

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MAKINDYE
(FAMILY DIVISION)
IN THE MATTER OF THE CHILDREN ACT, CAP 59 AS AMENDED
ADOPTION CAUSE NO. 34 OF 2020
AND
IN THE MATTER OF A PETITION FOR ADOPTION OF KANSIIME
BRIDGET BY BENJAMIN VAN DYKE DAVID AND KARI MARIE DAVID**

BEFORE: HON. JUSTICE SUSAN OKALANY

RULING

[1] This petition is brought under the provisions of the Children Act Cap 59 as amended, wherein Benjamin Van Dyke David and Kari Marie David, herein referred to as the 1st and 2nd petitioners respectively) are praying for:

- a) An order for the adoption of Kansiime Bridget, hereinafter referred to as the child;
- b) The costs of this petition to be provided for by the petitioners; and
- c) Such further and other orders that the court may deem fit.

[2]The petition is supported by affidavits in support of the 1st petitioner and the 2nd petitioner, Rachael Kabahuma - a Social Worker at Mercy Child Care Ministries and Nakazibwe Mary - the former Senior Probation and Social Welfare Officer of Wakiso district.

BACKGROUND

[3]The child was at the age of 7 years only, abandoned in Ganda village, Wakiso sub county, Wakiso district, on 24th October 2016. The matter was reported to Nansana Police and the officer in charge of the Child and Family Protection Unit of Nansana Police Station, informed the Senior Probation and Social Welfare Officer of Wakiso district at that time, a one, Ms. Mary Nakazibwe about the child's plight. Ms.

Nakazibwe subsequently referred the child to Mercy Child Care Ministries, an approved home for children. The child was placed in their care and custody as efforts to locate the child's family continued. Subsequently, the Family and Children's Court of Kakiri on 12th January 2017, issued a care order for the child to Mercy Child Care Ministries. Efforts to locate the family of the child became futile. Consequently, the director of Mercy Child Care Ministries informed the petitioners about the child. The petitioners approached Ms. Nakazibwe expressing their interest in fostering the child with the intention of eventually adopting her. The child was consequently placed under their care on 11th October 2018.

[4] The affidavit evidence of the petitioners shows that the 1st petitioner is a citizen of both Uganda and the United States of America, while the 2nd petitioner is a citizen of the United States of America. They have been married since 22nd February 2013 and have one biological child named Judah Benjamin Adyeri David aged three (3) years and a ten-year-old adopted child named Shaluwa Mukisa Atuhaise. The petitioners are desirous of adopting the child, whom they have fostered since 11th October 2018. They live in a rented house located in Naluvule LC1, Naluvule village, Naluvule ward, in Wakiso town council - Wakiso district. Furthermore, the 2nd petitioner has a Uganda Certificate of Residence valid for a period of ten years running from 2nd June 2016 to 2nd June 2026.

[5] The 1st petitioner founded Hope Speaks Ministries, where he works as Country Director, while the 2nd petitioner works with the same organization as the Executive Director and speech language pathologist.

[6] It is the petitioners' belief that they are mentally, physically and financially fit and capable of adopting the child and providing for her needs. They assert that they do not have criminal records, neither

have they received or agreed to receive any payment or reward in consideration for the adoption of the child. They also assert that they have not given anyone any payment or reward in consideration for the said adoption.

[7] There is report of a Senior Probation and Social Welfare Officer attached to Wakiso district a one Mary Nakazibwe, who recommends the petitioners as suitable adoptive parents who have bonded well with the child.

[8] When the matter came up for hearing on 19th February 2021, the court examined the 1st petitioner and the child. The 1st petitioner reiterated the contents of his affidavit in support of the petition and emphasized that in his organization - Hope Speaks Ministries, works with people, with communication challenges, with the aim of helping them learn how to effectively communicate. He explained that the said organization raises money from churches, communities, business people in the United States of America as well as from clients who can afford their said services. According to him, the funds raised through the different stakeholders, facilitate clients who cannot afford their services, enabling them to access the needed treatment freely. While he started Hope Speaks Ministries in 2015, it was fully registered in 2017 when he became its Country Director.

