THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS CAUSE NO. 37 OF 2009

IN THE MATTER OF PETER SSEBULIBA

ALIAS NAMANSA JAMES (An Infant)

AND

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJUCIENDUM BY SUSAN NAYIGA (Mother) IN RESPECT OF THE SAID INFANT

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

Susan Nagayi brought this application in respect of Peter Ssebuliba, her biological son. The application was brought under the provisions of s.42 (now 38) of the Judicature Act and rule 3 of the Judicature (Habeas Corpus) Rules, SI 13-6. The application referred to Peter Ssebuliba as the applicant but of course he did not have the capacity to originate an action in court because he was still a minor. I therefore considered his mother as the applicant who brought the application on is behalf.

The applicant sought for a writ of habeas corpus against one Victoria Kalungi Namakonzi who was holding the infant pursuant to an adoption order that had been issued by the Chief Magistrate at Jinja. Victoria Kalungi Namakonzi was a sister-in-law to the infant's father. The main ground for the application was that the adoption order had been procured fraudulently because Victoria Kalungi did not obtain the consent of the child's mother (his only surviving parent) before obtaining the order. Further ground was that the continued denial of the opportunity for the child to live with his biological mother was not only unlawful but unconstitutional.

This is an unfortunate situation that may result in a lot of pain both for the child and for the adoptive mother. But as will become apparent from the facts on which she based her application, the

prevailing circumstances have also caused the applicant a lot of pain and suffering. The applicant demonstrated this when she left the court wailing at the top of her voice after I reserved my ruling to a date in the future. While in the corridors of the court, she attempted to grab and take away the child but was restrained. I called the applicant back into court, cautioned her and advised her to restrain herself till the delivery of this ruling.

I have endeavoured to set out the evidence before me in some detail, as well as the submissions that counsel for both parties which they presented in a bid to resolve the painful issues in this application. The resultant ruling is therefore rather long, but that is also because Peter Sebuliba who is now only 6 years old is incapable of comprehending this process which may affect his life for a long time to come. When he is of age, he may desire to know and understand, as well as resolve the emotional and psychological issues that will no doubt arise from the effects that might result from my decision in this matter. This ruling might provide some solace.

In her affidavit in support of the application, the applicant deposed that she is the mother of Peter Ssebuliba a.k.a James Namansa (hereinafter “the child”) who was born to her and Joseph Ssebuliba on 2/04/2003. Joseph Ssebuliba died on 26/03/2005 after a long illness. According to the applicant, before his death Joseph Ssebuliba approached her at her home in Nabingo, Ntega Zone in Wakiso District with one Prosy Nalule, sister to Joseph Ssebuliba. He requested the applicant to hand the child to Prosy Nalule so that he could visit and get to know other members of his family. The applicant reluctantly obliged because the child was only 1 year and 4 months old at the time. The applicant further deposed that Joseph Ssebuliba promised that the child would stay away with his aunt Nalule for only two weeks. Nalule was resident with Joseph Ssebuliba’s other child called Tonny who he (Ssebuliba) wanted the child to become acquainted with. This convinced the applicant to release the child.

The applicant further averred that sometime after the child was taken away, Prossy Nalule called her to inform her that Joseph Ssebuliba was very ill. She requested the applicant to go and attend to him at a clinic in Nsambya. The applicant obliged. The applicant also averred that while she was at the clinic attending to the deceased, Prossy Nalule took the child to visit with her and his late father. Three weeks later, Joseph Ssebuliba died and he was buried at Bujjuko. The child attended the

funeral but after that the applicant was informed that he would still be retained by Nalule so that he could continue to mourn the loss of his father with other relatives.

It was also averred by the applicant that she visited the child once at Nalule's home in Bukoto, Kampala. But after that, Nalule began to avoid her; she hang up whenever the applicant called her on telephone and feigned illness whenever she proposed that they meet. The applicant then threatened to report the matter to the police and when she did so, Nalule informed her that the child was safe in Jinja learning English and Japanese. Nalule further assured the applicant that she was free to visit the child anytime she was in Jinja. In September 2008, the applicant called Nalule and requested to see the child. Nalule promised that they would meet in Jinja where she would take the applicant to the child. When the applicant arrived in Jinja, she called Nalule but Nalule did not show up. The applicant averred that she made a second attempt to get Nalule to take her to see the child in 2008. Nalule then told the applicant that she had sent the child to Germany for treatment for his ears that were infected and oozing with pus. The applicant then reported the matter to Jinja Police Station and Nalule was summoned. Police requested her to produce documents related to the child's travel but she failed to do so. After some interrogation by police, Nalule revealed that she had given up the child for adoption.

