

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
FAMILY CAUSE NO. 4 OF 2021
IN THE MATTER OF ELIANA MARIA KITAMIRIKA, EVANA
SPECIOZA KITAMIRIKE AND SHAMMAH GABULA KITAMIRIKE
(INFANTS)

AND

IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP
BY GABULA EDWARD KITAMIRIKE (APPLICANT)

BEFORE: HON. JUSTICE SUSAN OKALANY

RULING

INTRODUCTION

1) This is an application brought by way of notice of motion for legal guardianship under **Article 139(1) of the 1995 Constitution of the Republic of Uganda, Sections 16, 35 and 41 of the Judicature Act, Sections 3, 4 and 5 of the Children Act**, as well as **Section 98 of the Civil Procedure Act and Order 5 Rules 1 and 2 of the Civil Procedure Rules**. The applicant seeks orders that:

1. The applicant be appointed legal guardian of Eliana Maria Kitamirike, Evana Specioza Kitamirike and Shammah Gabula Kitamirike, in respect of land comprised in Kyadondo Block 120, Plot 2222, Nangabo sub county, Wakiso District, for

purposes of assigning, transfer, sell or transact in any way for and on behalf of the children;

2. The Applicant be appointed legal guardian of Eliana Maria Kitamirike, Evana Specioza Kitamirike and Shammah Gabula Kitamirike in respect of land previously known as Kyadondo, Block 120, Plot 1523, Nangabo, now comprised in Kyadondo Block 120, Plot 2221, Nangabo subcounty Wakiso District, for purposes of transferring it on behalf of the children, to Abaho Bekwatsize Boaz; and
 3. Costs of the application be provided for.
- 2) The grounds of the application are set out in the affidavit of the applicant, Gabula Edward Kitamirike and briefly are that:
- a) The applicant is the biological father of the infants Eliana Maria Kitamirike, Evana Specioza Kitamirike and Shammah Gabula Kitamirike aged 8, 5 and 3 years respectively;
 - b) He and the children are jointly registered proprietors of land now described as Kyadondo, Block 120, Plot 2222, Nangabo Subcounty, Wakiso District;
 - c) The applicant purchased the property as an investment for the children;
 - d) That at the time of the purchase, the property had a squatter who had purchased part of the land from its former owner, although his title to the land had not been processed;
 - e) The said squatter has now processed his title and has subdivided the land, his part being comprised in Block 120 Plot 2221.

- f) He now wishes to have his portion of land registered in his own name from the residue main title that was registered in the names of the applicant, his wife and the minors;
- g) The minors cannot enter into any contract legally or execute the transfer, except through a legal guardian;
- h) The applicant intends to execute transfer forms to facilitate the registration of the land of the squatter in his names and as well as carry out investments on the land that he jointly owns with the minors, in order to generate income for school fees and for the children's well-being; and
- i) It is in the best interests of the children that this application is granted.

BACKGROUND

- 3) According to the applicant in his affidavit in support of the application, he and his wife Samali Wakooli, sometime in May 2020, purchased land known as Kyadondo Block 120, Plot 1523 at Nangabo and registered it in his name, in the name of Samali Wakooli and the infants herein.
- 4) At the time of the said purchase, Mr. Wabala George, the vendor, informed him that part of the land had earlier on been sold to a one Abaho Bekwatsize Boaz who was a squatter and who was in the process of having his portion mutated from the main certificate. Abaho Bekwatsize Boaz has now completed the process of acquiring his certificate of title in which he had the original Kyadondo Block 120, Plot 1523 mutated into Plots 2221 and 2222 and now wishes to register Plot 2221 in his name. Kyadondo Block 120, Plot 2222 at Nangabo, belongs to the

applicant, his wife and the infants, as joint tenants while Kyadondo Block 120, Plot 2221 (also still registered in the names of the applicant, his wife and the infants) is the plot which Abaho Bekwatsize Boaz seeks to have transferred and registered in his name. The applicant asserts that the minors, as co-proprietors of the land, do not possess the legal capacity to transact, hence the need for the appointment of a legal guardian to execute the transfer on their behalf.

REPRESENTATION

5) Ms. Shirley Kongai represented the applicant.

