

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CORAM: HON. A.E.N MPAGI- BAHIGEINE, DCJ**  
**HON: A.S NSHIMYE, JA**  
**HON: M.S.ARACH-AMOKO, JA**

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**CIVIL APPEAL NO.70 OF 2011.**

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**IN THE MATTER OF DEBORAH JOYCE ALITUBEERA**  
**AND**  
**IN THE MATTER OF AN APPLICATION FOR LEGAL**  
**GUARDIANSHIP**

**BY**

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- 1. ANDREW DANIEL RIBBENS AND**
- 2. SARAH ANNE MARIE SHEPARD RIBBENS**

**AND**

**CIVIL APPEAL NO. 81 OF 2011**

**IN THE MATTER OF RICHARD MASABA**

20

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEGAL**  
**GUARDIANSHIP**

**BY**

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- 1. MATTHEW JOHN ZIMMERMAN AND**
- 2. AUDREY FINHANE GREEN ZIMMERMAN**

*[Appeals from Rulings and Orders by his Lordship the Hon. E.S Lugayizi, delivered on the 1st June 2011 and 1<sup>st</sup> July 2011, in Family Causes No. 59 and 81 of 2011, respectively]*

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## **JUDGMENT OF THE COURT**

Both appeals were brought against the orders of the High Court, Family Division, sitting in Kampala, delivered on the 1<sup>st</sup> June 2011 and 1<sup>st</sup> July 2011 respectively, dismissing Family Causes No. 58 and No. 81 of 2011 which  
10 the appellants had filed for legal guardianship of two infants called Deborah Joyce Alitubeera and Richard Masaba.

### **Background:**

The background to Civil Appeal No. 70 of 2011 was ably summarized by  
15 the learned trial Judge as follows:

The child, Deborah Joyce Alitubeera, the subject of the appeal, is the issue of Moses Lugya Mboka and Nansubuga Rita. Her birth certificate shows that she was born on 1<sup>st</sup> May 2010; and was one year old at the time of the  
20 ruling. After her birth, irreconcilable differences developed between Mboka and Nansubuga. Nansubuga moved away from Mboka and left the child with him when she (the child) was only 2 months old. Soon thereafter, it became obvious that Mboka (an exceedingly irresponsible and worthless drunkard) could not look after the child properly. As a result, the local  
25 authorities intervened and on the 16<sup>th</sup> February 2011, the lower court made an order placing the child in the care of a Non Governmental Organization called Mercy Child Care Ministry for three years.

Subsequently, the applicants, a married American couple living in Santa Barbra, California (USA), developed interest in the child. Using recommendations from the relevant USA Agencies (i.e. God's Families International Adoption, the FBI e.t.c.) the appellants filed Family Cause No. 59 of 2011 in the Family Division of the High Court in March 2011, seeking orders for:

- a) The grant of legal guardianship of the child.
- 10 b) Authority to obtain a Ugandan Passport for the child to enable them to travel with the child to the USA.

The application was dismissed on the ground that the applicants did not qualify for the grant of the orders sought as they were foreign nationals who were not residents in Uganda. If the Court were to grant the orders sought, it would inevitably lose jurisdiction over them and would, therefore, be incapable of supervising the welfare of the child. The learned trial judge was further of the strong feeling that the appellants were attempting to obtain an adoption order by using the said application, which was an abuse of the court process.

This Court at the same sitting also heard Civil Appeal No. 81 of 2011. The learned trial judge summarized the background to that appeal as follows:

25 Richard Masaba is an infant who was at the time of the application, 4 years old. His unknown parents abandoned him when he was only two days old.

