Petition Is supported by the Affidavits of Johnny Walters Jr dated 12th September 2017, Cheryl Ann Walters dated 12th September 2017; the Applicants, Moses Sebbaggala dated 8th January 2018 of Children Safe Uganda, Mushiso Patrick dated 8th January 2018 father of the child and James Ntege the Probation and Social Welfare Officer of Mukono District dated 08th January 2018.

Adoption is the creation of a parent-child relationship by Judicial Order between two parties who are unrelated creating a lifelong relationship of parenthood between a child and the adoptive parent.

The Background of the child

The child Victoria Babirye Namutosi was born to Mushiso Patrick and Night Maria of Gonve village Makukuba Parish, Nabbaale Sub county, Mukono District on 21st June 2006 as per the birth Certificate issued by Mukono District Local Government on 17th January 2018.

Her father Mushiso Patrick is and indeed looked an alcoholic when he appeared before court. The mother is mentally challenged as it was exhibited in court. She could hardly understand anything. As a result of the incompetence of both parents, she was a victim of aggravated defilement where the case was reported vide REF 50/IS/06/2015 and the defiler is currently serving custodial sentence.

She is a twin sister of Kato Joseph and has other siblings; Wamenyo Ashan aged 15 years Kimono Sarah aged 13 years Kiiza Joseph aged 9 years. She was greatly traumatized after the sexual abuse. She therefore could not stay in the same environment and was taken to Children Safe Uganda where she was placed under Bweya children's home for protection.

In January 2016 the Petitioners got to know about the plight of the child through Children Safe Uganda an NGO and their friends Johnny and Terry Touchet. They started sponsoring the child immediately though informally until they formally became her foster parents on 10th August 2017 as per copies of the foster care placement Order and Powers of Attorney marked L1 and L2.

After getting the foster care Order, the Petitioners took the child for medical checkup and she was diagnosed with a medical condition called Bilateral Genu Valgus commonly referred to as knock knees which needs urgent surgery if it is to be corrected. Moses Ssebagala the Director of Children Safe Uganda gave a detailed history of Victoria and how the Petitioners got interested in her when they visited his children's home.

The Probation and Social Welfare Officer of Mukono Mr. Ntege James evaluated the home of the parents and their ability to take care of the child. He established that the father was an alcoholic old man with no hope that he will get out of his addiction. The mother is mentally challenged. He recommended the child for adoption.

Background of Petitioners

The Petitioners are a couple and American Citizens. Johnny Walters Jr is a holder of an American passport No.543876696 while Cheryl Ann Walters is a holder of passport No.543876698. They are residents of 204 Holly Chase, Piedmont, South Carolina and while in Uganda reside at Bweya Sissa Sub County Wakiso District. Johnny is 53 years old while Cheryl is 50 years old. Copies of their passports and marriage certificates are all on record. They are proud happy parents of four biological children and one foster child.

Johnny is an Engineering Manager at Proper Polymers – Anderson while Cheryl works as a Real Agent with Keller Williams. Copies of their employment contracts are on record marked D and E respectively.

They are missionaries, who are gainfully employed and can afford to raise the child. They have a home. The issues for this court's resolution are whether the Applicants qualify to adopt the child and whether the child is available for adoption.

RESOLUTION OF ISSUES

I will resolve the two issues concurrently because they are related. Part VII of the children Act Cap 59 as amended in 2016 provides for Adoption from sections 44 to 48.

The Applicants in this case are aged 53 and 50 years old while the child is 11 years old. Both of them are over 25 years older than the child. They fulfill the age requirement under section 45 (1) (a) of the children Act.

This is an inter country adoption which allows a non citizen of Uganda in exceptional circumstances to adopt a Ugandan child. It is provided for under S.46 which sets conditions that should be fulfilled by the Applicant; He or she must have stayed in Uganda for 12 months, fostered the child for 12 months, must not have a criminal record, must have a recommendation concerning his or her suitability to adopt a child from their country's probation and welfare office or other competent authority and satisfy court that his or her country of origin will respect and recognize the adoption order.

The Applicants have been cleared by the Federal Bureau of Investigations US Department of Investigations, Interpol Uganda, which issued both of them with a Certificate of good conduct under Enq. No.02293/18 for Cheryl and 01850 for Johnny issued by Were Michael of Uganda Police Force NCB Interpol, Kampala, and The Child Abuse Clearance Record from the South Carolina Department of Social Services.

The evidence of criminal clearance from America was attached on the Petition and marked as G2, G3, H1, H2, and H3.