[9] It was also his testimony that he lost his father when he was only six (6) years of age. His mother died in 2002. It was his father's friend, a one Mr. Vincent Katungi who took him up, but before he could complete his secondary school education, Mrs. Katungi kicked him out of their house. He went to live in Mercy Child Care Ministries, the same institution that took care of the child.

[10] He subsequently met Pastor Wilson Bugembe, the founder of Mercy Child Care Ministries and Pastor of Light World Church Nansana, when he was a student of Maryland High School, where he sat for his

senior four exams. He attested that he later on met Mr. Troy Van Dyke and Mrs. Diane Van Dyke at Light World Church Nansana in 2005. Mr. and Mrs. Van Dyke sponsored his advanced level education at Lubiri Secondary School and also sponsored him through college in Grand Rapids, Michigan USA, from 2008 to 2012. The 1st petitioner obtained citizenship in USA in 2017 after getting married to the 2nd petitioner. That he is a holder of a certificate of dual citizenship issued by the Ugandan Government.

[11] Upon my examination of the child, she affirmed that she had stayed with the petitioners for a period of two years and that her siblings were Juda and Shaluwa. She further testified that she goes to Heritage International School and is in Grade 3. It was her testimony that she lived at Mercy Ministries under the care of “Mummy Haven” and while there, she attended Rafiki School for baby class and then attended Mercy Christian School for her primary education.

REPRESENTATION

[12] Mr. Isaac Muhumuza represented the petitioners.

SUBMISSIONS

[13] Counsel for the petitioners was **authorized** to address this court by way of written submissions. I have carefully considered this petition, the submissions of counsel and the law applicable. Mr. Muhumuza raised the following issues for determination during his submissions:

1. Whether the petitioners are eligible to adopt the child; and
2. Whether it is in the child’s best interest to be adopted.

[14] This court shall adopt the said issues to aid it in the determination of this petition.

Issue One - Whether the petitioners are eligible to adopt the child

[15] The Children Act as amended, in **Sections 45(1), 45(4), 45(5), 46 (1), 46 (2), 47 (1) and 47 (5)** stipulates conditions that noncitizens must fulfill before they as intending adoptive parents should fulfill in order to adopt a Ugandan child. These are:

- 1) The applicants should have attained the age of twenty - five years and be at least twenty-one years older than the child;
- 2) The applicants should have stayed in Uganda for at least one year;
- 3) The applicants should have fostered the child for period not less than one year under the supervision of a Probation and Social Welfare Officer;
- 4) The applicants should have no criminal record;
- 5) The applicants should have a recommendation concerning their suitability to adopt a child from their country's Probation and Welfare Office or other competent authority;
- 6) The applicants should satisfy the court that their country of origin will respect and recognize the adoption order;
- 7) They should have obtained a report from a Probation and Social Welfare Officer to assist the court in considering the application;
- 8) The applicants should satisfy the court that a child above fourteen years has given consent to the adoption; and
- 9) The applicants should satisfy the court that they have obtained the consent of the child's biological parents if they are known.

[16] Regarding the first condition, the 1st petitioner's birth certificate attached and marked as annexure "F1" of the petition shows that he was born on 2nd January 1987. The 2nd petitioner's certificate of live birth attached and marked "F2" of the petition shows that she was born on 13th February 1991. The 1st petitioner averred that the child was ten years old, which statement was corroborated by the child while giving her statement in Court. From the aforementioned

evidence, all the petitioners are above the age of twenty-five. The 1st petitioner is thirty-four years old, which makes him twenty-four years older than the child. The petitioners have thus fulfilled the first requirement.

