

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

ADOPTION CAUSE NOS. 016 AND 017 OF 2018

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IN THE MATTER OF KATUMBA FRANCIS (AN INFANT)

AND

**IN THE MATTER OF NAKITENDE AISHA JENNY NAMUGERI
(AN INFANT)**

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**IN THE MATTER OF A PETITION FOR AN ADOPTION ORDER BY TIMOTHY
ALAN WOZNICK AND HILLARY JEAN WOZNICK**

RULING

15 **BEFORE: HON. LADY JUSTICE EVA K. LUSWATA**

Introduction

Timothy Alan Woznick and Hillary Jean Woznic are the common applicants in Adoption Causes No. 16/2018 and 17/2018 for the adoption of Katumba Francis and Nakitende Aisha Jenny Namugeri (hereinafter referred to as Katumba and Nakitende respectively). The applications were presented under the Constitution of Uganda, The Judicature Act and Children Act (before and as amended) (hereinafter referred to as the Act) through M/s Nyombi & Co. Advocates.

25 At the hearing of 20/9/18, I confirmed that the applicants were seeking to adopt two children, each in their separate application. I thus made an order of consolidation to avoid duplicity and expedite resolution of the two applications. The applicants were present in Court with Nakitende, Bwamiki Mohamed and Harriet Nalyazi, Nakitende's parents. Also present were NamakulaZaija, Namulinda Amina and Nabukera Allen, her paternal aunt and grandparents
30 respectively.

On the other hand, Katumba was present in Court along with Ali Kkondo Sekitoleko, Makezie Isma, Katumba Francis and Tusaba Mariam, his biological father, maternal uncle and grandparents respectively. One Edema William was also present as the applicants' attorney here in Uganda. Ms Nazziwa Agnes and Ms.Fatuma Oman appeared for both
5 applicants.

The court took some time to interview some of those present at the hearing of 20/9/2018. Their responses together with counsel's submissions shall be considered in my decision.

10 **Background of the application**

It is stated in the two petitions that the petitioners are American citizens legally married on 5/12/2011 in Michigan USA, and now aged 48 and 44 years respectively. They are ordinarily resident at 8335 Vista Royale Lane, Rockford, MI 49341 USA, and when in Uganda, reside as tenants at Plot 7 House No. 3 Phillip Road, Jinja. The petitioners have no biological children
15 and are employed in the USA as a special needs education teacher and independent real estate agent respectively.

The petitioners have no blood relation with the children. They came to learn about the children's situation through M/s Life Adoption Services, an American adoption agency which
20 has a working relationship with M/s Welcome Home Ministries Africa (hereinafter referred to as the Home) in which the children were housed. They claim to have fostered both children since 5/7/2016 at the end of which period they made the decision to apply for adoption.

The antecedents of both children were not clear in either petition. However, I could deduce
25 from the documentary and oral evidence provided that, Katumba is child of the male sex, a minor citizen of Uganda born on 10/02/2013 to Ali Kkonde Ssekitoleko and the late Mbabazi Faridah. On the other hand, Nakitende is child of the female sex, is a minor citizen of Uganda born on 29/03/2010 to Bwamiki Mohamed and Nalyanzi Harriet who are both alive. Birth certificates for both children have been provided.

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The children who are resident in Uganda at the Home are not in actual custody of either petitioner. However, they claim to have *defacto* custody by virtue of foster care placement orders granted by the Probation and Social Welfare Officer, Jinja District (hereinafter referred to as PSWO) on 5/7/2016. That they have since July 2016 taken over full responsibility for the children's' material and educational needs and visited them numerous times in Uganda. Owing to difficulty of leaving their jobs in the USA, on 11/7/2016 the petitioners appointed Mr. William Edema as their attorney to look after the children in their absence.