They have also been highly recommended by Carolina Adoption services in a home study report dated 8th June 2017 attached and marked J, prepared by Dawn C. Bates, a Social Worker, a competent authority and James Ntege the Probation Officer of Mukono who knows the History and background of the child. Both reports are on record.

They have also averred in their affidavits in support of the petition that their country will respect the Adoption Order.

They have however not lived in Uganda and fostered the child for one year. Section 14 of the children (Amendment) Act 9 of 2016 amended section 45 (4) as follows:

“The court may in exceptional circumstances waive any of the requirements specified in subsection (1)”.

The child Victoria was present in court during the hearing. Court observed that she has knock knees the condition that has already been mentioned, the medical examination report is on record. She is 11 years old and the earlier the Surgery is done the better. The Petitioners have consulted a Surgeon in their home country who is willing to carry out the operation at no cost.

This court notes that foster care is not a permanent placement option for a child in need of care and protection. This care includes medical care.

As a general rule, the Social Worker is required to work for the eventual reunification of the child with her/his family or community if possible.

This approach must therefore be carried out within a frame work of planning for permanence in the child's life which must be balanced with understanding the need for stability of the child's life.

In some situations, it is in the interest of the child to be adopted by his or her foster parents.

In this case, the Petitioners have not fostered the child for one year as required by law, there is also no possibility that the biological parents will be in any better position in the near future to take care of the basic needs of Victoria.

Her medical condition which needs to be addressed urgently and the fact that the Petitioners are gainfully employed and need their jobs to look after Victoria which responsibility they have already undertaken presents exceptional circumstances to waive the statutory requirement of living in Uganda and fostering the child for one year.

In court's view, fostering for one year which is a temporary condition cannot be used to frustrate the process that leads to permanence in a child's life.

Section 47 of the children Act provides for consent of the parents if they are known.

Adoption leads to complete termination of parental responsibilities and rights. Removal of a child from their parents may appear to be unconstitutional but may be reasonable and justifiable in certain situations much as there may be no possibility of automatic review when the situation favours returning the child to the biological parents.

Parents' rights over their children are derived from their parental responsibilities and thereafter diminish as the child grows older.

In the case of **Gillick Vs West Norfolk (1986) AC (HL) 112 at page 184**

The House of Lords stated that;

“Parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child”

It is common knowledge that childhood is a process of development from lack of capacity to an attainment of capacity. This is a gradual process and a balanced theory of children's rights should reflect a combination of rights to protection and right to self-determination.

The father of Victoria gave his consent because he feels completely helpless and incapable of taking care of his child. He has failed to look after his other children as well. He however

wished to keep in touch and know what is happening to Victoria. He admitted that he cannot offer the best for his daughter. He signed the Consent to the Adoption.

Court however observed that deep inside him was a feeling of designation. He trusted the Petitioners as the best persons to take over his parental responsibility to help Victoria live a better life. He looked at them as better parents with a lot to offer than him. The Applicants have for sure fulfilled the legal requirements pertaining to adoption of a Ugandan child.

The question to be asked is whether Victoria is available for adoption. Victoria being a child of 11 years was asked about what she feels about her parents. She loves her parents and court observed that she has at the same time bonded with the Applicants. Victoria wishes to meet her parents in future. She wants to meet with her siblings.

The applicants were touched with the wish of both the father and the child. Of course the mother is mentally ill. Mr. Walter had this to say; **“Before coming here today 1½ years before, I met Victoria I felt the Lord had led us to adopt Victoria. We have always felt in the best interest of the child. It is best that she knows her family and that she knows her country. Before coming here today, we had decided that this is something we would be doing. We have a heart for the country Uganda and we want her to know that as well... We can be on Skype very often, face book, WhatsApp, we shall communicate when surgery is done and... share any important events...”**

Cheryl Ann had this to say; **“it is important that she has a story. It is her story. We don’t want her to lose her story. We want her to keep her culture and know the truth. It is not about us but it is all about her...”**

Generally speaking when a child has bonded with the biological parents and a need for adoption arises, it is usually critical for the child’s welfare to maintain ties with biological parents.

Circumstances exist where a parent may raise a child but a problem arises making parenting impossible with no family members able to take over the parenting role making adoption the best option.

When such circumstances exist it would be in the best interest of the child that the contact with the biological parents is maintained.

Victoria’s mother was normal before but became mentally unstable yet she has children. She can no longer execute her parental responsibilities. Victoria’s father is equally in a dire situation. He is not living with the other children. He is not capable of providing the basic welfare needs of his children like decent accommodation, education, medication, food and clothing.

Victoria knows her siblings. In our culture we believe in keeping the twins together and or in touch. She will certainly be happy to be in touch with Kato, the twin brother.