[17] Regarding the second condition, which is that the applicants must have stayed in Uganda for at least one year, the 1st petitioner testified that he was born in Uganda. This is evidenced in his birth certificate attached and marked as annexure “BD” of his affidavit in support of the application. It shows that he was born in Nakulabye, Rubaga Sub- County. He further testified that he stayed in Uganda until 2008 when he went to the USA for further studies. The 1st petitioner additionally testified that he came to Uganda in 2015 and founded Hope Speaks Ministries, which he heads. The 2nd petitioner on her part affirms that she settled in Uganda in 2015 and later obtained permanent residency in 2016. Her affirmation is corroborated by her certificate of residency, attached as annexure “CC” of her affidavit in support of the petition, which states that her residency in Uganda runs from 2nd June 2016 to 2nd June 2026. Also, the tenancy agreement attached and marked as annexure “A2” of the petition, shows that the petitioners have rented accommodation premises for a five-year period since 1st April 2018 to 1st April 2022.

[18] Furthermore, in a letter dated 15th September 2020 attached as annexure “A3” of the petition, the LC1 chairman of Naluvule village Council, a one Mr. Elias Mugalu has introduced the petitioners as residents of his Naluvule village in Wakiso district. Although Mr. Mugalu did not state the period in which the petitioners started residing in his village, considering the 2nd petitioner’s certificate of residency obtained in 2016, the petitioners’ tenancy agreement and also the fact that the 1st and 2nd petitioners work as Country director and executive director respectively with Hope Speaks Ministries, which was founded in 2015

in Uganda, it is my belief that they have lived together in Uganda since 2016. In the result, the 2nd condition has also been fulfilled.

[19] The third requirement is for the petitioner to have fostered the child for not less than one year at the time of their petition, under the supervision of a Probation and Social Welfare Officer. The petitioners averred that they have fostered the child from 11th October 2018 to date. This is evidenced by the foster care placement Form attached to the petition as Annexure “MD”, which shows that the petitioners received the child into their home on 11th October 2018. Also, the child testified that she had lived with the petitioners for more than two years.

[20] Ms. Mary Nakazibwe the Senior Probation and Social Welfare Officer of Wakiso district, averred that she visited the petitioner’s family several times when the child was in their custody. The totality of aforementioned evidence is that the child has been fostered by the petitioners for more than a year under the supervision of a Senior Probation and Social Welfare Officer. This requirement has thus been met.

[21] In regard to the question as to whether petitioners’ having any criminal records, the petitioners averred that they do not have criminal records and have attached child abuse clearance forms from the state of Michigan as well as certificates of good conduct from Interpol, Uganda which are marked as annexures “G1” and “G2” of the petition. In a letter dated 15th September 2020, which is attached to the petition as Annexure “A3”, the LC1 Chairperson of Naluvule village council where the petitioners reside, stated that the petitioners are law abiding persons. The evidence produced in my opinion establishes that the petitioners are law abiding persons. They have consequently satisfied this requirement.

[22] The other requirement is that the petitioners should have a recommendation of suitability to adopt from their country of nationality. It was Mr. Muhumuza's submission that Ms. Nakazibwe, the Probation and Social Welfare Officer, had recommended that the petitioners were suitable to adopt and that therefore, this condition had been met. The 1st petitioner testified that he obtained citizenship from the USA in 2017 and that he had a certificate of dual citizenship from Uganda. This certificate was not produced in Court.

[23] Nonetheless, it is evident that both the petitioners are USA Citizens, considering the fact that their US passports are attached to the petition as annexures "A1" and "A2". Hope Speaks Ministries is according to the 1st petitioner, registered in the USA. Since both petitioners are citizens of the USA, it is highly likely that they will return to the USA in future. Clearly, the recommendation of Ms. Nakazibwe's, a Ugandan probation officer does not serve as a recommendation from the petitioners' country of nationality. The petitioners have failed to meet his condition.