It appears that for quite sometime, both the applicant and her advocates did not know about any remedies available to the applicant. The matter lay in limbo till the applicant brought this application for an order for habeas corpus. She sought to have the child brought to court so that orders are made to hand him over to her because she desires to live with him at her residence in Nabingo, Wakiso District.

On the basis of the applicant's affidavit, on 23/01/2010 I issued a writ for habeas corpus directed to Victoria Kalungi Namakonzi to produce the child. The writ was returnable on 2/03/2010, but before that, under the provisions of s.83 of the Civil Procedure Rules, I called for the file in Adoption Cause No. 51 of 2009 in the Chief Magistrates Court at Jinja with a view to revising the contested proceedings. The writ was served on the respondent but she failed to produce the child on the 2/03/10 claiming he was in a boarding school in Entebbe and that the headmistress of the school who promised that she would bring the child to court had been delayed. The matter was then adjourned to 4/03/2010 when the child was finally produced in court and the hearing of the application proceeded.

The respondent deposed an affidavit in reply to the application on 4/03/2010. A supplementary affidavit in reply was deposed by Prossy Nalule on the same date. In her affidavit in reply, the respondent stated that she obtained permission to take custody of the child in January 2005 from his father, his aunt Prossy Nalule, as well as another aunt called Jane Namukasa. She also averred that she had been reliably informed that the mother of the child had abandoned him to the father who was bedridden, suffering from AIDS disease. Further that at the time, the child was in poor health and there was no other person to look after him. According to the respondent, at the time she took custody of the child, she insisted that the permission to do so be documented. She further averred that shortly after she took custody of the child, Joseph Sebuliba (his father) died. That since the child suffered from various ailments including a recurrent discharge of pus from the ears, she ensured that he got treatment for the ailments. Medical treatment notes from International Air Ambulance Clinic (IAA) and a referral form from International Hospital Kampala (IHK) were Annexure “A” to her affidavit.

It was also averred by the respondent that she obtained a fostering order in respect of the child with the consent of the child’s paternal aunts who were the only relatives that she knew, the mother (applicant herein) having abandoned the child. A Photostat copy of a care order dated 19/12/2005 was attached as Annexure “B” to her affidavit. The respondent further averred that the applicant was aware of the adoption proceedings because she called the respondent on telephone through Prossy Nalule in 2008. The respondent also stated that at the time, the applicant told her that she had no objection at all to the adoption but she demanded for money which the respondent refused to give her. The respondent further averred that in 2009, she did not know where the applicant was and all efforts to trace her were futile. Further that Prossy Nalule and Jane Namukasa assured her that the applicant had no interest in the child because she abandoned him when she found out that his father had HIV and suffered from AIDS. Also that she was informed that the applicant abandoned the child because she feared that he too had HIV. The applicant finally averred that she was innocent of any fraud; that she took up the custody of the child in good faith because of his poor health and helplessness. She thus proceeded to adopt him and obtained an adoption order from the Chief Magistrates Court at Jinja (Annexure “C” to her affidavit).

In a supplementary affidavit, Nalule averred that the applicant abandoned the child who was then 1½ years old, at Joint Clinical Research Centre at Kabalagala where Joseph Sebuliba was ill and bed ridden. Further that the child was also very ill and everybody at the clinic tongue lashed the applicant for doing so. That the applicant insisted that though Joseph Sebuliba was ill he should take care of the child. Nalule further averred that she convinced the applicant to keep the child and care for him till her brother recovered. That when he gained some strength, she accompanied him to the applicant's home where the applicant released the child to them.
Nalule further averred that at the time she had no job. That in addition to Peter Sebuliba she also had custody of Joseph Sebuliba's other children, Tonny Kawuma and Joan Namboze. Further that at the instance of Joseph Sebuliba, she and Jane Namukasa convened a meeting where, together with Joseph Sebuliba, they resolved that they find a person to take care of the child. That she then contacted the respondent who reluctantly agreed to take care of the child while in her (Nalule's) custody, but Joseph Sebuliba insisted that the respondent take over full responsibility for the child. She also averred that Joseph Sebuliba executed a document giving the respondent full powers over the child.