They dumped him at one Michael Wandah's verandah in Shikoye village, Bungokho County, Mbale District, during the night of 7<sup>th</sup> February, 2007. Wandah picked him up and informed the local authorities of the area and the Police about the child. Subsequently, he handed the child to the Probation Officer of Mbale District, (a one Ms. Mutonyi Meresi). In turn, Ms. Mutonyi took the child to Kizito Babies Home where he stayed for some time. On 1<sup>st</sup> November 2010, the applicants obtained a Care Order from the Family and Children's Court at Mbale authorizing them to take custody of him and look after him. They have been doing so since then. Subsequently, the appellants also lodged Family Cause No.81 of 2011 for legal guardianship and authority to obtain a passport for the child so that they could take him along to the USA. Their application too was dismissed for basically the same reasons. The appellants were aggrieved and appealed against the orders.

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In Civil Appeal No. 70 of 2011 the grounds of appeal were that:

1. **The learned trial Judge erred in law and fact when he ruled that the appellants do not qualify under Ugandan law for the grant of the order of legal guardianship and permission to immigrate with the child to the USA.**
2. **The learned trial Judge erred in law and in fact when he failed to consider the best interests of the child.**

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In Civil Appeal No. 81 of 2011, the grounds were that:

1. **The learned trial Judge erred in law when he dismissed the application without considering the grounds therein.**

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2. **The learned trial Judge erred in law and fact when he failed to evaluate the evidence on record and the welfare principle.**

For convenience, it was decided that both appeals be dealt with together since the issues which arose from the grounds were similar, namely:

- 1) **Whether the best interests of the children were taken into account in determining the applications.**
- 2) **Whether the appellants qualify under Ugandan law for the grant of the orders sought.**

The appeals were also ex-parte. Mr. Isaac Obiro Ekirapa argued Civil Appeal No. 70 of 2011 while Civil Appeal No. 81 of 2011 was argued by Mr. Charles Majoli. The appellants and the children were in court.

**Submissions by Mr. Obiro Ekirapa:**

Regarding the first issue, Mr. Obiro submitted that the learned trial Judge did not take the best interests of the child into account while dealing with the application. The learned judge therefore erred when he ruled that the child be taken back to institutional care as that is not in the best interest of the child. The Probation Report by the Probation Officer was very clear. It was to the effect that the mother of the child had conceived the child as a result of rape at the age of 15. She suffered domestic violence at the hands of the child's father and was forced to flee to her parents. When the parents sent her back to the child's father, she abandoned the child at two months. The child's father is an alcoholic who lives in a wooden house in Katanga slums

with 4 other children under the age of 10 years. The shack can hardly shelter his children from the cold nights. He has fathered 17 other children from different mothers and does not remember where they live. The Probation officer noted in the report that the child's father cannot afford meals let  
5 alone adequate clothing or bedding for his children. That at the time the child was rescued; the child was malnourished, underweight and was suffering from pneumonia. The Probation officer says in the report that she interviewed both parents and established that both of them wanted nothing to do with the child. Both parents consented to the applicants being appointed  
10 guardians. It was clear that the child had no chance of survival had it not been taken to Mercy Child Care. Photographs of the child at the time of rescue were availed. The trial judge also ruled that the child's father was a worthless drunkard.

15 This was an error because the welfare principle is the paramount consideration in making decisions in matters concerning children. In the instant case, the child narrowly survived death at the hands of her parents and the best option for her is the appellants' family that is ready to provide her with basic needs. To support his submissions on this issue, Mr. Obiru  
20 relied on **Article 34 of the Constitution, 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); **Section 3 of the Children Act and Principle 1 of the 1<sup>st</sup> Schedule to the Act.**

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Mr Obiro also relied on **Bromley's Family Law, 8<sup>th</sup> Edition**, at page 336, where the learned author states:

*“...the child’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...”*

5 At page 338 the author states that:

*“... In applying the welfare principle the court must act in the child’s best interests... it should be appreciated that a judge is not dealing with what is ideal for the child but simply with what is the best that can be done in the circumstances...”*

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At page 341 the author states that:

*“...the child’s welfare is so overwhelmingly important that it can outweigh the interests of even unimpeachable parents in seeking to look after their own child against a stranger.”*

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He referred to the affidavit of Wilfred Rugumba, a director of Mercy Child Ministries who deponed that an institution is not a proper place for a child to grow up especially in her tender years.