[24] In respect of the requirement for the applicants satisfy the court that their country of origin will respect and recognize the adoption order, the 1st petitioner averred that the USA shall respect the adoption order once granted. No evidence was tendered to show how and why the adoptive order if granted, would be respected. It is a mere belief by the 1st petitioner, who has not demonstrated that the US will accept the adoptive order of this court. This condition has also not been met.

[25] Concerning the requirement of the submission to this court of a probation and social welfare report by the Probation and Social Welfare Officer, a report prepared by Ms. Mary Nakazibwe, a former Senior Probation and Social Welfare Officer of Wakiso district is attached to this petition as annexure "ND". In that report, she inter alia gives background of the petitioners. She observes that the 1st petitioner

having been raised by several persons after the death of his parents, is motivated by his former circumstances to provide family care and protection to children in need. She further observed that the 2nd petitioner on the other hand grew up in a highly cohesive family environment. That their backgrounds have given them the opportunity to nurture children in a loving and good family environment. According to her, the petitioners earn about \$ 63,600 jointly per annum, making them financially capable of providing for the child. She notes that the child has established a bond with the petitioners. That the child's needs are being met and that she is happy. Having considered the report of Ms. Nakazibwe, it is my finding that the petitioners have fulfilled this requirement.

[26] The other requirement of the law under Section 47 of the Children Act, is for the consent of the child's parent to be obtained before an adoption order can be made, if the parents are known. In this case, this requirement shall be dispensed with since the child's birth parents are incapable of giving the said consent, they having abandoned the child.

[27] Although the petitioners have not proved some of the requirements listed above, Section 46 (3) of the Children Act gives this court the discretion to waive any of the requirements above listed, if exceptional circumstances have been proved. According to the record before this court, the child was abandoned and attempts to find her relatives were futile. The petitioners have taken the child into their home and provided her with the necessities of life. The first petitioner from his affirmation, is a Ugandan by origin. The 2nd petitioner's certificate of residence shows prima facie that the petitioners plan to stay in Uganda for some time. That will make it possible for the Probation Office of Wakiso to monitor the development of the child.

[28] Furthermore, I think that the 1st petitioner's experience as an orphan who had to depend on the support of persons outside his extended family, empowers him to support the child, having had a similar background at a certain point in his upbringing. I believe that he identifies with the child's circumstances before she became his foster child and will in my view raise her with understanding. In the circumstances, I find that the petitioners have proved that they are eligible to adopt the child, whose immediate relatives were not found. Therefore, considering the provisions of **Section 46 (3) of the Children Act** supra and the decision in **Natalie Matama (An Infant) Adoption Cause No. 289 of 2013**, where it was held that the provisions of Section 46 of the Children's Act are merely directory and not mandatory on account of the welfare principle, in Section 3 of the Children Act, I find that exceptional circumstances have been established by the petitioners to warrant my waiving of the requirements stipulated in **Sections 45(1), 45(4), 45(5), 46 (1), 46 (2), 47 (1) and 47 (5) of the Children Act**.

Issue 2 - Whether it is in the child's best interests to be adopted

[29] **Section 3 (1)** of the **Children Act Cap 59** as amended, provides that 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, inter-alia. Also, the United Nations Convention on the Rights of the Child lists the following principles as the guiding principles for the treatment of children in all aspects of their lives:

1. Best interests 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

[30] Under **Section 3 (3) of the Children Act**, it is provided that in determining any question under **subsection (1)** thereof, the court or any other person dealing with an issue concerning a child is enjoined to take into account the following:

- 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 ascertainable wishes and feelings of the child concerned, with due regard to his or her age and understanding.

[31] During her testimony in court, the child referred to the 1st and 2nd petitioners as her father and mother respectively and stated that she had two siblings named Judah Benjamin Adyeri David and Shaluwa Mukisa Atuhaise. Also, Ms. Mary Nakazibwe in her probation and social welfare report, indicates that the child has established a bond with the petitioners and that she is happy. Interacting with the petitioners and the child during the hearing of this petition, I formed the view that there is a strong familial bond between the petitioners and the child and she wishes to continue being a child of theirs.