Nalule stated that since she abandoned the child, the applicant only contacted her once in 2008. She then told the applicant that Joseph Sebuliba surrendered the child to the respondent with a view to adopting him. Further that the applicant insisted that the respondent should give her money for her own upkeep which the respondent refused to do because she had to provide for the child. Nalule denied that she avoided meeting the applicant. She also denied that the applicant ever communicated that she wanted to take the child back. She asserted that the applicant was not deprived of custody of the child but that she deliberately abandoned him. That no consent was obtained from her for the adoption because her whereabouts were not known. That since the applicant's conduct exhibited lack of interest in the child it was in his best interest that the respondent adopt him.

Mr. Shaban Muziransa who appeared for the respondent submitted that the facts above which were stated in the affidavits of the respondent and Prossy Nalule constituted the return of the writ. He was also of the view that the adoption order in his client's possession could only be challenged by way of an appeal under s.50 of the Children Act. He further contended that though this court had the discretion to call for the file from the Magistrates Court and revise the adoption proceedings, such

revision could only be carried out under the provisions of s.83 of the CPA after an application by a party thereto. He prayed for directions on how to proceed in the application.

Directions regarding the procedure in such applications were issued following the provisions of the Judicature (Habeas Corpus) Rules (SI.13-6), emphasising that an application for the writ of habeas corpus could issue in any matter where a person is alleged to be unlawfully detained. This includes situations where a child is so detained, as was envisaged by Form 1 of the Judicature (Habeas Corpus) Rules. I did not agree with Mr. Muziransa's contention that this court cannot revise proceedings before the magistrate's court unless there is an application to do so, brought before it by an aggrieved party. The powers of revision vested in this court by s.83 of the CPA are very wide and there is no specific form in which the court is to be moved to revise proceedings of magistrates' courts. Any appeal, complaint or application resulting from such proceedings is cause for and may result in revision. It is for that reason that I called for the file in Miscellaneous Application No. 51 of 2009.

Counsel for both parties offered submissions on the application for habeas corpus. In her submissions, Ms. Juliet Komugisa for the applicant stated that the adoption order that was granted to the respondent on the 6/05/2009 was a nullity and prayed that it be set aside and the child handed over to the applicant. She submitted that the order was a nullity because there were no exceptional circumstances that warranted granting an adoption order in respect of a male child to a female adoptive parent. Further that the order was a nullity because the consent of the only surviving parent (the applicant) had not been obtained which was contrary to the provisions of s. 47 of the Children Act. That according to Article 34(1) of the Constitution, it was the right of the child to be cared for by the applicant and this had been contravened.

Ms Komugisa thus prayed that court makes an order nullifying the adoption order, and that the child be handed back to his biological mother. Further, that in the event that court declined to make the order, the child ought to be handed over to a neutral person, the Probation and Social Welfare Officer. She also prayed that the costs of the application be borne by the respondent.

In reply, Mr. Muziransa submitted that the applicant did not detain the child unlawfully because she had a valid adoption order granted to her. That subsequent to the order and before it, the respondent

had demonstrated that she cared for and duly provided for the child as is required by law. That there were special circumstances justifying the grant of an adoption order in respect of a male child to the female respondent because he was ill and his biological mother had abandoned him. With regard to the absence of the consent of the applicant to the adoption, Mr. Muziransa submitted that s.47 (2) of the Children Act empowered courts to exercise their discretion to dispense with consent of the parents where they are incapable of giving it. That in this case, since the mother had expressed unwillingness to take care of the child, and she had demanded for money from the respondent, her conduct was such that she was incapable of giving her consent for the adoption.

