



**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
FAMILY MISCELLANEOUS CAUSE NO 5 OF 2022**

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**IN THE MATTER OF TUMESIGYE GIFT (A MINOR)
AND
IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP
BY KAMWESIGYE PROSSY (MOTHER OF THE MINOR)**

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Before: Hon. Justice Nshimye Allan Paul. M.

RULING

REPRESENTATION

15 Adv. Robert Mugarura for the applicant

BACKGROUND

20 This application is brought by Notice of Motion under Article 139 (1) of the Constitution of the Republic of Uganda, section 39(2) Judicature Act, section 3 of the children's Act, Section 98 of the Civil Procedure Act Cap 71 and Order 52 Rules 1,2 & 3 of the Civil Procedure Rules (CPR) S.I 71-1. The applicant, Kamwesigye Prosy, who is the mother of the child named Tumwesigye Gift is seeking orders that;

25 The applicant be appointed a guardian *ad litem* of Tumwesigye Gift for purposes of administering her respective beneficial interest in the property comprised in freehold block 3 plot 931 land at Kakyka, Kasahri, Mbarara city developed with a 4 residential houses.

GROUND

30 The grounds of the application itemized in the application and supported by an affidavit by applicant, are;

1. That the applicant is the biological mother of Tumwesigye Gift, a child.
2. That the applicant and Tumwesigye Gift are joint owners of land comprised in freehold block 3 plot 931, which h the applicant intends to pledge as security for a loan facility to renovate rental houses and expand the family business

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which would generate school fees to benefit the child and improve the wellbeing of the child.

3. That for the plaintiff to pledge a title it requires a person of contracting capacity.

4. That the child does not have capacity to nominate or appoint the applicant as their attorney for purposes of undertaking the contemplated commercial endeavors on her behalf.

5. That the applicant is the biological mother of the child and she has her best interest at heart and will ensure that the loan facility is administered in the most commercially viable manner for her benefit.

6. That it is in the interest of justice that the application is allowed.

SUBMISSIONS

The applicant filed written submissions stating that the applicant is the biological mother of the child, that both the mother and the child are joint owners of land comprised in freehold block 3 plot 931. That the mother has applied for a loan of Uganda shillings twenty million from Katete Peoples Sacco and the purpose of the loan is for development purposes, which is renovating of the houses. That in determining such application court must consider the best interest of the child and he referred court to the case of **IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY WANDERA PETER HIGH COURT FAMILY CAUSE 4 OF 2017**. He concluded that court grant the prayers in the application.

DETERMINATION

It is trite law that for one to deal with property of a child they must apply to court to be appointed for that purpose as a guardian of that child. This application is based on the fact that the child is not yet of age to enter transactions that are by law required to be done by a person who has attained a particular age. In this case pledging security for acquisition of a loan are governed by the Contracts Act, 2010 (Act 7 of 2010).

The evidence on court record in paragraph 2 of the affidavit in support and annexure A thereon, a NIRA birth notification record document, shows that the child is 14 years which is below the age of 18 that required for one to have capacity to contract as provided in section 11 (1)(a) of the Contracts Act, 2010 (Act 7 of 2010). This case therefore requires an application to court to appoint a guardian for that purpose.

I have noted that the applicant in her prayers made reference to appointment of a guardian *ad litem* and I have noted some decisions also refer to the same when dealing with an application to appoint a guardian for purposes of dealing with property of a minor. I am of the opinion that in our law and in matters relating to children there are three different categories of applications for a guardianship order that can be made in a court of law. They are;

i. An application for **legal guardianship** to be vested with parental responsibility of a child as provided in section 43A read hand in hand with section 43H of the children's Act as amended by Act 9 of 2016. This application is by way of a petition as provided in 43A of the children's Act as amended by Act 9 of 2016.

ii. An application to appoint a **guardian ad litem**. The word *ad litem* means "*appointed to act in a lawsuit on behalf of a child or other person who is not considered capable of representing themselves.*" Appointment of a guardian *ad litem* to represent a minor who is a defendant in a suit is provided for in Order 32 rule 3(1) and 3 (2) CPR and was highlighted in by the supreme court for tis very purpose in **ITERURA V MUGUTA (SCCA 5 OF 2006)**. A guardian *ad litem* may also facilitate court with information *to protect the best interest of the child* in an adoption hearing as stated in section 46 (5) of the children's Act as amended by Act 9 of 2016. The procedure of the application for the appointment of a guardian ad litem is by way of a notice of motion supported by an affidavit as provided in Order 32 rule 3(3) and rule 16 CPR.

iii. An application to appoint a **guardian in respect to a minor's proprietary rights**, this application enables court to appoint a person to perform acts and transactions on behalf of a minor because the minor does not have capacity to act in law. This form of guardianship is granted by court basing on its inherit power to make orders as may be necessary for the ends of justice as provided in Article 139(1) of the Ugandan Constitution 1995, section 14 & 33 of the Judicature Act and section 98 of the Civil Procedure Act. The procedure for this application for the appointment of a guardian in respect to a minor's proprietary rights is by way of a notice of motion supported by an affidavit as provided in Order 52 rule 1, 2 & 3 CPR.

A careful study of this application, reveals that we are dealing with an application for the appointment of a **guardian in respect to a minor's proprietary rights**. This kind of application as was articulated by His Lordship Justice Engonda Ntende **IN THE**



MATTER OF ATUHEIRWE PAULINE MUHUMUZA HCT-FD-MC-0010-2009, is linked to the doctrine of *Parens patriae*, a Latin phrase meaning the "parent of the country."