The child's physical, emotional and educational needs.

[32] The child testified that she is staying with the petitioners in Naluvule near Nansana and that she considered the petitioners and

their children to be her family. It is evident that the child is emotionally attached to the petitioners and their children. There is no doubt in my mind, from the evidence adduced that the child's physical and emotional needs have been met by the petitioners who have provided her with a loving family to grow up in.

[33] Regarding her educational needs, the child attested that she attended Rafiki School for her baby class and went to Mercy Christian School for her primary one while she was with Mercy Child Care Ministries. The child further testified that she now goes to Heritage International School and is in Grade 3. Her evidence is corroborated by a letter dated 31st August 2021, attached as "I" of the affidavit of the 1st petitioner, which confirms that the child is enrolled in that school. According to Mr. Nsubuga Hannington the School's Registrar, the school is accredited by two accreditation bodies: The Association of Christian Schools International and Middle State Association of Schools and Colleges and is classified by the Ministry of Education and Sports in Uganda. It is evident to me that the child will receive a good education at Heritage International School. She appeared to me, from her responses to the questions that I asked, to be very intelligent and developing well intellectually. Clearly, the child's educational needs are being met by the petitioners.

The likely effects of any change in the child's circumstances

[34] The child was placed with Mercy Child Care Ministries after she was found abandoned by the police at a tender age of seven years old. She was later placed with the petitioners who have fostered her since 11th October 2018. She has grown to love the petitioners to the extent that she considers them her own family. It is obvious that the child is comfortable with the petitioners as her parents. I think that if the child is taken away from the petitioners at this point, she will suffer instability in her upbringing, considering the possibility of being

institutionalized or fostered by new parents. It is imperative that the current stability that she enjoys is maintained.

The child's sex, age, background and any other circumstances relevant in the matter.

[35] According to the record before this court, the child is a female aged ten years old. The petitioners are married and have demonstrated their ability to provide a good home for the child. She is at such an age where she needs guidance from both parents and will soon become a teenager, needing further protection, if she is to be molded into a responsible adult. The petitioners have already made sacrifices towards the child's good upbringing.

[36] Concerning the background of the child, as noted above, she was abandoned and her relatives were never located. The 1st petitioner, himself having been institutionalized at Mercy Child Care Ministries, following the death of his parents and his being expelled by someone who had raised him, went through similar circumstances as the child. He was assisted at Mercy Child Care Ministries and facilitated to meet Mr. Troy Van Dyke and Mrs. Diane Van Dyke at Light World Church Nansana in 2005, who became his 'parents' and sponsored his education. He is in my esteemed view, best suited to father the child, since he appreciates her circumstances. Ms. Nakazibwe reported that the petitioners have already chosen their children's guardians to be Mr. Troy Van Dyke and Mrs. Diane Van Dyke in the event of their demise or disability. It is my considered view that the child is in the circumstances best suited to be with the petitioners.

Any harm that the child has suffered or is at risk of suffering.

[37] As noted above, if the adoptive order is not granted to the petitions, the child risks being institutionalized again or being fostered

afresh by new foster parents, and yet she has already formed a bond with the petitioners and their children. The petitioners have already demonstrated their capacity to love and care for the child during the two years that they have fostered the child. Considering my findings in that respect, they are competent to raise the child. In fact, the child is likely to suffer from psychological trauma, if she is disengaged from the petitioners, whom she now considers her parents and family.

The capacity of the child's parents, guardian or any other person involved in the care of the child, in meeting the needs of the child.