Turning to the provisions of Article 34 of the Constitution, Mr. Muziransa submitted that the respondent took custody of the child only because Joseph Sebuliba asked her to do so; he therefore dispensed of his right to care for the child. Further, that by her conduct, the applicant gave up her constitutional rights to have custody of and take care of the child. Mr. Muziransa further submitted that in making the order, the Chief Magistrate emphasised that it was made in the child's best interests, and given the circumstances at the time it was in his best interests that the order be granted. He also argued that ordering that the child be returned to the applicant would not be in his best interests because the child was still undergoing treatment for his ear infection. The child was also in school and looked healthy and well. Further that the only mother that the child had known in his entire life was the respondent. He opposed the prayer that the child be handed over to probation services for the same reasons. He also opposed an order for costs being made against the respondent because she had provided for the child for a period of 5 years. In addition, he submitted that because the application had been brought on behalf of the applicant by FIDA (U) in the form of legal aid, the applicant was not entitled to advocates cost.

The main question for determination by this court is whether the adoption order granted by the Magistrates Court was fraudulent and/or unlawful and if so, whether it ought to be set aside. That would involve determining the following sub-issues that were raised in the pleadings and the submissions by both counsels:

i) Whether the respondent obtained the child's parents' consent before the adoption; if not
ii) Whether the trial court properly dispensed with the requirement for consent;
iii) Whether the adoption order was vitiated by other fraud or illegality;

iv) Whether the applicant is entitled to the remedies sought.

The requirement for consent of the parents of the child before an adoption order is granted is provided for by s. 47 of the Children Act. S.47 (1) provides that the consent of the parents of the child, if known, is necessary for the adoption order to be made; but the consent may be revoked at any time before the pronouncement of the adoption order. Rule 8 (1) of the Children (Adoption of Children) Rules provides that a consent required by the Act shall be given in the manner set out in Form C in the Schedule to the Rules, except that a consent required by the Act from a child over the age of fourteen years shall be given in Form D in the Schedule. Rule 8 (2) of the Adoption of Children Rules further provides that all consents shall be sworn before a commissioner for oaths and shall be submitted together with the affidavit of verification of the petition or accompanied by a separate affidavit of verification.

The consent to adoption is a very important document because it is in it that the parents or guardians of the child to be adopted vest their parental rights in the adoptive parents. The relevant part of Form C of the Adoption of Children Rules reads as follows:

> "Whereas the petitioner(s) has (have) petitioned or intend(s) to petition the court for an adoption order in respect of the child, _____, I, ______________ (*name*) of __________(*address*) __________, being the mother/father/other person with rights or obligations in respect of the child (*specify*) or spouse of the petitioner, consent to the adoption of the child by the petitioner(s) and acknowledge that an adoption order will vest all parental rights and obligations in respect of the child in the petitioner(s).
>
> Signed __________________"

The form above is framed in a manner that requires the natural parent to give up his/her rights to the child. I think it is for the same reason that the provision requiring consent is couched in mandatory terms and may only be dispensed with in exceptional circumstances.

In this case, although the respondent stated that Joseph Sebuliba, Jane Namukasa and Prossy Nalule consented to the adoption of the child, the consent that is required by the law was never produced in

the lower court. Neither was it produced here when those proceedings were being questioned. In addition to that, though both Nalule and the respondent stated that Joseph Sebuliba vested the rights to custody in the respondent by a power of attorney that he executed before his death, that power of attorney was not produced in these proceedings. I carefully perused the file in the lower court and found that no such document was produced in those proceedings either. But in my opinion, even if the powers of attorney had been produced, the respondent stated that the said power of attorney was granted to her in order to vest custody of the child in her; it was never intended to be the formal consent required in adoption proceedings.

As to whether the respondent obtained the consent of the applicant before the adoption, there is no contest that she did not. The respondent and Nalule both claimed that the applicant herein had abandoned the child. After perusing the file in Adoption Cause No. 51 of 2009, I thought the facts stated by the respondent and Nalule in this application were substantially different from those that had been stated in the lower court on the petition for adoption. In paragraph 9 of the Victoria Kalungi's affidavit verifying the petition which was dated 28/04/2009, she averred that although she had requested Prossy Nalule to look after the child while she sorted out her business commitments and travels, Nalule also abandoned the child in the respondent's compound in her absence and without her knowledge. The respondent had also stated that Joseph Sebuliba handed the child over to her when he was ill and bedridden due to HIV/AIDS after the child's mother abandoned him when she realised that he suffered from that condition. She relied on Prossy Nalule's affidavit dated 16/12/2005 for that averment. In paragraph 2 of that affidavit, Prossy Nalule averred that the applicant abandoned the child, who was ill, at Joseph Sebuliba's residence where he too was very ill and bed ridden. I therefore put some questions to the respondent and Nalule about the contradictions that were evident between the affidavits in this application and those in the lower court.