The *Parens patriae* doctrine is based on the concept that a state has a duty to protect its citizens that may not have capacity by operation of the law or otherwise unable to protect their interests. This is the reason as to why, even a biological parent that already has parental responsibility over a child as provided in section 6 of the Children's Act, still has to apply to court as an organ of the state and a vehicle through which the state applies the doctrine of *Parens patriae* to consider the application and decide whether to appoint or refuse to appoint the applicant as a **guardian in respect to a minor's proprietary rights**.

When court is determining an application to appoint guardian in respect to a minor's proprietary rights it must consider and interrogate the following;

- 1) The age of the minor
- 2) The relationship of the applicant to the minor
- 3) The nature of the minor's property
- 4) The purpose of the application
- 5) The best wishes of the minor

I will now analyze the evidence on court record guided by the considerations above;

1. The age of the minor

The age of adulthood in Uganda where a party can handle their own matters is 18 years as provided in Article 257 of the constitution of Uganda, section 11 (1)(a) of the Contracts Act, 2010 (Act 7 of 2010). The evidence on court record in paragraph 2 of the affidavit in support and annexure "A" thereon, a NIRA birth notification record shows that the minor is 14 years, which implies that she is a child as provided in section 2 of the children's act, as such below the age for one to have capacity to contract as provided in section 11 (1)(a) of the Contracts Act, 2010 (Act 7 of 2010). This means that this court has jurisdiction to consider an application of this kind since we are dealing with a child as shown by the evidence on record.

2. The relationship of the applicant to the minor

The applicant has stated in paragraph 2 of her affidavit in support that she is the mother of the child, the Child also confirmed that the applicant was her mother when she appeared in the Judge's chambers on 11-10-2022. The applicant has attached her national identity card which is annexure "B" to the

supplementary affidavit to show that she is a Ugandan Citizen her NIN is CF850371063ZEC. The court has confirmed that the applicant is the biological mother of the child, and by virtue of the law already has parental responsibility of the child, she is not a stranger and would presumably act on the face of it act in the best interests of the child by virtue of her relationship.

3. The nature of the minor's property

The evidence on court record in paragraph 3 Of the affidavit in support and annexure "B" thereon, shows that the land is comprised in Kashaari Block 3 Plot 931 and is registered in the names of Kamwesigye Prossy (applicant) and Twesigye Gift (child), this means that they are joint tenants as provided in section 56 of the Registration of titles Act. Any dealings of the land must have the input of both parties that are registered on the title that is why a guardian in respect to a minor's proprietary rights has to be appointed to facilitate the dealing in the land if found necessary.

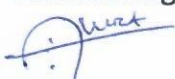
4. The purpose of the application

The evidence on court record in paragraph 2 and 3 of the supplementary affidavit is to the effect that the applicant has applied for a loan of 20 million from a SACCO and intends to apply the loan money to renovating houses on the land that are used for rental purposes. I note that the loan money is meant for development purposes and the applicant states in paragraph 10 that she is capable to protect and preserve the minors interest and any profits arising will be held in trust and appropriated for the benefit of the child.

I am mindful of the danger of defaulting on the loan and the property could be lost, but in this analysis we have to consider the words of **His Lordship Justice Engonda Ntende** in the matter of **ATUHEIRWE PAULINE MUHUMUZA HCT-FD-MC-0010-2009**, where he held that "the existence of risk should not inhibit the course of business, if it is prudently managed". Considering that the loan amount sought is 20 million, that is not excessive, the possible advantages from the renovation outweighs the possible risks of defaulting on the loan.

5. The best wishes of the minor

The court must consider the best wishes of the child guided by the welfare principle stipulated in section 3 of the children's Act. This necessities considering the evidence on record and where it is possible interacting with the



child to obtain their views. The interaction with the child who can speak and understand, is important because it also enables the child know that there is an application to deal with their property. It also helps court verify some statements made especially if the interaction with the child is in camera. I note that on record the applicant attached the loan agreement and a letter of support from the probation officer, Mbarara City.

The evidence on court record in paragraph 3 in both the affidavit in support and the supplementary affidavit is to the effect that the loan is for renovation of rental houses, so as to generate money used for child's school fees and welfare. The court interacted with the child in chambers who also confirmed that the rent from the houses is used to pay her school fees, in my analysis the purpose of the loan serves to enhance the welfare of the child and as such if the loan is applied to the purpose it is purported to be obtained, the resultant generation of income will be in the best wishes of the child.

In conclusion, I find that this a befitting application for court to exercise its inherent power to give a remedy for the good of the child by appointing the applicant a **guardian in respect to a minor's proprietary rights.**

I order that;

1. The application to appoint a guardian to deal with the property of the child is granted
2. The applicant, Kamwesigye Prossy of NIN CF850371063ZEC is appointed a guardian in respect to Twesigye Gift's proprietary rights in regard to offering land comprised in Kashaari Block 3 Plot 931 as security for a loan.
3. That the applicant is authorized to execute any documents and instruments necessary for the acquisition of a loan of up to Uganda shillings twenty million only using the land comprised in Kashaari Block 3 Plot 931 as security,
4. That the applicant shall apply the loan money for the welfare of the child and for the renovation of the rentals that are used to raise money that is used to cater for the minor's needs.


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Nshimye Allan Paul M.

JUDGE

11-10-2022