[38] Concerning their financial capacity, the petitioners aver that they are employed and earn \$63,600 annually. However, there is no documentary evidence adduced to confirm that fact. That notwithstanding, the petitioners have showed that they are indeed gainfully employed. The 1st petitioner in a letter dated 20th August 2020, attached as annexure "D" of the petition affirmed that he and his wife were employed by Hope Speaks Ministries as Country Director and Executive Director respectively. They have also been able to provide for the child's educational needs at Heritage International School. Given the said evidence provided to this court, I think that the petitioners do earn enough money to enable them adequately provide for the upbringing of the child and their two children. It is thus my considered view that the petitioners have proved that they can meet the child's needs.

[39] I am cognizant of the fact that **Section 46 (6)** and **46 (7)** of the **Children Amendment Act** provides that Court shall consider inter country adoption as a last option, compared to the continuum of comprehensive child welfare services like family preservation, kinship care, foster care and institutionalization. In the instant case, the child was abandoned by her parents. Ms. Mary Nakazibwe together with

Wakiso police, tried to trace for the child's parents through community posters and newspaper announcements but failed to locate any of her relatives. She was then institutionalized at Mercy Child Care Ministries and later on placed under the foster care of the petitioners with whom she has lived for over two years. The petitioners welcomed her into their family and treated her as their own child. Notably, the 1st petitioner is well versed with Ugandan culture, given that he was raised here. It is my opinion that he will due to his background, be instrumental in teaching her about her about local culture. The fact that the petitioners are resident in Uganda is an added advantage for the child in that, she will not be immediately removed from her local environment as soon as this petition is granted. The child is better off with the petitioners thus, compared to subjecting **her** institutionalization or to another fostering process.

[40] I should point out that section 48 of the Children Act provides inter-alia that the Court should consider if any payment has been made to the applicants as consideration for adoption or if the applicants have made any payments to the child's parents as consideration for the adoption of the child. The petitioners averred that they had not received payment as a consideration for the adoption of the child and neither had they **considered** anyone for the adoption of the child. In my opinion, in cases for adoption, which are heard exparte, it is an uphill task for the court to establish with certainty the fact that the applicants before it are not guilty of facilitating a fraudulent adoption process. The court relies heavily on the reports of probation officers who are expected to act professionally. It also relies on the report of the Alternative Care Panel which it relies on to do the necessary vetting of the petitioners and Child care institutions.

[41] I have examined the totality of the circumstances under which the petitioners fostered the child and the fact that the child

corroborated the petitioners claims concerning where she was living before the petitioners took her up. These circumstances do not suggest to me that the petitioners are complicit in any bribery in order for them to obtain the custody of the child. It is thus my considered opinion that the petitioners have demonstrated that this petition is brought in the best interests of the child. They have provided her with an education and a loving home amongst other things, and have in so doing, undertaken to raise her well. In the result, this petition is allowed with the following orders:

- a) Benjamin Van Dyke David and Kari Marie David are appointed the adoptive parents of the child Kansiime Bridget;
- b) The Registrar General of Births and Deaths is hereby directed to make an entry recording the particulars of this adoption in the Adopted Children's Register and to issue a certificate to Kansiime Bridget, reflecting the parental relationship established;
- c) This Adoption Order shall be furnished to the Consular Department in the Ministry of Foreign Affairs;
- d) This Adoption Order shall be furnished to the Permanent Secretary, Ministry of Gender, Labor and Social Development;
- e) The petitioners shall every two years, until the child clocks 18 years of age, furnish the Registrar of this Court with a social welfare report of the child, showing her development in life, which report shall be prepared by the Probation and Social Welfare Officer of Wakiso district or of any other area of their residence in Uganda, or the equivalent of such officer in any place that the petitioners may relocate to abroad, which report shall be accompanied by supporting documentation establishing

the progress of the child, including photographs of the child, with members of her adoptive family, church, school and friends; and

f) The costs of this petition shall be borne by the petitioners.

I so order.

Susan Okalany

JUDGE

22/03/2021