

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE NO. 0019 OF 2023

**IN THE MATTER OF ARTICLE 139 (1) & 2 OF THE 1995 CONSTITUTION.
S. 14, 33 AND 39 OF THE JUDICATURE ACT CAP. 13, S.3, 4, 5, & 6 OF THE
CHILDREN'S ACT CAP. 59 AND SECTION 98 OF THE CIVIL PROCEDURE
ACT CAP 71 AND 0.52 r1, 2 & 3 OF CPR S.1 71-1**

AND

**IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY
MUSISI SULAIMAN NSUBUGA (APPLICANT)**

Before: Justice Ketrach Kitariisibwa Katunguka

Ruling

Introduction:

1. Musisi Sulaiman Nsubuga brings this application by Notice of Motion under Article 31(4), 34 (1) of the 1995 Constitution of Uganda, Section 98 of the Civil Procedure Act, 71, Order 52 r1,2, and 3 of the Civil Procedure Rules S.I 71-1 and Section 3, of the Children Act Cap. 59; seeking orders that he be appointed as guardian of Tendo Jalia and Nakaye Mirembe Lukia, (both minors); and allowed to sell/transfer property comprised in Kibuga Block 28 Plot 1102, land at Makerere Kavule measuring 0.384 hectares(herein called the suit land); which is registered in the names of the said minors; and that costs be borne by him the applicant;
2. The grounds of the Application are in the Notice of Motion and the Affidavit deposed by Musisi Sulaiman Nsubuga, (the Applicant) and briefly that; he is the biological father of the children and has been providing for all their care and necessities; the Applicant is ordinary resident in Kanyanya Kawempe Division and self-employed as a director of Twin Tower Hotel located at Makerere Kavule; he feels he can best attend to the interests of the children if appointed legal guardian; he is married to a one Namuyiga Annet with whom they solemnized their Islamic marriage at Kampala and gave birth to two daughters Tendo Julia and Nakaye Mirembe Lukia;

3. The said children are the registered proprietors of land comprised in Kibuga Block 28 Plot 1102 being 0.384 hectares of land at Makerere Kavule; the land has squatters and no access road and he would like to sell the land and get better and squatter free property in the children's names but was advised that this cannot be done until the property is registered in his names or upon appointment of the applicant as guardian of the registered proprietors;
4. The applicant seeks the grant in order to administer the said land in his daughters' names to cater for their welfare and their future; he is physically able to fulfil the responsibilities and handle physical demands of raising the children and has enough time to care and can afford to raise the said children through his own income and he has custody of the children; he has been caring for the children's needs including feeding, shelter, education and medical since they were born and he has coped well as far as the pressure of caring for the children subject of this application; he is able to take control over the children's real and personal estate and make decisions in their best interest; it is for the welfare of the children that legal guardianship be granted to him as he has the means and resources to financially and otherwise provide for them
5. The Application is supported by copies of the Birth Certificates of the children; certificate of title to land comprised in Kibuga Block 28 Plot 1102; and a copy of the consent of the mother of the children a one Namuyiga Annet;

6. Representation:

The Applicant was represented by Counsel Mubiru Nassifu who made written submissions;

The case

7. The applicant bought land and registered in the names of the minors whom he together with his wife Namuyiga Annet, looks after; the land has squatters ; he wants to sell it and buy a better accessible land and register it in the names of the children; the application is in the best interests of the children; When the application came up on 22/03/2023 the applicant, the minors and their mother appeared with their counsel; the birth certificates presented show that the applicant together with Namuyiga Annet are the parents of the children subject of this application; the children individually told court that their father looks after them and pays their school fees; they do not object to the application which was explained to them by court; Namuyiga Annet told court she consents to the application;
8. The issues for consideration are:



1. Whether this court has jurisdiction to entertain the matter and; 2. Whether the application is in the best interests of the children Tendo Jalia and Nakaye Mirembe Lukia.

Resolution

I. Whether this court has jurisdiction to entertain the matter.

9. Article 139(1) of the Constitution provides; *‘The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law’*; section 14 (1) of the Judicature Act provides; *‘The High Court shall, subject to the Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or this Act or any other law’*;

10. Section 33 of the Judicature Act provides; *‘The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided’*; section 98 of the Civil Procedure Act cap. 71, provides; *‘Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of this court’*; O. 52(1) of the Civil Procedure Rules provides; *‘All applications to the court, except where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open court’*.