20 Another quotation was from the **Inter-American Commission on Human Rights Organisation of American States’** Written response to questions by Commissioners at Thematic Hearing on Human Rights of Unparented Children and Related International Adoption Policies at pages 11-12 where it is stated that *“...studies have for decades shown the*  
25 *devastating damage done when children are denied a nurturing family, and in recent years these studies have been able to demonstrate the causal effects of institutional conditions... even the better institutions have*

*proven incapable of providing the personal care that human children need to thrive physically and emotionally... research on children who started their early life in institutions demonstrates vividly the damage such institutions do even when the children are lucky enough to escape the*  
5 *institutions at relatively early ages...”*

Counsel also relied on **Adoption Fact book (National Council for Adoption, ADOPTION FACTBOOK IV, 2007)** which reports that most internationally adopted children live in institutional care prior to adoption  
10 and suffer a range of health and development problems as a result, some of which can be overcome with nurturing family care, and many of which are serious enough to put the children at risk of lifelong physical, mental and emotional problems.

15 Another quotation relied on was from the **Inter- American Commission on Human Rights Organization of American States’ Written Response to questions by Commissioners at Thematic Hearing On Human Rights of Unparented Children and Related International Adoption Policies** which states at page 5 that “...*there is no evidence that placement across*  
20 *national, ethnic or racial lines causes any harm to children ...there is extensive evidence that denying children a permanent nurturing home early in life causes them severe cognitive, socio-emotional and other damage”.*

25 Nearer home, he quoted from a High Court case decided by Egonda Ntende, J.; **In the Matter of Michael (an infant) And In the Matter of An Application For Guardianship by Morse Richard Peterson Jr And**



Pricket Teresa Renee where the learned judge stated that “ ... *the infant’s current circumstances as a resident of an orphanage are only intended to be temporary, pending the availability of a suitable home in which the infant can be raised...No governmental support, be it local or central, is*  
5 *available for the care and upkeep of the infants generally or specifically in the case of this child. Right now it is under the care of a local non-governmental organization..... There is no offer from Ugandans or non- Ugandans resident in Uganda to take up the responsibility of looking after this infant. I find therefore exceptional*  
10 *circumstances exist for an order to be made in favour of non-citizens who are the only liable alternative.”*

On the second issue, Mr. Obiru criticized the learned judge for ruling that the appellants do not qualify under Ugandan law for the grant of the order of  
15 legal guardianship because they were foreign nationals who are not residents in Uganda. He submitted very emotionally, that the appellants qualified under Ugandan law for the grant of the orders sought. According to him, the learned trial judge did not carry enough research on the position of legal guardianship in English Common Law. **Bromley’s Family Law, 8<sup>th</sup> edition**  
20 at page 405 states that:

***“...all persons appointed as guardians... have parental responsibility for the child...”***

At page 299 the learned authors state that:

25 ***“...parental responsibility means all the rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property...”***

At page 301, the authors state:

5 *“...parental responsibility comprises providing a home for the child, having contact with the child, taking the child outside the United Kingdom and consenting to the child’s emigration...”*

At page 451, the learned authors state that:

10 *“... persons who are not domiciled in England and Wales, Scotland or Northern Ireland ( in whose favour therefore a full adoption order cannot be made) but who wish to remove a child out of the country to obtain an adoption order under their lex domicilii can apply to the High Court or county court for an order giving him parental responsibility for the child. The Court has jurisdiction to make such an order only if it would have had the jurisdiction to make a full order had the applicant possessed the*  
15 *relevant domicile...”*

