

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS CAUSE No. 32 of 2018

**IN THE MATTER OF SHAMILLAH NAAVA KAYAGA MASIMBI, SHANICE NAAVA
NABAWANGA MASIMBI AND SHAREEN NAAVA MASIMBI (MINORS)**

AND

**IN THE MATTER OF AN APPLICATION FOR A GUARDIANSHIP ORDER BY
ZALWANGO SARAH (BIOLOGICAL MOTHER)**

BEFORE: HON. LADY JUSTICE OLIVE KAZAARWE MUKWAYA

RULING

This is an ex parte application for legal guardianship brought by the applicant Zalwango Sarah biological mother to the three minors, Shamillah N.K. Masimbi, 8, Shanice N.N Masimbi, 11 and Shareen N.Masimbi, 4. It is brought under Article 139(1) of the Constitution, S.98 of the Civil Procedure Act, S.14 (1) and S.33 of the Judicature Act, S.3 and 6 of the Children Act as amended in 2016, Or.52 r.1 and 3 of the Civil Procedure Rules, SI 71-1. The application is supported by the affidavit of the applicant.

The grounds for the application are that the applicant jointly, with her husband, Muhammed Masimbi take care of the welfare of the said minors, their daughters. The applicant purchased land comprised in Busiro County Block 321 Plot 310 at Kapeeka which land she registered in the names of the three minors. She seeks to be appointed legal guardian over the children in order to mortgage the land with the Centenary Bank for their welfare. Copies of the birth certificates of the children were attached and marked 'B', 'C' and 'D'. A copy of the certificate of title was marked 'A'. Originals of both these documents were perused by this court.

In her affidavit and her sworn testimony in court, the applicant emphasised that she was unable to get a loan from the bank using the said land as collateral without the guardianship order applied for. Masimbi Mohammed Yusuf her husband testified that their three children were the subject of this application. He said he was aware that the land was in the names of the children and he had no objection to his wife being appointed legal guardian to the children for purposes of mortgaging the land.

Article 139(1) of the Constitution read with S.14 of the Judicature Act Cap 13, grants the High Court unlimited jurisdiction in all matters. S.98 of the Civil Procedure Act empowers the High Court to invoke its inherent powers to grant remedies where there are no specific provisions of the law under which such remedies may be granted. Above all, under S.3 of the Children Act as amended, the welfare principle and its guidelines are laid out. In making decisions regarding children, courts are enjoined to apply the welfare principle.

S.3(1) provides that *'the welfare of the child shall be of paramount consideration whenever the states, a court, a tribunal, a local authority or any person determines any question in respect to the upbringing of a child, the administration of a child's property, or the application of any income arising from that administration.'*

S.3(3) provides that *in determining any question under subsection (1), court or any other person shall have regard to:*

- a. the ascertainable wishes and feelings of the child concerned with due regard to his or her age and understanding*
- b. the child's physical, emotional and educational needs;*
- c. the likely effects of any change in the child's circumstances;*
- d. the child's sex, age, background and any other circumstances relevant in the matter;*
- e. any harm that the child has suffered or is at risk of suffering; and*
- f. where relevant, the capacity of the child's parents, guardian or any other person involved in the care of the child, and in meeting the needs of the child'*

The children in the instant case were aged between 11 and 4 years and this court did not interact with them. However, the court interviewed both their parents who agreed that it was in their best interests for the land registered in their names to be mortgaged to support their upkeep. In the Matter of Elijah Amumpaire and others, Family Cause 155/2015, Hon Lady Justice Percy Tuhaise had this to say:

‘...where the applicants, who are the infants’ biological parents, seek a guardianship order in respect of their biological children to enable them obtain a loan and use the infants’ certificate of title as security so that they construct a house on the land to generate income for the two infants, such order should be granted as it is for the welfare of the and the best interests of the said infants.’

In the instant case, the applicant is the biological mother to the children and she wishes to access the loan for their welfare and upkeep. This court is satisfied that this order would be in the best interests and welfare of the three girls.

I therefore order as follows:

1. The applicant, Zalwango Sarah is appointed legal guardian to the children, Shamillah N.K. Masimbi, Shanice N.N Masimbi, and Shareen N.Masimbi in respect to land comprised in Busiro County, Block 321 Plot 310 at Kapeeka.
2. Costs of this application to be met by the applicant.

Dated at Kampala this 11th day of July 2018

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Olive Kazaarwe Mukwaya