This court therefore has jurisdiction to entertain this application.

Issue 2. Whether the application is in the best interests of the children Tendo Jalia and Nakaye Mirembe Lukia.

11. The position of the law is that when considering issues to deal with children, their welfare is paramount; (see 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 the child (which Uganda ratified in 1990); Article 4(1) of the African Charter on the Rights and the Welfare of the Child (which Uganda ratified in 1992). This position has been fortified by courts who have held that in all

matters concerning children, the best interests of the child shall be the primary consideration,(see the case of Mark Siduda Trevor (an infant) Family Cause No. 213 of 2014 and the case of Deborah Joyce Alitubeera Civil Appeal No. 70 of 2011; (see also Bromley's Family Law, 8th Edition, at page 336, that “...*the children’s welfare is the court’s sole concern, and other factors are relevant only to the extent that they can assist the court in ascertaining the best solution for the child....;*”

12. Article 26 (1) of the Constitution of Uganda provides: ‘*Every person has a right to own property either individually or in association with others*’. section 11(1) (a) of the Contracts Act, 2010) provides; ‘*A person has capacity to contract where that person is—eighteen years.....*’; section 43H(1) of the Children (Amendment) Act, 2016 provides; “...all persons appointed as guardians have parental responsibility for the child ...”; section 1(o) of the Children Act, Cap.59 provides that “Parental responsibility means all rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child.”;

13. The applicant is, according to the availed birth certificates, the father of the children; as such he has the constitutional duty to raise and cater for them; the children though young told court their parents look after them; when court explained the gist of the application they said they have no problem;

14. Unless there are exceptional circumstances, a biological parent is the best person to provide care for the child and ensure that the child’s rights, including property rights, are protected and preserved until he/she is of age; In most instances like in this case the child has come to own property because the parent has gifted or bequeathed it; so where a child has property it should in the most ideal situations be protected by the biological parent until the child is of majority age. While most decisions are made on behalf of a child by either a parent or guardian, for example decisions to seek medical assistance, decisions on accommodation, among others, being a biological parent on its own does not automatically entitle a parent to deal in the property of his or her minor child; because ownership rights are exclusively person to holder (see Article 26 cited above).

15. To harness the rights of a child to own property and to benefit there from without jeopardising his or her welfare, courts have granted Guardianship orders to biological parents and other people who have demonstrated that their intention is for the welfare of the children who own property like in this case (See the case of **Alya Mayanja (HCMC No. 20 of 2003 ; In Re Mark Siduda (an infant) Family Cause No. 213 of 2014 and In the matter of an Application for guardianship by Wandera Peter ; Family and Children’s Cause No. 04 of 2017)**).

16. The consideration is that the applicant should not have interests that are adverse to those of the minor, the subject of the application (see **In the matter of Nabatanzi Jovia and In The Matter Of An Application For Guardianship by Ronald Kamusiime, Mc. No. 48 Of 2016**); the applicant has already demonstrated good intentions towards the children by buying land and registering in the said children's names; he is not seeking to get legal guardianship for purposes of selling the land to aid him look after the children; he states in his affidavit that he is financially capable of providing for the children; he only seeks to sell so that he can get alternative land which is better accessible;
17. I do not find that the interests of the children are at risk if this application is granted; but rather that they shall be better protected by ensuring that the land that will be bought from the proceeds of the sale of the property subject of this application will still belong to the minors; shall be more accessible since the property at the moment has squatters; the mother of the children has consented;

The application is in the best interests of the children Tendo Jalia and Nakaye Mirembe Lukia; and it is hereby granted; I make the following orders:

- 1) Musisi Sulaiman Nsubuga is hereby appointed legal guardian of Tendo Jalia and Nakaye Mirembe Lukia.
- 2) Musisi Sulaiman Nsubuga is allowed to sell/transfer property comprised in Kibuga Block 28 Plot 1102, land at Makerere Kavule measuring 0.384 hectares; and use the proceeds there from to purchase land and have it registered in the names of Tendo Jalia and Nakaye Mirembe Lukia.
- 3) That the applicant shall bear the costs of this application.



Ketrah Kitariisibwa Katunguka

Judge

27/03/2023

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