Mr. Obiru submitted that this approach has been applied by many judges of the High Court in this country who have time and again granted guardianship orders and permitted foreigners to emigrate with Ugandan children if they meet all the criteria for adoption, save for residence. That this is done on a case by case basis depending on the facts of each particular case and in particular, the grant of the order will depend on the best interests of the child. The appellants are married and have one biological child. They have no criminal record and are free from any communicable disease. They are therefore suitable adoptive parents. He cited another High Court case **In the Matter of Juliet Tend (a child) and In the Matter of an Application for legal Guardianship by Jonathan Adam Hodge and Jill Renee Hodge,**

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**FC 006 of 2009** where his Lordship Egonda Ntende noted that the applicants met all the qualifications for adoption under section 46 of the Children Act, save for residence and fostering and had circumvented that provision by applying for guardianship.

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The learned trial judge therefore misapplied English Common law to deny the appellants legal guardianship of the child.

He further submitted that many provisions of statutory law have also been  
10 relied on by the High Court when granting guardianship orders, namely, section 2 of the Children Act, Section 3 of the First Schedule to the Children Act, **Article 139 of the Constitution** and section 14(1) of the Judicature Act [Cap. 13]. Section 14(2) (b) (iii) actually expressly saved the provisions of section 9(a) of the repealed Judicature Act of 1967 which provided that the  
15 High Court shall have power to appoint and control guardians of infants and estates of infants. He relied on **In the Matter of Howard Little (an infant) and In the Matter of an application for legal Guardianship by Mr. Kevin Little and Mrs. Rebecca Little, Civil Appeal No. 33 of 2006** and **In the Matter of Francis Palmer (an infant) and In the Matter of an  
20 application for legal Guardianship by Noel Adam Palmer and Mrs. Michelle Louse Palmer, Civil Appeal No. 32 of 2006** where the Court of Appeal dealt with a similar matter.

Mr Obiru also gave examples the practice in other countries particularly  
25 Kenya and South Africa where such orders are now granted easily as a result of law reforms in the best interests of the child. He prayed that the appeal be allowed and the appellants granted the orders sought.

### **Submissions by Mr. Majoli**

Mr. Majoli associated himself with Mr.Obiru’s submissions. He emphasized that the appellants have been living with the child in Uganda since 2009.

5 The issue of residence should not therefore be a major obstacle in granting the order sought. He too prayed that court allows the appeal and grants the appellants legal guardianship over Richard Masaba.

### **Consideration of the appeals and decision by Court:**

10 **ISSUE No. 1: Whether the best interests of the children were taken into account by the learned trial judge**

The law confers jurisdiction on courts to appoint guardians of infants where circumstances warrants so. The main law is contained in the **Children Act**  
15 **of 1997**. However, the Act does not provide for guardianship. But Article 139 of the Constitution confers to the High Court unlimited jurisdiction. This should be read together with Section 98 of the Civil Procedure Act which empowers the High Court to invoke its inherent powers to grant remedies where there are no specific provisions and in appropriate cases.

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The High Court can also apply common law and equity. According to Halsbury’s laws of England 4<sup>th</sup> Edition paragraph533;

25 ***“The High Court may appoint a guardian of a minor where (1) the proposed guardian applies for such appointment and the minor has no parent or guardian of his person and there is no other person having parental rights with respect to .....and other instances.”***

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration. This is contained in Article 34 **of the Constitution**, Section 3 and the 1<sup>st</sup> schedule to the Children's Act, international conventions to which Uganda is a party such as the UN Convention in the Rights of the Child (Article 3(1)); the African Charter on the Rights and Welfare of the Child (Article 4(1)); as well as text books on family law notably Bromley's Family Law, 8<sup>th</sup> Edition specifically pages 336 and 341.

The criteria for decisions in applications of this nature are set out in Section 3 of the 1<sup>st</sup> Schedule which says that the Court shall have regard in particular to:

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- a) The ascertainable wishes and feelings of the child in light of his or her age and understanding;*
- b) The child's physical, emotional and educational needs;*
- c) The likely effects of any changes in the child's circumstances;*
- d) The child's 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;*
- f) Where relevant, the capacity of the child's parents, guardians or others involved in meeting his or her needs.*

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Our perusal of the records of appeal reveals that the learned trial Judge was, in all fairness, alive to this principle and stated so in both rulings.