With regard to the applicant's alleged abandonment of the child, Prossy Nalule stated before me that the applicant abandoned the child to the deceased at her home in Nabbingo. In her words:

> *"We went for the child when my brother got better. We went to her home at Nabbingo. She abandoned the child in Nabbingo when we went for him with my brother."*

This statement by Nalule seemed to tie in very well with the applicants' averment in paragraphs 3 and 4 of her affidavit in support of this application. In those two paragraphs she stated that Nalule

and Joseph Sebuliba went to her and took away the child on the pretext that they were taking him to get acquitted with his siblings. I therefore believed the applicant's statement that Nalule and her brother took the child away from her in circumstances that made her believe that they would bring him back after sometime. I came to the conclusion that the applicant did not abandoned her child but Nalule told lies to the Family and Children Court (FCC) that granted the care order to the respondent, that she did so. The same lies were perpetrated before the Chief Magistrate's Court because that court relied on Nalule's affidavit in the FCC to come to a finding that the applicant abandoned her child.

I inquired from Nalule whether she too abandoned the child at the respondent's home sometime before the adoption order was granted, as was alleged by the respondent in paragraph 9 of her affidavit verifying the petition for adoption. Nalule responded as follows:

> *"I did not abandon the child. It is not true that I abandoned the child at Victoria Kalungi's home. I could not do that because the child was ill."*

Nalule's statement before this court was not different from what she stated in the affidavit in support of the application for the care order in the FCC. In paragraphs 6 and 7 thereof she stated that Victoria Kalungi used to give her assistance and paid the child's bills at IHK. Also that she and the children in her care (Peter, Tonny and Joan) survived on handouts from Victoria Kalungi. After the death of Joseph Sebuliba, Nalule had to find a job to ensure her own survival. Therefore in July 2008 Nalule handed the child over to Victoria Kalungi so that she could have custody and take care of him. That being the case, I find that paragraph 9 of the respondent's affidavit verifying the petition for adoption contradicted Nalule's affidavit. That contradiction also amounted to a lie on Nalule's part about an important aspect of the child's welfare.

The allegations that Nalule and the respondent could not get a formal consent from the applicant because they did not know where she was were also doubtful. According to Nalule, she last communicated with the applicant on telephone in September 2008. This was only about 6 months before the adoption petition was lodged in the Magistrates' Court (on 28/04/09). At the time the applicant telephoned to Nalule to enquire about the welfare of the child. Nalule talked to the

applicant but she stated in this court that at the time she did not try to find out where the applicant was, though she also admitted that all along she had the applicant's telephone number.

On the other hand, the respondent stated that Nalule called the applicant before the adoption and she (the respondent) talked to her. She asserted that the applicant was aware of the adoption proceedings because she (the respondent) informed her about them. According to the respondent, she took no trouble to obtain consent to adopt the child because the deceased, Nalule and Namukasa signed the required consent for the adoption which she (the respondent) gave to her lawyer. In addition, the respondent stated that Nalule told her that the applicant had moved from her former residence and Nalule did not know where to find her.