The grounds for the adoption for the children are also not clear in both petitions. None the less, they were summarized by counsel in their submissions to be:-

For the child Katumba:-

- i. The petitioners have fulfilled the legal requirements of a adopting a child in Uganda.
- ii. The child is a part orphan with only a living father who is unable and unwilling to care of him.
- iii. The child has been under the foster care of the petitioners since 5/7/2016 who still wish to continue providing for him all parental care and all necessities for his welfare.
- iv. No local Ugandan family has shown interest in fostering or adopting the child.
- v. The petitioners intend to travel to the USA or other place where they live or work and need proper authorization to travel with the child.
- vi. The adoption is in the best interests of the child.

For the child Nakitende:-

- i. The petitioners have fulfilled the legal requirements to a child in Uganda.
- ii. The known biological parents and relatives of the child are unable and unwilling to care for her. They have consented to the adoption.
- iii. The child has been under the foster care of the petitioners since 5/7/2016 who still wish to continue providing for her all parental care and all necessities for her welfare.
- iv. No local Ugandan family has shown interest in adopting the child.

- v. The petitioners intend to travel to the USA or other place where they live or work and need proper authorization to travel with the child.
- vi. The adoption is in the best interests of the child.

5 **A brief background of the child Nakitende**

I was able to gather from the evidence of the numerous affidavits and counsel's submissions that Nakitende was born to Bwamuli Mohamed and Nalyanzi Harriet on 29/3/10. Both her parents struggled financially and eventually separated and Nalyanzi disappeared for good. The child was for some time entrusted with Namakula Zauja her paternal aunt who due to financial constraints, handed her over to the Home after obtaining suitable recommendations from the LC1 Chairperson Masese I, Jinja and the PSWO. It is confirmed from available records that the child was admitted into the home on 6/4/2011 and her formal commutal was granted on 7/10/11 by a Care Order of the Bugembe Magistrate's Court.

A brief background of the child Katumba

15 The available evidence is that Katumba was born on 10/2/2013 to Ali Konde Ssekitoleko and the late Mbabazi Faridah. Mbabazi died soon after Katumba's birth and Konde singly carried on with his care with some assistance from Katumba Francis his father. When Katumba ceased to offer any assistance, one Tusaba Mariam, the child's maternal grandmother took over the caring role for about four months.

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Konde was forced to retrieve the child from Tusaba because he found him to be severely malnourished. However, he still could not care for the child. That upon the advise of a friend and recommendation of the LC1 Chairperson of Wakisi I, LCI in Buikwe District, and with the intervention of the PSWO, he entrusted the child into the care of the Home on 27/6/2014.

25 The child was subsequently formerly committed to the Home through a care Order of the Bugembe Magistrate's Court on 22/12/2015.

Subsequent attempts to have the child re-united with his father Konde failed for the latter explained that he was still unable to care for him. He strongly preferred that the child to be adopted, a stance he maintained in my presence. Katumba's relatives in court overwhelmingly supported the applicant's wish to adopt him.

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A brief background of the applicants

According to the 1st petitioner, they were unable to have their own children and had for some time prayed for an opportunity to adopt in Africa. Uganda was the first choice owing to other families in their community in Michigan USA who had adopted Ugandan children from within the Home and who had been well assimilated into those American families. They went through the designated channels in Michigan up to the point when they were approved as a suitable adoptive family by the Home. They were able to see the children's photographs and learnt about their unfortunate pasts through communication with one Mandy Sydo, an official at the Home and by perusing documents sent to them.

Having considered all those facts, two issues come to mind for resolution by this court: -

1. Whether the applicants qualify to be appointed adoptive parents of the two children.
2. Whether this application if granted, will be in the best interests of the children.

Issue No.1 - Whether the applicants qualify to be appointed adoptive parents of the children.

Provision is made for the adoption of children in Uganda in sections 45, 46 & 47 of the Children Act (as amended) (hereinafter referred to as the Act). That notwithstanding, it is well cemented in our jurisdiction that any order affecting a child, including an adoption order, is to be made with paramount consideration of their welfare. See for example, **In the matter of David Twesige (An infant) Adoption Cause No. 02/2009 (High Court Fort Portal)**. The Act proceeds to give extensive guidance on what the Courts should consider in their decisions which of course should be in line with Article 34 of the Constitution, on the Rights of the child.