The issue is therefore whether he applied this principle to the evidence  
5 before court. As a first appellate court, we have appraised the evidence on record and subjected it to fresh scrutiny in order to determine this issue. (see: Rule 30(1) of the Judicature (Court of Appeal Rules) Directions and Pandya Vs R. 1957 E.A 336).

10 With due respect, we do not think that the learned Judge made any effort to carefully evaluate the evidence availed to him before ascertaining whether the applicants had satisfied those criteria or not.

He simply rubbished the welfare principle that it is:

15 ***“Not a magic wand which a conjurer waves around to deceive the unsuspecting and make them admit that they saw what was actually not in place. “***

He thus concluded that:

20 ***“ The said principle applies only when everything which would lawfully support a guardianship order or any other related order is, without doubt, in place; and not otherwise”***

This was an error. The judge was duty bound to carefully evaluate all the  
25 evidence on record and to take into account the best interests of the child

before making a decision. We accordingly answer this issue in the affirmative.

Issue 2:

- 5 **Whether the appellants qualify under Ugandan law for the grant of the orders sought.**

This issue was partly answered in issue No.1. The courts have jurisdiction to grant guardianship orders and have done so in several cases. The Court of  
10 Appeal, **In the Matter of Palmer (an infant) and in the Matter of Howard Amani Little (an infant)(supra)**, held that the High Court has jurisdiction to grant orders of legal guardianship by a 2 to 1 decision. This is what L.E.M Mukasa-Kikonyogo, DCJ (as she then was) said at page 17 of her judgment:

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*“As far as I am concerned, the High Court has jurisdiction to entertain applications for guardianship orders. The appellants’ applications were properly filed in the High Court by way of notice of motion.”*

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Examples include some of the authorities relied on by counsel for the applicants, namely:

In the matter of an application for legal guardian by:

- 25 **1. Rick Elder Neill and Kendra Rae Fruechting Neil, Misc. Application No. 2/2011 (Fort Portal High Court) in respect of Baguma Stephen (an infant).**

2. **William Alfred Legere and Teresa Cornelius Legere, Family Cause No. 169 of 2010, in respect of Sarah Arinda (an infant)**
3. **John Michael Hewett and Kimberly Dawn Thomas Hewett, Family Cause No. 273 of 2010, in respect of Tumwebaze Emmanuel.**
4. **Adrian Dennis Eastland and Kristin Katherine Eastland, Family Cause No.170 of 2010, in respect of Max Mwesigwa (an infant).**
5. **Jonathan Adam Hodge and Jill Renae Hodge, Family Cause No. 68 of 2009, in respect of Juliet Tendo (a child).**
6. **Morse Richard Paterson Jr and Pricket Teressa Renee, Family Cause No. 72 of 2009, in respect of Michael (an infant).**

Having settled the issue of jurisdiction, we shall next determine the appellants' appeals on merit.

In Civil Appeal No. 70 of 2011, the grounds for the application were that:

- a) **The child was abandoned by her mother and the child's father is unable to cater for the basic needs of the child.**
- b) **The child being in need of care and protection was committed to the care of Mercy Child Care Ministry.**
- c) **The applicants are ready and willing to provide the child with love, warmth and a healthy environment.**
- d) **The appellants have been found to be suitable parents by probation and welfare officers in their country of origin.**



**e) It is in the best interests of the child that the Applicants be granted legal guardianship.**

The application was supported by the affidavit sworn by both appellants  
5 explaining that:

They got married on 25<sup>th</sup> September 2004 in Santa Barbra, California and are  
blessed with one child, Owen Ribbens, aged 3 years. Andrew holds a  
Masters degree in Architectural Engineering from Illinois Institute of  
10 Chicago and is employed with Ribbens Construction. Sarah holds a Bachelor  
of Arts degree in Elementary Education from Westmont College. The couple  
was informed by Wilfred Blair Rugumba a director of Mercy Child Care  
Ministry how the child, Deborah Joyce Alitubeera was in need of care and  
protection and was committed to Mercy Care Ministry.

