

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

HCT-00-FD-FC-0067-2009

IN THE MATTER OF BAKHITA NAKIBERU A CHILD

AND

IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY PATRICK KELLY
CUNNINGHAM AND CHARITY ELIZABETH CUNNINGHAM

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicants, a married couple, are United States citizens residing at 2320 Scot Lane, Aurora Illinois in the United States of America. In this application they are seeking a guardianship order in respect of Bakhita Nakiberu hereinafter referred to as the child. The child was born on 13th June 2004 to Richard Kiberu and Night Nalubwama. The mother abandoned the child with the father 2 months after its birth.
2. The father failed to provide for the child and it suffered considerably. The child suffered severe malnutrition. The child was eventually given to a Mr. Kiwanuka on 14th January 2006 who accepted to care for the same and has done so since then to date. Mr. Kiwanuka lives on Bweya village in Wakiso District. Mr. Kiwanuka works part time with Bweya Children's Home where he came into contact with the applicants. Mr. Kiwanuka has a family of six children and other dependants and feels

that he is unable to continue caring for this child. He supports this application as does the natural father of the child, Mr. Kiberu.

3. The probation officer's report states in part,

'The above child has lived really a trying life without the potential economic base for his sustainability and a ground to foster his full growth, development and education potential as his father is not able and the mother's whereabouts are not known.'

4. Patrick married Charity on 5th August 2006 at Hinsdale, Illinois in the USA. Patrick is a website builder with Lifting Gear Hire Corporation. Save for 2 traffic offences Patrick has no criminal record in the United States. Neither does he have a history of child abuse or neglect. Charity is employed as a Development Assistant with Wheaton Academy, West Chicago, Illinois.

5. An Intercountry Adoption Home Study on the applicants by Sunny Ridge Family Center of Bolingbrook, Illinois notes,

'Patrick and Charity Cunningham have completed all the requirements of Sunny Ridge Family Center for the adoption of a child from Uganda. They have put much thought and consideration into the international adoption process and seem well prepared to parent a child. They lead a family-oriented lifestyle and feel that adopting a child is a wonderful way to continue to build their family. Sunny Ridge Family Center assesses Patrick and Charity Cunningham as physically, mentally, and emotionally, capable of parenting an adopted child.'

6. I am satisfied that the applicants, on the facts available to me, are suitable adoptive parents. I must now turn to the law.

7. The applicants apply for legal guardianship under Article 139(1) of the Constitution, Sections 14 of the Judicature Act, Sections 2, 3, 4 and 5 of the Children Act, Section 98 of the Civil Procedure Act and Order 52 Rules 1 and 3 of the Civil Procedure Rules. It is clear that the applicants' intention is to adopt the infant in question and intend to do so in the USA in case this application succeeds. Given that scenario I

would have been inclined to find that the applicable law should be Section 46 of the Children Act which deals with inter-country adoption, in which case, this application would have failed given the fact that the applicants would not have complied with the residency requirement and the 36 months foster period.

8. However, the Court of Appeal, in the case of *In the Matter of Francis Palmer an Infant*, Civil Appeal No. 32 of 2006, and in the case of *In the matter of Howard Amani Little, an infant*, Civil Appeal No.33 of 2006 held that this court has jurisdiction to grant orders of legal guardianship by a 2 to 1 decision. What that decision does not make clear are in what circumstances should a court issue that kind of order, especially in cases that are akin to inter country adoptions.
9. In that the decision the Court of Appeal was divided as to when and how the High Court may grant orders of legal guardianship in the circumstances where the applicants were foreign applicants resident outside this country and whose intention of applying for legal guardianship was to take the children outside this jurisdiction.
10. The Presiding Justice was of the view that legal guardianship was to be resorted to where the applicants could not fulfil the conditions under Section 46 of the Children's Act. The second Justice of Appeal disagreed. Though in agreement with the presiding justice that this court had jurisdiction to grant orders of legal guardianship, the justice of appeal stated that it should not be applicable where the applicants were foreign applicants who did not qualify under Section 46 of the Children's Act. To allow such applicants to obtain orders of legal guardianship, while they did not qualify to adopt the children under the Act, would be an infringement of the Act. The third Justice of Appeal did not agree that the High Court had the power to grant orders of legal guardianship, such power being only available to Family and Children's Court, by the issue of care orders and appointment of Foster Parents. Nevertheless he concurred in the granting of the order of guardianship proposed by the Presiding Justice.
11. The Court of Appeal decision, given the conflicting legal positions taken by each justice, provides no authoritative guidance as to how this court should exercise its power in granting orders of legal guardianship. In the result, perhaps, I must turn to simply one question. Is the grant of such an order in the best interest of the infant?
12. What is needed for this infant and many other infants in her position is a home with loving parents and a family. This child is being provided an opportunity to grow up in a loving family environment to be provided by the applicants. The child's family circumstances are from being conducive for this child's normal development. No

governmental support, be it local or central, is available for the care and upkeep of vulnerable children suffering want of care generally or specifically in the case of this child. I find therefore that exceptional circumstances exist for an order to be made in favour of non citizens who are the only viable alternative.

13. I am satisfied that it is in the infant's best interests to grant rather than refuse this application. Accordingly I grant an order of legal guardianship of Bakhita Nakiberu to the applicants effective immediately.

Signed, dated and delivered at Kampala this 18th day of June 2009

FMS Egonda-Ntende

Judge