Under Section 45 of the Act, joint application by spouses is allowed where they have attained 25 years, or are at least 21 years older than the child. In this case, the application is presented by joint applicants who are married and are aged 48 and 44 years respectively, and thereby 21 years older than the two children. They would qualify in that regard.

Under Section 46 of the Act, non-citizens may in exceptional circumstances adopt a Ugandan child. Conditions are set for them to fulfill and although the Court is strongly persuaded that those conditions are mandatory, the court is permitted in exceptional circumstances to waive any of those requirements where the circumstances of the case deserve.

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The applicants filed with this court a criminal record check carried out in their home county confirming that they have no criminal record. They have in addition filed home study reports for each child, prepared by M/s Families Through Adoption, a Hague accredited, nonprofit agency licensed by the State of Michigan. They were confirmed to be suitable adoptive
10 parents and that the State of Michigan provides for the full judicial recognition of a foreign adoption like this one. With regard to our local authorities, the PSWO issued reports dated 16/3/2018 in which he highly recommended both applicants as suitable and capable parents. Prior to that, he kept the applicants under observation during the fostering period and issued progressive reports highlighting their efforts to attain the children's welfare.

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I do have some reservations against the PSWO's reports; those will be expounded upon later in my ruling.

In my view, the applicants have fulfilled much of what is required of them under Section 46
20 (1), (c), (d) and (e) of the Act.

According to section 47 of the Act, consent of the parents if known is necessary. I would have no doubt that the available parents of either child consented to these applications. Both fathers signed formal consents and prior to this. Mr. Konde, Katumba's father, had indicated a
25 preference that the child be put up for adoption. Nalyanzi the mother who mentioned she is currently resident in Nakasongola, also stated that her financial situation is dire and she has no capacity to care for the child. She too consented to the adoption. The other close relatives present were of the same view. None contested the adoptions when they appeared before me in court. Mbabazi, Katumba's mother was confirmed dead, and thus unable to give her
30 consent. I am prepared to waive that requirement in her respect.

The requirement for residence in Uganda and the statutory fostering period

It is a requirement under S. 46(1) (a) & (b) of the Act that the applicants must have stayed in Uganda for at least one year and fostered the child under supervision of the PSWO for the same period.

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The applicants conceded that they have not lived in Uganda for the statutory period. The reasons for their inability to reside in Uganda are varied. They are not employed here and thus have no source of income in Uganda. That it would be detrimental to the children's' welfare if they lost their employment from which they derive a livelihood and income to look after them. They submitted however that they have fostered both children since 5/7/16 a period of more than two and a half years and have a temporary or ordinary residence in Uganda at Plot 7 A3 Iganga Road in Jinja District where they stay each time they visit Uganda. They have for the reason of their absence from Uganda granted powers of attorney to one William Edema to look after the children while they are not in Uganda.

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In his submissions their counsel added that they have so far shown full commitment to look after the children and have received favorable recommendation both from their home country and the PSWO of Jinja as suitable adoptive parents. Citing authority, counsel persuaded Court to consider the current relationship between the applicants and the children to be what they referred to as "*constructive fostering*". That term was coined in the decision of Justice Mukibi in **Adoption Cause No. 10/2017 In the Matter of Innocent Turyahabwe (Child)** he held on page 8 that:-

".....the the requirement for fostering a child for one year does not solely mean having physical custody of the child. It includes any conscious effort made by prospective petitioners to assist/support a child through any practical arrangement. Support may be channeled through a parent or other relative of the child, or any other person having physical custody of the child who has a special arrangement with the prospective petitioners for receiving and administering such support. Should there be need for a term of this art, this may be called "*constructive fostering*".