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Ms. Betty Moller, a social worker with God's Families International  
Adoption Services, an organization licensed by the State of California to  
carry out home studies to determine the suitability of prospective adoptive  
parents has found them to be fit and proper persons to be adoptive parents.  
20 That the Federal Bureau of Investigations of the USA Government also  
carried out a criminal record check and confirmed that both of them have no  
criminal record. They were medically examined and found medically free  
from any communicable, physical or mental impairment that could endanger  
the child. They are a financially able and happily married couple and will  
25 provide the necessary atmosphere for the child to develop into full potential.  
They intend to obtain a Uganda passport for the child, if appointed guardians

to travel with her to the USA where they reside in order to provide parental guidance and cater for the child's education, shelter, clothing, medical needs and basic necessities of life. The order, if granted will be in the best interest of the child since the child will be entitled to all rights that accrue with such  
5 an adoption under the US laws where she will henceforth reside.

Annexed to the affidavits are photo copies of the relevant documents including letters from their employers, degree certificates, the Home Study Report, FBI criminal record check reports, medical reports and U.S.A VISA  
10 application.

Mr. Rugumba, a director of Mercy Child Care Ministry, has also sworn an affidavit in support of the application confirming that:

15 The child is indeed in need of care and protection, having been admitted to Mercy Child Care Ministry on the 2<sup>nd</sup> February 2011 upon the request of the child's father, Moses Lugya Mboka. The LC1 Chairman of Busia Zone where the father resided had written on behalf of the child's father informing him that the child's mother Judith Natukunda abandoned the child and the  
20 child's father was unable to provide for the child. At the time of admission, the child was in a malnourished state and at risk of death. The child was later on committed to the care of Mercy Child Care Ministry on the 16<sup>th</sup> day of February 2011 vide Nabweru Family Court Care Application No. 030 of 2011. The child's father, Moses Lugya has consented to the applicants being  
25 appointed legal guardians to the child. He had also met the child's mother in Katanga slums after the child was admitted to Mercy Child Care Ministry and informed her of the interest of the appellants becoming legal guardians

of the child and eventually adopt the same and she had agreed. He knows that an institution is not a proper place for a child to grow up in especially in her tender years. The appellants were highly recommended to him by Lifeline Children's Services as fit and proper persons who can provide a healthy home environment for the child and he knows it is in the best interest of the child if this court grants the application.

Annexed to the affidavit are Photostat copies of the Certificate of Approval of Mercy Child Care Ministry, the letter from Busia Zone LC1 Chairman, coloured photos of the child in a malnourished state, the order of the Family and Children's Court in Misc. Appl. No. 30/2011.

An affidavit sworn by Moses Lugya Mboka on the 22<sup>nd</sup> February 2011 was also availed to court, stating that the child's mother abandoned him and emphasizing his inability to cater for the basic needs of the child, hence his consent to the appellants' application for legal guardianship.

Rita Nansubuga, the child's mother, also swore a similar affidavit dated the 18<sup>th</sup> March 2011.