I did not believe the respondent's reasons for failing to get the written consent for adoption from the applicant. On the contrary, I am of the opinion that Nalule and the respondent deliberately ignored the applicant in the whole process. That was possibly due to the belief that the father's rights to custody of the child are paramount and they override the mother's rights. It is also sometimes the customary law position that the father's relatives have better rights to custody and guardianship of the children of a deceased male than the children's mother. This was epitomised by paragraph 14 of Victoria Kalungi's affidavit verifying the adoption petition in which she stated that:

> *"The said natural mother of the infant was* ***merely a girlfriend of the infant's father, has other children and is believed/rumoured to have got (sic) married to another man*** *and has shown no interest in maintaining the infant through provision of necessities, education, upkeep and/or exercising any parental obligation/care as by law and nature required."*

This implied that the mothers' rights to custody were subordinate because when she had the child with the deceased she was not married to him. The allegation that she got married to another man was meant to further diminish her rights because it is presumed that when a woman gets married she is not supposed to take children from past relationships into the marriage where her rights are to be subordinated to those of her husband. In addition, s. 2(n) (ii) and 44 of the Succession Act used to validate that position, and in particular, s. 44 provides that if the father of an infant does not appoint a guardian by his will, on his death the priority to become the statutory guardian of his infant

children will favour his relatives starting with his father and mother. If his father and mother are deceased, then his sisters and brothers will take priority as guardians of his infant children. In the event that the brothers and sisters of the deceased are dead, then the mother's brothers and her father would be considered. In the event that there were no mother's brothers or father, then any person willing or entitled to be a guardian under the mentioned categories of relatives, then court would on an application of any person interested in the welfare of the child appoint a guardian.

Mothers were completely ignored by the drafters of the provisions above meaning that they had no right to become statutory guardians of their infant children except with leave of court under the provisions of s.44 (2) of the Succession Act. However, the Constitutional Court declared the two provisions (among others) unconstitutional in the case of **Law and Advocacy for Women in Uganda v. Attorney General, Constitutional Petitions Nos. 13/05 and 05/06.** The mother of the infant is now entitled to become the statutory guardian of the infant in the event that the infant's father predeceases her.

I did not consider the respondent's allegation (paragraph 8 of the affidavit in reply to this application) that the applicant asked her for money sometime in 2008 important. Neither did I think that Nalule's similar allegation in paragraph 17 of her supplementary affidavit was material. This was mainly because that allegation did not feature any where in the proceedings for adoption. If it was true that the applicant asked for money in connection with the proposed adoption, then it should have been brought to the attention of the Chief Magistrate before she granted the order. I am of the view that this allegation was an afterthought that the respondent and Nalule invented to demonise the applicant. It was meant to justify their failure to obtain the applicant's consent for the adoption. It is also my opinion that even if it were true that the applicant asked the respondent for money for her own upkeep, that fact did not justify the respondent's failure to obtain consent for the adoption.

Mr. Muziransa contended that the applicant was incapable of giving consent for the adoption because she asked to money. It was therefore his view that the court rightly dispensed with the mother's consent under the provisions of s. 47 (2) of the Children Act. However, I did not agree with that proposition because the terms of the said provision are clear. Consent is only dispensed with if the parent in "*incapable*" of giving it. My understanding of the incapacity envisaged in this case would be similar to incapacity under the law of contract. It would include situations in which the parent is mentally ill, is a minor (i.e. below 18 years), or where he/she is perpetually intoxicated. The

respondent did not prove that the applicant fell under any of the three categories of incapacity at the time she obtained the order. I therefore find that she was capable of giving the required consent but no one asked for it.

I was convinced that this was the position because at the time that Nalule and her brother got the child from the applicant, she resided in Nabingo. In her affidavit in support of this application, the applicant deposed, and this was not contested, that she still resides in Nabingo. It is therefore amplified that Nalule and the respondent just ignored her interests, and consequently the rights of the child when they failed to involve her in the process. In conclusion, the respondent obtained the adoption order illegally contrary to the provisions of s.47 of the Children Act and for that reason alone I would set it aside.

As to whether there were any other infringements of the law, perusal of the proceedings in the lower court revealed that the respondent or her advocates omitted to serve the petition on other persons interested in the child contrary to the provisions of the Adoption of Children Rules. Rule 5 thereof provides that the petition for adoption shall be served on the parent or parents of the child, if any. If there are none, then it has got to be served on the guardians of the child or any other person or persons having the actual custody of the child. In the event that there are none, then the petition has got to be served on the person or persons liable to contribute to the support of the child. Where the child is above the age of 14 years, the petition has got to be served on him/her. According to rule 5 (2) Adoption of Children Rules, the judge or chief magistrate may dispense with the service on any of those persons listed in sub-rule (1) and may order the petition to be served on any other person or persons.