SUBMISSIONS OF COUNSEL

6) Ms. Kongai in her submissions reiterated the contents of the affidavit in support of the application, submitting that **Article 139(1) of the constitution of Uganda** and section **14 of the Judicature Act**, gives the High Court unlimited original jurisdiction in all matters. That similarly, **Section 98 of the Civil Procedure Act**, empowers the High court to invoke its inherent powers to grant remedies where there are no specific provisions made for obtaining the remedy sought.

7) Additionally, she submitted that the provisions of **Article 34 of the Constitution** of the **Republic of Uganda**, **Section 3(1)** of the **Children Act**, **Article 3(1)** of the **United Nations Convention on the Rights of a Child** and **Article 49(1) of the African Charter on the Rights and Welfare of the child** have been fortified by courts, which have held that in all matters

concerning children, the best interest of the child shall be the primary consideration.

- 8) According to counsel, the issue for determination in this application is whether the application is brought in the best interest of the children. Counsel Kongai submitted that the applicant is the father of the infants who are aged 8, 5, and 3 years respectively. Copies of the children's birth certificates are attached to his supporting affidavit as proof of paternity. She asserted that the applicant has produced the certificate of title of the stated property where the registered proprietors are himself, his wife and the infants as joint tenants.
- 9) Furthermore, she asserted that the applicant has produced the sale agreement that was made at the time of the purchase of the property in question, indicating that Abaho Bekwatsize Boaz had an interest in part of the land, although he had not yet processed the certificate of title for his particular portion; the said Abaho, having completed the process of obtaining a title for Block 120, Plot 2221, which is still in the name of the applicant, his wife and children, now desires that his portion be transferred into his name. She maintained that since the children are minors and cannot execute a land transfer on their own, this application for legal guardianship was brought to enable the applicant execute the transfer on their behalf.
- 10) Counsel additionally emphasized the fact that the said transfer of land will not affect the welfare of children and that to protect the rights of children to own property and to benefit there

from, without jeopardizing their welfare, courts have granted guardianship orders to the biological parents or other persons who have demonstrated that their intention is to further the welfare of such children. In support of her assertion, she cited the decisions in the cases of Re **Mark Siduda Trevor (infant) Family Cause No 213 of 2014** and **Deborah Joyce Alitubera and Richard Masaba, Civil Appeal No. 70 of 2011.**

- 11) Ms. Kongai additionally averred that the court needs to determine whether an applicant for legal guardianship has any interests adverse to those of the minors who are the subject of the application, and that the minors physical, emotional and educational needs will be sufficiently met by granting the order for legal guardianship.

RESOLUTION

- 12) I have considered the application, the submissions of counsel and the law applicable. I agree that the main issue for determination in this matter is: *Whether it is in the best interests of the minors that a guardianship order is granted to the applicant in respect of the property in question.*
- 13) The United Nations Convention on the Rights of the child underlines the following principles, providing guidance on the treatment of Children in all aspects of their lives:
1. Best interest of the child - Article 3;
 2. Protection of the right to life, survival and development - Article 6;

3. Right to be heard and respect for the views of the child – Article 12(2); and
 4. Non-discrimination -Article 2.
- 14) Specifically, **Section 3** of the **Children Act Cap 59** as amended, in my view encompasses the above four principles of the convention on the rights of a child. It states:
- “The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines the question in respect to the upbringing of the child, the administration of the child’s property, or the application of any income arising from that administration”.*
- 15) In determining the suitability of an applicant to be appointed as guardian for a child, the court is guided inter alia by **Section 43F (1) (e)** of the **Children Act** which provides that the court shall before making a guardianship order satisfy itself that: *“Consideration has been given to the wishes of the child, having regard to the age and understanding of the child, where in the view of the court, the child is able to understand the guardianship proceedings...”*
- 16) The applicant in his affidavit depones that he is the biological father of the infants Eliana Maria Kitamirike, Evan Specioza Kitamirike and Shammah Gabula Kitamirike. He produced copies of the children’s provisional birth certificates, attached as annexures **A, B and C** respectively, as proof of that fact the infants are his children. The applicant further depones

that he and his wife Samali Wakooli, purchased land known as Kyadondo, Block 120, Plot 1523, Nangabo, which they registered in his name, in the name of Samali Wakooli and their children Eliana Maria Kitamirike, Evana Specioza Kitamirike and Shammah Gabula Kitamirike (the infants) as joint owners. The original certificate of title in regard to Kyadondo, Block 120, Plot 1523, Nangabo, is attached to the supporting affidavit as annexure **E**.