Finally, there is a copy of the Probation Report from the office of the Town Clerk, KCC, Kawempe Division, signed by Ms. Sarah L. Buuzabalyawo as the Probation, Youth and Child Affairs Officer, dated 14<sup>th</sup> April 2011 to the High Court Judge, Family Division where she gave a graphic description of the home and income of the child father as follows:

***“The father lives in a wooden house where a lot of air actually enters the house. This caused pneumonia to Debora and if only it was not of Mercy Child Care Ministry, the child had no chance to survive.***

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***Mboka a type of pauper and alcoholics has 17 children from different mothers and apparently he knows his number of children as he can't remember where the grownups live. At home I found him with four other children all below 10 years old. It is hard for this family to afford any meal a day in addition to adequate beddings and clothing. (sic) ”***

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The Probation Officer goes on to state that Mboka has no land to which he is likely to resettle. As to whether if supported by the appellants, he would stay with the 9 months old child, the report says he told the Probation Officer that he was ***“not the least interested in staying with his child, he only wishes that someone else who has time, love and sympathy for her, can ably take her on for further protection”***. (Sic)

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20 The Probation Officer recommended that the appellants be granted legal guardianship but a proper mechanism be put in place to track the progress of the child while in the USA.

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Dr. Emmanuel De Vivio of the Surgery located at Acacia Avenue in Kampala also filed an affidavit dated 6<sup>th</sup> May 2011 stating that she carried out several tests including stool, urine, HIV, HB to ascertain the child's health, and the tests revealed that the child was severely malnourished. The

doctor recommended medical treatment and better feeding for the child. Copies of the medical reports are attached.

Regarding Civil Appeal No. 81 of 2011, Andrey Finlane Green Zimmerman  
5 of 900 North Stafford Street, Arlington Virginia, 22203, USA filed a Statutory Declaration dated 31<sup>st</sup> March 2011 stating that:

She is married to Matthew John Zimmerman. They are blessed with one biological child, Cori Green, aged 27 years. She came to Uganda as a  
10 volunteer for the Catholic Archdiocese of Tororo. They lived at Nyondo Catholic Parish Mbale district since November 2009. They first met Richard Masaba at St. Kizito Babies Home in Mbale when they came to Uganda on a Mission trip for the Catholic Diocese of Tororo in July 2007. Since then, they have been supporting Richard Masaba by providing him with  
15 medication, parental love and care through St. Kizito Babies Home.

They were authorized to foster the child in 2010. They would like to take full responsibility for Richard and intend to live with him in the USA where they can provide him with a home, medical care, education and other  
20 necessities of life. They have no criminal record and are both physically and mentally healthy. Their home has also been recommended as being fit for adoptive purposes by the Adoption Home Studies, Archbishop of Tororo Diocese and the Bishop of Jinja Diocese. They wish to adopt the child and are fully aware of his medical problems including his ear and testicles as  
25 reflected in the medical report. They believe that their appointment as legal guardians will be for the benefit and welfare of the child as they will provide him with a home, love and medical care.

Mr. Zimmerman has also signed a similar Statutory Declaration of the same date corroborating the one of his wife. Annexed to the Statutory Declarations are Photostat copies of supporting documents including a  
5 Notarised letter confirming their mission in Uganda, their marriage certificate, passports, foster certificate, certificate of good conduct from INTERPOL, Adoption Home Studies Report and recommendation letters from Tororo and Jinja Dioceses.

10 There is also an affidavit of Michael Wanda who deponed that:

On the 7<sup>th</sup> February 2007, at about 8:00 p.m, he found a child abandoned at his home. The child was wrapped in a shawl and a portion of his umbilical cord was still attached. He notified the police and he was instructed to take  
15 the child to the home of the LC1 Chairman of Shikoye village, one Werikhe Moses. The next day, the LC1 took the child to Mbale Central Police and later on the child was referred to St. Kizito Babies Home by the Probation and Welfare Officer, Mbale. The child's parents are unknown and todate he has not been contacted by anyone about the child.

20

He believes the order sought would benefit the child as the appellants will provide him with parental love and care.

Ms. Chelimo Lovinsa, the O.C child and Family Protection Unit, Mbale  
25 Central Police swore an affidavit dated 23<sup>rd</sup> March 2011 corroborating the evidence of Mr. Wanda.

Mr. Moses Werike also swore an affidavit dated 19<sup>th</sup> March 2011 narrating the same story how the child came to be in his custody and eventually that of the Police and St. Kizito Babies Home.