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Indeed that term is not mentioned in our laws at all and must have been an attempt by the Court to address specific circumstances of that case. Indeed, the facts in that case can be distinguished from the circumstances before me. The subject of adoption in **Innocent Turyahabwe** was a much older child of 17 years and a complete orphan. The applicants
5 Patrick and Margaret Showalter had for several years before been appointed legal guardians (and then adoptive parents) of Sharon Showalter, Turyahabwe's biological sister who was now a member of their family. They sought to reunite these sibling orphans into a happy family. It seems in that case that the Showalters had had a previous long standing relationship with Turyahabwe and his local guardian in Uganda. The Judge was on those and other
10 grounds satisfied that the applicants had sufficiently been present in Uganda. That notwithstanding, that being a High Court case, the decision may be persuasive, but not binding upon me.

That said, I take judicial notice of the fact that our Courts are increasingly receiving cases of
15 non residential foreign applicants for adoption who may wish to take advantage of this principle. In light of the requirements of Section 46 1(a) & (b) of the Act, I will take some time to analyze that provision in line with the facts of this case.

The previous position in the Act was a requirement under Section 46 1(a) & (b) for applicants
20 to have resided in Uganda for a period of three years and fostered the subjects of the applications for a similar length of time. That position was amended in 2016 when the duration was reduced to one year. I believe the driving force of the Legislature in that amendment, was an appreciation that for many people, it was economically and socially oppressive to leave their homes and lives and move and settle in Uganda for the sole reason of
25 adoption. That section had become a deterrent to serious foreign applicants for adoption and shortening that period was a way of accommodating such people, while at the same time, ensuring that they took off sufficient time to bond with the children whom they intended to adopt within a social and cultural environment to which the children were accustomed. The compromise was to reduce the period to one year. It appears that even then, more applicants
30 are still unprepared or unable for good or other reasons to reside in Uganda for that period.

Beyond that amendment, a new inclusion to Section 46 of the Act was made to permit the Court in exceptional circumstances to waive any of the requirements that have to be met by a foreign applicant, including that of the residence and fostering period. This is clearly judicial discretion to be exercised with much caution and after evaluating the circumstances of each case. Even then, I remain conscious that the welfare principle on which our law is strong, must under all circumstances remain paramount.

The decision in **J Vrs C (1970) AC 668 at page 710-711** would be useful in this regard. It was held that “...*more than that, the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. [Welfare] connotes a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child’s welfare as that term is now understood ...[it is] the paramount consideration because it rules upon or determines the course to be followed.*”

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S.M. Cretney and J.M. Masson have in their text **Principles of Family Law 6th Edition at page 723** advised that the welfare test requires individual assessment of each case. Consequently that, precedent may have little value except in certain cases to indicate the approaches predominantly favoured by the Judiciary at any given time. Thus, my decision will be more informed by the current legal provisions, the circumstances of this case and ultimately, whether the children’s’ welfare is met.

It is clear that the applicants were appointed foster care parents on 5/7/2016. Being unable to reside in Uganda, they entrusted that responsibility to one Edema William by power of attorney. A definition of the term fostering or foster care placement will be useful

Under Section 2 of the Act, the term foster care placement is defined to be “..*placement of a child with a person who is not his or her parent or relative and who is willing to undertake the care and maintenance of the child*”. A foster parent means “*a person not being the biological mother or father or relative of the child who assumes parental responsibility of the child by way of a care order.* On the other hand, parental responsibility means ...”all rights,

duties, powers responsibilities and authority which by law a parent of a child has in relation to the child”.

I believe that an important policy emanating from the above provisions is the realization that foster parents and children can form a close relationship which should be recognized and protected by the law in force. Even then, the common law position is that a parent cannot transfer or surrender parental responsibility by private agreement or arrangement exceptions being when a child is entrusted for example, into a school, to child minders or a recognized institution. **See Jonathan Herring in Family Law 2nd Ed. At page 651.**

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By virtue of the Care Order, the children were entrusted to the home who in turn recommended the applicants as suitable foster parents, and ultimately adoptive parents. Serious consideration must be taken of the undertakings these applicants made (and indeed all applicants for a foster care placement will make in Uganda) under the Foster Care Placement Rules of the Act. They undertook to look after the children's' health and have them medically examined, permit the PSWO or other representative of the Ministry to visit their home and see the children any time, to inform the PSWO if the children befell an accident or other calamity, and inform the PSWO whenever they changed address. I believe that those were the powers and more handed over to Mr. Edema in the power of attorney which powers were to continue “...in force until they return”.