It is trite law that when making decisions concerning children, the welfare Principle is paramount. As mentioned earlier, emotional welfare is critical and as important as any other tenets of welfare. Unlike children who are very young and may not recall anything about their

birth parents, an 11 year old child cannot simply erase her background and family ties out of her mind.

It is also apparent that Adoption rights are mostly on the side of biological parents, not adopted children. The child does not have the capacity to decide whether or not he or she should ever get to know his/her biological parents.

Unless the birth parents want to remain anonymous, the child should be helped to remain in contact or get to know information about her family if it is in the best interest of the child.

It is trite law that the adoptive parent holds all the rights as the Legal parents, but in circumstances like these prevailing in this case, an open adoption would serve the best interest of the child.

Open adoption is a form of adoption in which the biological and adoptive families have access to a varying degree with each other, with the adoptive parents holding all the rights as a legal parent, while at the same time, both the adoptive and biological parents may exercise the option to open the contact in varying forms exchanging photographs, sending emails and physical visits between themselves.

This kind of adoption is common in the United States of America where Victoria would be going. It is ideal where adoption is seen as a social support where adoptive parents come in to help the biological parents who cannot afford to provide for the basic needs of their children. This of course is done in the best interest of the child.

Our law does not provide for open adoption. What it provides for is akin to closed adoption where there is no contact whatsoever between the biological parents and adoptive parents and the child after the adoption takes place. With closed adoption there is no interaction of any kind between biological parents and prospective adoptive families and no identifying information is provided either to the birth families or adoptive families. This happens when the adoption process is done through an Adoption Agency or an Attorney and both the adoptive and birth parents have nothing to discuss which is not the case here as the father had to consent to the adoption.

In Uganda our laws provides for an Adoption children Register under section 54 of the children Act CAP 59, where particulars of the adoptions under the Act are registered. My understanding of this section is that all relevant information about the biological parents, and adoptive parents is recorded and under section 55, the law provides;

- (1) Where a child has attained the age of 18 years or at an earlier age on the child's own request or at the discretion of the adopter, the child shall be informed by the adopter of the identity of his or her natural parents unless it is not in the child's best interest to do so.
- (2) The adoptive parent shall inform the child that he or she is adopted as soon as the child is of an age of understanding.

This court is mindful of the effect of an adoption Order as provided under section 51 of the children Act where all parental rights are extinguished and transferred to the Adoptive parent.

This court is however of the view that sections 54 and 55 of the children Act provides a leeway for the courts to make orders that can enable the adopted child to know her history even before she attains the age of 18.

Situations like the instant case where the Applicants are of a white race while the child is purely of African descent, in my humble view call for an open adoption which would not leave so many questions unanswered. It would enable the child understand why he or she is different in colour from his or her parents.

It is even more ideal in cases where the children are old enough to have bonded with their biological parents before the Adoption.

Section 33 of the Judicature Act and section 98 of the Civil Procedure Act gives the High Court inherent powers to make orders that may be necessary for the ends of Justice.

Section 98 of the Civil Procedure Act provides; “Nothing in this Act shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as maybe necessary for ends of justice”.

In the best interest of the child the Petition is allowed with the following Orders:

1. Johnny Walters Jr and Cheryl Ann Walters are appointed the adoptive parents of the child Babirye Victoria Namutosi and the relationship of parents is hereby established with all rights and privileges incident thereto including the right of inheritance of the property of the adoptive parents.
2. Given the special circumstances of this case, this Adoption shall be open with Adoptive parents keeping in touch with children safe Uganda for purposes of exchanging photographs, emails, whatsapp messages updating them about the condition of the child for the information of the birth parents and informing the child about her family provided such information is not stressful to the child.
3. For avoidance of doubt, the parental rights of having exclusive care, custody, and control of the child Victoria and parental Responsibilities for her maintenance, education, medical care previously with the biological parents is extinguished and vested in the adoptive parents.
4. The Registrar General of Births and Deaths is hereby directed to make an entry recording the particulars of this Adoption in the Adopted Children Register and to issue a Certificate to Babirye Victoria Namutosi reflecting the parental relationship established.
5. The Adoptive parents are at liberty to add their family name to the child’s names.

6. This Adoption Order shall be furnished to the Consular Department in the Ministry of Foreign affairs and Permanent Secretary Ministry of Gender, Labour and Social Development.

7. Costs of this Petition shall be borne by the Petitioners.

GIVEN under my hand and the Seal of this Honourable Court this **19th** day of **JANUARY, 2018.**

Margaret Mutonyi
JUDGE
MUKONO HIGH COURT