5 Mr. Mutonyi Meresi, the Senior Probation Officer, Mbale District swore an affidavit dated 23<sup>rd</sup> March stating that the child is an abandoned child whose parents are unknown. That he has not received any information about the child's parents or relatives since he was abandoned. He visited the appellants' home in Nyondo Parish Bungokho county Mbale District and has  
10 established that their home is suitable for foster care and adoption purposes. He also supports the application.

The affidavit of Sr. Mary Lunyolo, the Administrator of St. Kizito Babies Home is to the effect that the couple got to know of the child when they  
15 visited the home. That they have since then been providing for him. That they placed an advertisement in the newspapers regarding the child, but no one responded. Sister also supports the application.

The two children were produced before us in Court. They looked well  
20 nourished and happy. The sum total of the above evidence is to the effect that the welfare of the children will be catered for by the appellants.

The other hurdle that the learned trial Judge was concerned about has been addressed in previous applications for guardianship by the stringent  
25 conditions given by Court. We shall adopt the same precedent.

In the result, both appeals succeed. The decisions and orders of the High Court are hereby set aside with the following orders:

1. The appellants in Civil Appeal No. 70 of 2011 are hereby appointed  
5 legal guardians of the 1<sup>st</sup> infant and the appellants in Civil Appeal No. 81 of 2011 are also appointed legal guardians of the 2<sup>nd</sup> infant until the said infants attain the age of 18 years or any other lawful orders of the Court on the following conditions:
  - 10 a) The infants must retain the Citizenship of Uganda until attainment of the 18 years or further orders of the court.
  - b) The appellants in each case are directed to obtain Ugandan passports for the infants using their existing Ugandan names.
  - 15 c) The appellants in each case are directed to leave all their particulars, addresses, e-mail and physical residence where the infants will be residing, with the Chief Registrar of the Courts of Judicature, with copies to the Probation and Welfare Officers of Kampala and Mbale,  
20 The National Council for Children, Mercy Child Care Ministry in Kampala, St. Kizito Babies Home in Mbale, the Ministry of Foreign Affairs in Kampala and Uganda Embassy in Washington D.C. in the U.S.A.
  - 25 d) The appellants are directed to submit progressive reports of the 1<sup>st</sup> infant and the 2<sup>nd</sup> infant, respectively, every 6 months to the District Probation and Welfare Officers Kampala and Mbale, Chief Registrar



Courts of Judicature, Ministry of Foreign Affairs Kampala and the Uganda Embassy in Washington D.C. U.S.A. The same report must be sent to Mercy Child Care Ministry in Kampala and St. Kizito Babies Home in Mbale.

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e) In the event of an application for adoption of the infants or any one of the two, it must be filed in Uganda failure of which will result in the revocation of the guardianship orders.

10 f) The appellants in both cases are hereby ordered to bring the 1<sup>st</sup> and 2<sup>nd</sup> infants back to Uganda and produce them before The Chief Registrar of the Courts of Judicature every 5 years from the date of this decision until the said infants attain the age of 18 years.

15 g) Any changes of address must immediately be communicated to the above mentioned authorities.

2. The Civil Registry of the Court of Appeal is directed to send copies of the guardianship orders to the Chief Registrar Courts of Judicature,  
20 the Ministry of Foreign Affairs, Kampala, The National Council for Children, the District Probation Officer, of Kampala and Mbale, and the Uganda Embassy in Washington D.C. U.S.A.

Dated at Kampala this...**09<sup>th</sup>** ...day of ...**February**... **2012**.

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**HON. JUSTICE A.E.N. MPAGI-BAHIGEINE**  
**DEPUTY CHIEF JUSTICE**

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**HON. JUSTICE A.S.NSHIMYE**  
**JUSTICE OF APPEAL**

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**HON. JUSTICE M. S. ARACH AMOKO**  
**JUSTICE OF APPEAL**

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