

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(FAMILY DIVISION)**  
**MISCELLENEOUS APPEAL NO. 04 OF 2023**  
**ARISING FROM MISC. APPLICATION NO. 656 OF 2023**  
**(ARISING FROM DIVORCE CAUSE NO. 100 OF 2022)**  
**ANN SARAH NALWOGA :::::::::::::::::::::: APPELLANT/APPLICANT**  
**VERSUS**  
**IGEME KATAGWA :::::::::::::::::::::::::::::::::::::: RESPONDENT**  
**RULING BEFORE: HON. LADY JUSTICE CELIA NAGAWA**

**1.0. Introduction**

1.1. This ruling relates to a Notice of Motion that was filed in this court on behalf of Ann Sarah Nalwago (the applicant) under Sections 3 of the Children Act, Cap. 59, Section 33 of the Judicature Act, Cap.13, Section 98 of the Civil Procedure Act, Cap. 71, Order 50 Rule 8 and 52 Rules 1 & 3 of the Civil Procedure Rules SI 71-1. The orders sought are that;

- a) The ruling and orders of the Learned Assistant Registrar in Misc. Application No. 656 of 2023 be set aside and an interim custody of the three (3) issues be granted to the Applicant pending the determination of Divorce Cause No. 100 of 2022.
- b) Costs be in the cause.

1.2. The grounds of the Application are set out in the Notice of Motion and explicated in the supporting affidavit sworn by the applicant but in brief are that;

- a) The Applicant is the mother of the three issues aged 16, 14 and 11 years whom she loves dearly and has nurtured from birth.



The applicant and the respondent solemnized their marriage on 22<sup>nd</sup> October, 2009.

- b) The respondent petitioned this Honorable Court for the marriage between the parties herein to be dissolved and this court is yet to determine the Divorce Petition including custody of the issues.
- c) The issues attend boarding school, during school holidays they stay with the applicant but their father picks them by force once in a while and returns them later, so all their financial needs pertaining to their welfare, property and upbringing have been left to the applicant as her responsibility.
- d) The respondent applied for interim custody which was granted by the court in error ignoring the father's absenteeism and his home not being a safe place for the children to live.
- f) The ruling and orders neglected to provide for the special needs of their daughter and last born who keeps asking for the applicant.
- g) The best interests of the children will be better served when the issues are with their mother who has literally single handedly raised them from infancy and that the children should not be separated completely from their mother.

1.3. The respondent opposed the application in his affidavit in reply filed in this court on 19<sup>th</sup> October, 2023. Confirming that he filed Divorce Cause No. 100 of 2022 against the appellant seeking dissolution of the marriage and primary custody of the children. He averred that during the pendency of the Divorce Petition, the appellant made



various egregious statements disinheriting the children never to stay in their matrimonial home and wishing upon them a life of suffering, wandering the world, feeding on garbage and eventually dying in a state of madness. It was against that background that he filed Miscellaneous Application No. 656 of 2023 seeking for an interim order of custody of the children pending the disposal of Divorce Cause No. 100 of 2022 as the appellant's statements constituted a threat to the well-being and safety of the children. On 31<sup>st</sup> July, 2023 court decided that in the best interest of the children they should be committed to the care of the respondent.

- 1.4. The appellant filed a rejoinder which I have taken consideration of its averments in determination of this matter.

## **2.0. Representation and Hearing**

- 2.1. At the hearing, the appellant was represented by Mr. Francis Nyakoojo of Uganda Christian Lawyers Fraternity (UCLF) while the respondent was represented by Mr. Eriya Mikka of MMAKS Advocates. Both learned counsel agreed that this matter would proceed by filing written submissions.

## **3.0. Issue for determination by this court.**

1. Whether the Learned Assistant Registrar erred in law and fact when she granted the respondent an order for interim custody of the three issues?

### **3.1. Duty of the first Appellate Court**

- a. It is the duty of the first appellate Court is to appreciate the evidence adduced in the trial Court, subject it to an exhaustive scrutiny and re- evaluate evidence in order to reach its own



conclusion. In the case of **Kifamunte Henry V Uganda, S.C Criminal Appeal No. 10 of 1997** court held that;

- b. *“The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it”*. This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion.
- c. I will therefore bear these principles in mind as I resolve the ground of appeal.

### **3.3. Determination of the issue**

**Whether the Learned Assistant Registrar erred in law and fact when she granted the respondent an order for interim custody of the three issues?**

### **4.0. Parties' submissions**

- 4.1. Counsel for the appellant submitted that the learned registrar erred in law and fact when she granted the Respondent an order for interim custody of the three issues deciding that the appellant was unfit to have custody of the issues because of the strained relationship with her children and that her behavior would be harmful to them. He stated further that the court therefore improperly evaluated the evidence on record and arrived to an erroneous ruling since the appellant has literally raised the children from birth to the present age.
- 4.2. On the other hand, counsel for the Respondent cited Section 73A (3) of the Children Act, (as amended) in particular Section 73A (3) (a) which states that; *“the court may issue an interim custody order,*



*where the court is satisfied that- (a) the child is suffering or likely to suffer harm, if the order for interim custody is not issued”.*

- 4.3. Counsel for the respondent was elaborate on the child suffering or likely to suffer once the custody of the children is tempered with. He discussed at length the alleged stable mother-child relationship, risk of depression of the eldest child of the parties and the child stay concerns.
- 4.4. In all this the mother (appellant) believes that she is the most suitable parent to raise her children one of them being a daughter and the last born being so fond of her. With that in mind she finds herself as the mother of the children deserving to raise her children, the father being absent at work, in other relationships and his home not being a safe place for the children to grow. She contends that it is in the best interest of the children that they should stay with their mother since this will allow her an opportunity to instill and remind the children continually what she has taught them since they were young.
- 4.5. The appellant averred in her submissions that the audios relied on by the respondent and the Learned Ag. Assistant Registrar are concocted and unverified. She denied ever making such utterances to her children and that she was mentally stable. The appellant loves her children and as their mother she would never want to harm them.
- 4.6. This application is supposed to last until disposal of Divorce Cause No. 100 of 2022.