17) Obviously, the infants in this matter, who are co-proprietors of the land in issue, do not possess the legal capacity to execute any transfer or to transact in anyway concerning the land, except through a legal guardian. The mutated certificates of title for Kyadondo Block 120, Plot 2221 and Plot 2222 at Nangabo, are attached to the applicant's affidavit as annexures **H** and **G** respectively.

18) At the hearing of this application, I examined the children to ascertain their views and feelings on the matter. Eliana Maria Kitamirike stated inter alia, that she was 8 years old at the time of the hearing of the application. She is currently home schooling together with her sibling Evana Specioza Kitamirike and their cousins, in the home of their said cousins Adrina and Abigail Amani, pending the opening of schools. The applicant and Ms. Samali Wakooli are her parents. Her family stays in Kabaka Kitezi Zone. Before the COVID19 restrictions, she was attending school in Kampala Junior Academy in Kitante, together with Evana Specioza Kitamirike. However, she did not know why she was in court.

- 19) The second child Evana Specioza Kitamirike aged 5 years, gave similar testimony to what Eliana Maria Kitamirike stated in court.
- 20) The 3-year-old Shammah Gabula Kitamirike, was as expected, too young to speak for himself. He was too destructed and playful and could not speak well. He was thus not be examined.
- 21) My impression of the infants is that they are healthy and happy children, who appear well protected and empowered by the applicant and his wife Ms. Wakooli. Except for the youngest one, the two girls spoke freely with me, exuding the fact that they are undergoing proper formal and informal education, are loved by their parents and are developing quite well. As expected, they had no idea why they had come to court on that day. The youngest one too, demonstrated by his playfulness and attachment to his father and siblings, that he was well cared for by his family. It is clear to me from the facts that I discovered during my examination of the infants, that the rights to life, survival and development of the infants are well protected.
- 22) Also, from the clear facts of the case as shown in the supporting affidavit and its attachments, particularly the land sale agreement attached as annexure **F**, the interests of Abaho Bekwatsize Boaz on the said land were fully recognized by the applicant and the vendor at the time of the purchase of the land. The said Abaho Bekwatsize Boaz was in the process of procuring a certificate of title when the applicant purchased the land.
- 23) His desire now is that his portion, measuring 11 decimals, be transferred and registered in own his name. That transfer can

only be executed by all the proprietors on the title known as Kyadondo Block 120, Plot 2222, who include the minors, who as I have already observed above, have no legal capacity transact. I thus agree with counsel Kongai that empowering the applicant to execute a transfer of the land that is the subject of this application on behalf of the infants, is not adverse to the interests of the infants, since Plot 2221 lawfully belongs to Abaho.

24) In any case, I find that appointing the applicant as the legal guardian of Eliana Maria Kitamirike, Evana Specioza Kitamirike and Shammah Gabula Kitamirike, for purposes of assigning, transferring, selling or transacting in any way for and on behalf of the children in respect of land comprised in Kyadondo Block 120, Plot 2222, Nangabo sub county, Wakiso District, will not prejudice the best interests of the infants, considering the evidence I recorded during my interaction and examination of the infants, which supports the fact that the applicant and his wife are very much on the right truck in promoting the physical emotional and educational needs of the infants. It is my considered opinion therefore that this application for Legal Guardianship was brought in the best interests of the infants.

25) In the result, I grant it with the following orders:

- a) The Applicant is appointed legal guardian of Eliana Maria Kitamirike, Evana Specioza Kitamirike and Shammah Gabula Kitamirike in respect of land comprised in Kyadondo Block 120, Plot 2222, Nangabo sub county Wakiso District (previously known as Kyadondo, Block 120, Plot 1523, Nangabo, in Wakiso district), for purposes of assigning,

transferring, selling or transacting in any way, for and on behalf of the children;

- b) The Applicant is appointed legal guardian of Eliana Maria Kitamirike, Evana Specioza Kitamirike and Shammah Gabula Kitamirike in respect of land comprised in Kyadondo Block 120, Plot 2221, Nangabo subcounty Wakiso District (previously known as Kyadondo, Block 120, Plot 1523, Nangabo in Wakiso District), for purposes of transferring it on behalf of the children, to Abaho Bekwatsize Boaz; and
- c) The costs of this application will be met by the Applicant.

I so order.

Susan Okalany

JUDGE

11/3/2020