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I see no provision in our laws permitting foster parents to entrust their responsibilities and powers of a child to another party or entity by power of attorney or other means. However, I am persuaded that the applicants can meet all the children's material needs through Mr. Edema and the latter would be in a position to present the children up for examination and review whenever the PSWO or other appropriate officer deemed so. Indeed, he would be able to do so because according to paragraph 3 and 9 of his affidavit in support of the application, the primary objective of the Home is to take care of unfortunate abandoned children, who are then nurtured up to the age of three years, after which they are prepared for resettlement or placed in suitable adoptive homes.

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That said and it is my view, that the Home had completed its responsibility when it appraised and then recommended the applicants as suitable foster and then adoptive parents for these children. I therefore find it contradictory that it is into the care of a top official in that same institution that the applicants chose to leave the children, thus prolonging their institutional
5 care. It also appears that the PSWO has continued to evaluate the children not in the home of the applicants, but the Home for as conceded by the 2nd Applicant, even when the applicants come to Uganda they only spend the day with the children who then sleep at the home.

The requirement that a foster parent should have physical custody of the child during the
10 fostering period cannot be underestimated. Under Rule 6 of the second schedule to the Act, the PSWO must follow an elaborate procedure before a foster care placement is approved. One of the requirements is to visit the home where the child is to be placed and ascertain its suitability and that of all its occupants. It is to the same home that the officer will return during the fostering period to check on the progress of the foster parents and child and at the
15 appropriate time, make a report that will assist the Court to make a decision on an application for adoption.

The circumstances of this case would not be ideal for the PSWO to make such a report. He was only able to evaluate the applicants during the short periods they were in Uganda, and
20 even then, the children continued to leave in the institution from which they were expected to have left. The applicants themselves appeared to have changed addresses in Uganda. According to Annexure 'D' they were first tenants of Mr. Edema at plot 7 House A3 Iganga Road for an unspecified period. On other visits they hired in an apartment owned by the school. The probation officer did not in his reports mention that he was aware of those
25 changes and conspicuously did not report the arrangement between the applicants and Mr. Edema. There must have been reason for this.

Again, I have noted that in his report, the PSWO confirmed from the applicants that they undertook to "*provide a balance in all areas so that the children are not stigmatized by their*
30 *adoptive status*". In my view, this would entail that the applicants themselves have first understood the culture and way of life of these children to a sufficient degree. That knowledge

and experience would empower them to prepare the children for the American culture and way of life which is quite different from what they have been accustomed to. As I have said, I believe that was an important consideration made when the residential period was first put at three years and then reduced to one year.

5 Judge Chigamoy Owiny Dollo **In the matter of David Twesigye (an infant) and in the matter of an Application by Dawn Pittman and Dustin Pittman HCMA No. 0004 of 2008 (at page 4, 5 and 6)** considered the issue of societal resettlement. He stated that:-

10 *“...while the primary right of a child is to grow up under the tutelage of his or her parents, or parent, for the obvious reasons of emotional attachment; if it is shown to the satisfaction of a competent authority, and in this case the court, that vesting legal guardianship of the child in the applicants, it would serve the best interest of the child, then it would be proper for this court to make an order removing such child from the parent. Court has to weigh the*
15 *emotional loss of staying with ones parents against the opportunities that would come with the relocation away from the hands of the parents. Therefore, in determining whether or not to vest legal guardianship in the applicants herein as sought, the issue of education and guidance, health care and medical attention, and shelter which the child would benefit from vis-à-*
20 *vis the situation of the child before the grant of the guardianship, are principal factors for considering such grant.... Therefore, the court has to be satisfied that in the circumstance of this case, the child will not become a victim of any form of prejudice from the society he is headed for....”.*Empasis of this Court

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That matter was dealing with guardianship but the principles would be equally applicable to adoption.