## **5.0. Court Analysis and Determination**

5.1. The learned assistant registrar while determining this application considered the best interests of the child(ren). Basing her decision of the content of Section 3 and 73A of the Children Act. She emphasized the meaning of the words “*shall regard the welfare of the infant as the first and paramount consideration*”. She analyzed the reports presented before her and with reason she gave her findings.

5.2. I agree with the learned registrar that in any determination in relation to the upbringing of a child- which includes the making of any order, whether contested or agreed between the parties, the court’s paramount consideration must be the welfare of the child. Delay in determining cases about children’s upbringing “*is likely to prejudice the welfare of the child*”. When a court is considering making an order under Section 3 of the Children Act, the circumstances mentioned in subsection (3), the court shall have regard in particular 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 the risk of suffering; and***

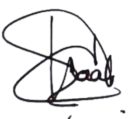


***(f) where relevant, the capacity of the child's parents, guardian or any other person involved in the care of the child, and in meeting the needs of the child."***

5.3. Section 3 (3) of the Children Act was exhausted in the learned registrar's ruling at pages 7-8. In my opinion I find that, in accordance with the welfare checklist, where the child is settled and happy, the courts have generally required some good reason for disturbing that position. "Status quo" is made relevant only by relating it to the direct welfare of the child because it is simply referred on the broadest sense to the current living arrangements for a child.

5.4. If the children are settled in one place, then the court is to have regard to Section 3 (3) (c) of the Act and *consider the likely effect on them to change their circumstances*. Since the grant of the interim custody order on 31<sup>st</sup> July, 2023 the children have been well settled with the respondent. Were the children are well looked after and they are with the parent in whose custody there are presently then it might not be necessary to disturb these circumstances. The children attend boarding school; and apart from the third (3<sup>rd</sup>) term holiday the rest of the stay home days are ordinarily brief ranging from 23-24 days only to wit they should be left to settle in one place.

5.5. I am alive to the provisions of Section 4 of the Children Act, subsection (1)(a) Every child shall the right to (a) live with his or her parent of guardian. At the same time the provisions of Section 4(2) which provides that subject to subsection (1) (a), where a competent authority determines in accordance with the laws and procedure applicable that it is in the best interest of the child to separate the child from his or her parent, the best substitute care available shall be provided for the child.



5.6. The Learned registrar assessed the circumstances as presented, basing her decision on the medical reports, the audios, the police press statement and the affidavit in reply of the appellant wherein she stated that she was beaten up by her two older children to the extent that she required medical attention. This alone reflects that the soured relationship between mother and child and in no circumstances would they live together in the short term.

## **6.0. Interim orders**

6.1. An interim order can only be made if the threshold and Section 3 criteria are met and making an interim order is proportionate to the risk faced by the child. The purpose of the interim order is to provide a legal framework until a final order can be made. It is temporary in nature and it does not weigh on the court one way or the other in deciding the final order. Children need protection and it would be wrong for the court not to make an interim order in the interest of the children.

6.2. The utterances of the appellant in the audio indeed called for an interim order and at page 9 of the decision the learned registrar was elaborate.

6.3. When determining interim orders in children related applications in the case of **RE C (Direct Contact Suspension) (2011) EWCA Civ 521** *Munby LJ* made these findings;

- Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.





- Contact between parent and child is a fundamental element of family life and is almost always in the interest of the child.
- There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain and to restore contact. The judge has a positive duty to attempt to promote contact. Some judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He/She must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has been clear that the child will not benefit from continuing the attempt.
- The court should take a medium- term and long- term view and not accord excessive weight to what appear likely to be short-term or transient problems.
- The key question, which requires “*stricter scrutiny*”, is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
- All that said, at the end of the day the welfare of the child is paramount, “the child’s interest must have precedence over any other consideration”.

6.4. The learned registration took into consideration the findings in **RE C (Direct Contact Suspension) (2011) EWCA Civ 521** in reaching the decision in Miscellaneous Application No 656 of 2023.

6.5. It is the appellant’s submission that the trial court stated that the children are at a vulnerable stage and living with the appellant will be harmful to them. I agree, the ages 16, 14 and 11 years are very



vulnerable to any young person as they try to discover themselves, the said ages are challenging in child development hence it might not be necessary to disturb their custody at such a time for the interests of the adults. Let the children remain in custody of the Respondent.

#### **7.0. Other experts'**

7.1. Where necessary to resolve this application, the court may also give permission to a party (or the parties jointly) to instruct a psychiatrist or psychologist to assess a parent of child. I find that the parents (appellant and respondent) should explore this opportunity in the interim to seek psychiatric and psychologist services given the background of this appeal and previous application. The children should also meet with a counsellor in the interim. This will help all concerned parties in this appeal who seem affected in one way or the other.

#### **8.0. Conclusion.**

8.1. I will not set aside or vary any orders or ruling made by the learned Assistant Registrar. I accordingly conclude as follows;

1. Miscellaneous Appeal No.004 of 2023 is hereby dismissed.
2. Each party shall bear their own costs.

I so order.

***Dated, Signed and Delivered via email this 10<sup>th</sup> day of November, 2023.***



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**CELIA NAGAWA  
JUDGE**