

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

HCT-00-FD-MC-0010-2009

In the matter of Atuheirwe Pauline Muhumuza

And

In the Matter of An Application by Mpeirwe Janepher Muhumuza

BEFORE

THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. In this application, the applicant, the natural mother of the infant in question, is seeking to be appointed its legal guardian. The applicant further seeks leave of this court to pledge Block 395 Plot No.608 land at Sekiwunga to Stanbic Bank (U) Ltd as security for a loan to Uniol (U) Ltd a company in which the minor is a shareholder. The applicant and the infant are the registered proprietors of the land the applicant seeks to mortgage.
2. This application is made, as far as I can gather from the notice of motion filed in this matter, under Section 98 of the Civil Procedure Act, Sections 16, 33, 39 of the Judicature Act, Sections 4 of the Children Act and Order 52, rules 1 and 3 of the Civil Procedure Rules. Section 4 of the Children Act deals with a child's right to stay with its parents. It has no application here. Neither in my view does Section 98 of the Civil Procedure Act, given that the applicant has cited Order 52 rule 1 and 3 as the rules

under which this application is made. Section 98 referred to above recognises the inherent powers of court to prevent abuse of its process and or injustice.

3. I shall assume that the application wished to refer to Section 3 of the Children Act, which deals with guiding principles in children matters. It may be a useful starting point, given the fact that the guiding principles it points to touch on the making of decisions affecting a child's property.
4. Section 3 of the Children Act states,
 - '3. Guiding Principles
The welfare principles and the children's rights set out in the First Schedule to this Act shall be the guiding principles in making any decision based on this Act.'
5. Clause 1 of the Guiding Principles in Schedule 1 of the Act, states,
 - '1. Welfare Principle
Whenever the State, a court, a local authority or any person determines any question with respect to ---
 - (a) the upbringing of a child; or
 - (b) the administration of a child's property or the application of any income arising from it;the child's welfare shall be of paramount consideration.'
6. It is clear the substance of this application is to deal with the administration of the child's property by allowing the applicant to mortgage the same. Other than the welfare principle set out above, I have been unable to find any other provision in the Children Act that relates to the management of a child's property or estate. Much as the Act defines a guardian in its interpretation section, it contains no provision dealing with appointment of guardians. There is clearly a lacuna in the Children Act with regard not only to appointment of guardians, but more importantly, the management of a child's estate or property. Section 98 of the Civil Procedure Act is not helpful in this regard, given that it is dealing with inherent powers of court to prevent abuse of its process or injustice.
7. Under Section 1(k) of the Children Act a guardian is defined as a person having parental responsibility for a child. Parental responsibility is stated to be all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child. Under Section 6 of the Children Act a parent, that is the biological

parent of a child, is seized with parental responsibility for his or her child or children. A parent is therefore a natural guardian of his or her child or children.

8. Unfortunately the management of a child's estate or real property is not the subject of any written law in this jurisdiction, save for the mention it receives in the guiding principles under schedule 1 to the Children Act. However, this court is a court of unlimited jurisdiction in all matters as provided in Article 139 of the Constitution. This is a matter therefore which this court can entertain.

9. Under Section 14 (b) of the Judicature Act this court is empowered, where the written law does not apply or extend, to apply

‘(1) the common law and the doctrines of equity;

(ii) any established and current custom or usage; and

(iii) the powers vested in, and the procedure and practice observed by, the High Court immediately before the commencement of this Act in so far as any such jurisdiction is consistent with the provisions of this Act; and

(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience.’

10. As there is no applicable written law, save the guiding principles set out in Schedule 1 to the Children Act, it is to the common law of Uganda that we must turn to first before considering any other source of law as provided for in Section 14 of the Judicature Act. This position is set out, in my view, in Halsbury's Laws of England, 3rd Edition at page204 in the following words,

‘A guardian appointed by the court is, in the absence of express direction, only a guardian of the infant's person; but the court may appoint him, or a separate person, to be guardian of the infant's estate.’