The applicants have admitted that they are only able to visit the children periodically
30 during the fostering period. The periods that they have been in Uganda are not certain. According to their lawyer, they were in Uganda on 29/6/16 and 18/12/16 a

period of only two days. The PSWO's report indicates their presence on 5/7/16 and 18/12/16. The duration of their stay is not given. The record in Annexure 'H' to the 1st applicant's affidavit indicates entries between 29/6/16 to 11/7/16 and 18/12/16 to 30/12/16, a sum period of 24 days in 2016. They were obviously in Uganda for the
5 hearing of 20/9/2018.

Although they have provided all necessities of life, I am not persuaded that the time they have spent in Uganda is sufficient for the applicants to have bonded with the children emotionally, physically and socially. It is too short a time for them to have
10 understood the children's way of life and culture. They would not be in a position to prepare these children for the life to which they are destined when they themselves have not fully appreciated and understood where the children are coming from. They will not be adequately equipped to protect the children from stigma, when they themselves have no real lived experience in Uganda and specifically in Busoga
15 where these children hail. My observations are echoed in the decision in **Saunders Terry Tobin and Semujju Cromweel Clifford (Minors) Misc cause No. 10/2017** in which Court observed that the requirement for an applicant to have stayed in Uganda for a period of one year was meant to ensure that all applicants acclimatize to our culture and way of life and also bond with their charges.

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I should mention that I was not impressed with the applicants' existing relationship with Mr. Edema. Working through him for such long periods of time makes them appear as carrying out parenting "at *arm's length*". I would strongly caution Mr. Edima and others like him to desist from taking over such serious responsibility
25 through dubious arrangements. Being a strong actor in the area of children rights in Uganda, he should be more cautious of his decisions.

I do appreciate the financial predicament the applicants would be faced with if they both decided to leave their work in the USA. However, their situation is not an
30 exception. This is not a "single-parent" family and the applicants are both gainfully

employed. The 2nd applicant reported that she is an independent real estate contractor working on commission. That implies a flexible work schedule.

In my view, the couple can between them decide the spouse who can take time off to
5 live with the children in Uganda for the fostering period. The Court may be even prepared to consider an applicant who has not lived the full term of the fostering period but at least, a duration that connotes sufficient interaction with the child and their lived environment. Indeed the Court has done so on previous occasion.

10 It may well be that the applicants have satisfied most of what is required of them under our law. However, the requirements under Section 46 of the Act were meant to be mutually inclusive and supportive of each other. I hasten to add that these children are most probably destined for institutional care in the short or long run and adoption would be the most ideal alternative. However, for the reasons given, I do
15 not find that alternative to be in the best interest of these children under the current circumstances. I would borrow **Bromley's** advice that:

"...in applying the welfare principle, the Court must act in the child's best interests...it should be appreciated that the Judge is not dealing with what is ideal for the child but simply what is the best that can be done in the circumstances..." See **Bromley's Family Law, 8th Edition at**
20 **page 338.**

In summary, I am much persuaded that the residential requirement for one year or such appropriate period should apply strictly to the applicants in this case. I choose not to waive it. The applicants are strongly advised to consider my observations and recommendations given
25 in this ruling. They are not restricted from filing a fresh application after fulfilling any outstanding requirements for the adoption of these two children.

I accordingly decline to allow the application. The children can continue in residence at the Welcome Home Ministries of Africa or any other appropriate and legally recognized institution that the Home may refer them to. This ruling does not take away any parental

responsibilities that the applicants may have under the foster care placement. They therefore can continue to love, care and support these children.

The applicants shall meet the costs of these two consolidated applications.

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I so order.

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10 **EVA K. LUSWATA**

JUDGE

19/03/2019