11. Authority for that proposition of law is indicated in a footnote to be Re Willoughby (an Infant) (1885), 30 Ch. D. 324, C.A. at p.330; (i) Re Bond (1864), 11 Jur. 114; and Re Pavitt, [1907] 1 I.R. 234. I have not been able to lay my hands on the said authorities save for Re Willoughby (an Infant) (supra). It was decided by the Chancery Division of the High Court of England and then appealed to the Court of Appeal

which affirmed the decision of the trial court. Under consideration was the question of whether the courts in England had jurisdiction to appoint guardians for an English infant, with no property in England, and who was living in France with its French mother. The French mother, under French law, was its natural guardian.

12. Of interest is the statement of the common law with regard to whether the courts had jurisdiction to appoint guardians of infants. Kay J., answered the issue in the following words, at page 327,

‘... but it is said that the court has not the power to appoint guardians of this child, or if it has the power, it is not a case in which it ought to exercise that power. Now, whether it has the power or not seems absolutely beyond controversy after the case of *Hope v Hope*. Lord Cranworth, in his judgment in that case, says: “The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rest upon this ground, that it is in the interests of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriae*, is bound to look to the maintenance and education (as far as he has the means of judging) of all his subjects. The first question then is, whether this principle applies to children born out of allegiance of the Crown; and I confess that I do not entertain any doubt upon the point, because that it is established by statute that children of a natural born father born out of the Queen’s allegiance are to all intents and purposes to be treated as British-born subjects, of course it is clear that one of the incidents of a British-born subject is that he or she is entitled to the protection of the Crown as *parens patriae*.” No language can be more clear and emphatic. This child is entitled to all the rights and privileges of a British subject, as much as if she had been born in this country, and therefore it is within the jurisdiction of this Court to provide for the custody and care of this child, who is entitled to such rights.’

13. *Parens Patriae* is defined by Black’s Law Dictionary (5th Edition) at page 1003 as

‘literally “parent of the country”, refers traditionally to role of state as sovereign and guardian of persons under legal disability.....*Parens Patriae* originates from the English Common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants, idiots and lunatics. In the United States, the *parens patriae* function belongs to the states.’

14. I accept Kay, J., statement above as a correct statement of the common law with regard to the jurisdiction of this court to appoint guardians of infants in relation to their estates. The Sovereign in Uganda are the people of Uganda who have in their Constitution vide Article 126(1) thereof entrusted judicial power to the Judiciary, and granted to this court unlimited jurisdiction in all matters vide Article 139 thereof. It is for this court therefore to deal with all judicial aspects of the exercise of the power of *parens patriae* held by the state in relation to citizens of this nation. In particular this is so in relation to the custody and care of infants and their estates, in absence of written law to the contrary. I am therefore satisfied that this court has jurisdiction to appoint guardians of infants in respect of their estates.
15. The applicant seeks to be appointed a guardian of the infant in question in relation to infant’s estate. The applicant also seeks authority of this court to mortgage the property referred to above which is owned by the infant and the applicant. The purpose of the mortgage is to secure funds to enhance shareholder value of the company in which the infant possesses shares. In the main I would suppose that this would be in the interests of the infant as it would grow its asset base.
16. However risks are attendant upon such a course of action. The company may default and the property of the infant would be lost! Nevertheless the existence of risk should not inhibit the course of business, if it is prudently managed.
17. The infant is possessed with property which it cannot manage by virtue of its minority. Such property needs to be managed. The candidate in this case for that position is its natural guardian. I am satisfied that the applicant is qualified to take on this responsibility. I appoint the applicant guardian of the infant in respect of the infant’s property.

18. The applicant in her role as guardian of the infant's estate is a trustee. And like all trustees she must account for her stewardship of the property she will manage in trust for the infant. It is not necessary that this court grants her authority for every single act that she must carry out during her tenure. I believe that she is clothed with all authority of the owner as the guardian of the owner's interests. I need not therefore grant her specific authority to pledge or sell the property in question.

19. This application is allowed to the extent set out above.

Signed, dated, delivered at Kampala this 4th day of March 2009

FMS Egonda-Ntende

Judge