The Adoption of Children Rules also provide for a specific mode of service in rule 6. It is there provided that the petition, notice or other documents shall, unless the judge or chief magistrate otherwise directs, be served by an officer of the court, by delivering or tendering a copy of it signed by the registrar or the chief magistrate and sealed with the seal of the court to the person to be served. According to rule 6 (2) it is mandatory that service of every petition be verified by affidavit, unless the judge or chief magistrate otherwise directs. According to rule 4 of the Adoption of Children Rules, the Civil Procedure Rules (CPR) and practice apply to adoption matters as far as is practicable. Therefore, Order 5 CPR would apply to situations where service becomes complicated,

either by failure to find the person to be served within this jurisdiction or due to his or her absence from their known physical address.

If it was the respondent's case that the applicant's whereabouts were unknown, then service should have been effected by substituted service under the provisions on Order 5 rule 18. This would have included by advertisement of the petition in the newspapers, or by affixing the same on a wall or the door at the applicant's last known physical address. In this case, I found no evidence on file to show that the petition was served on any of the interested parties. For that reason, I find that the adoption order was fraudulently and or improperly obtained.

It is also usually the practice that at the hearing of a petition for adoption, the petitioner and the child that is the subject of the petition both appear before the court. Perusal of the proceedings in the lower court revealed that on 30/04/2009 when the petition was called on for hearing, Mr. Muziransa appeared alone as counsel for the petitioner. The record did not indicate whether or not the child and the petitioner were in court. I tried to clarify this issue with the respondent during the course of this application. She informed court that she was present and this is what she stated before me:

> *"I was in court for the adoption proceedings. Yes the child was also in court. No, Nalule was not in court during the proceedings. Nalule was in court in the afternoon. I was in court alone. She was there before me."*

The respondent's statement had a material contradiction in it. At first she stated that the child was in court. Later in the statement she stated that she was in court alone. She appeared to be unsure about what she was telling court or what had happened at the proceedings. In any case, the record does not show any of what she stated. I was therefore inclined to believe that the respondent also lied about this aspect of the proceedings. Nalule and the child were never in court at the time of the proceedings. In fact, I think that Nalule was not with the respondent by the time she filed the petition. If she had been with her, the respondent would not have stated that Nalule abandoned the child at her home without her knowledge. Nalule would also have deposed a fresh affidavit in support of the petition; the respondent would not have been placed in a position where she had to rely on the affidavit that Nalule had deposed 4 years earlier in support of the respondent's application for a care order in respect of the child. The fact that the appearances of Nalule and the

child were not on record could have been by omission or oversight of the trial magistrate. Unfortunately, this court takes the record as it finds it. It cannot import additions or supplements that were not recorded by the lower court to be part of its record.

Rule 3 (4) of the Adoption of Children Rules also provides that at the hearing of the petition for adoption, the probation and social welfare officer under whose supervision the child has been fostered by the petitioner or petitioners shall be present at the ex parte hearing; and shall attend all subsequent proceedings, as directed by the court, in order to advise the court. Though the probation officer made a report to the court, he did not attend court as is required by the rules. Since the provision for his/her attendance is couched in mandatory terms, I am of the view that it was irregular for him not to attend court, especially in a situation were it was alleged that the child had been orphaned by his father's death and his mother has also abandoned him.

The care order that the respondent relied on to show that she had fostered the child raises another issue. S. 45 (4) of the Children Act provides that the application for adoption shall not be considered unless the applicant has fostered the child for a period of not less than thirty-six months under the supervision of a Probation and Social Welfare Officer. Rule 4 of the Foster Care Placement Rules (Schedule 2 of the Children Act) provides that any person interested in fostering a child shall complete the application form specified in Form 1 of the Schedule to those Rules and submit it to the District Probation and Social Welfare Officer or to the warden of an approved home.

In this case, the respondent attached an application to foster a child and an undertaking that she made to do so to her petition for adoption. Unfortunately, the application did not indicate which child had been applied for; the undertaking referred to a child called Patricia Namakonzi, not Peter Sebuliba or James Namansa. There was therefore no clear evidence before the lower court (save for the probation officers report which could have been fabricated for purposes of the petition) that the applicant fostered the child and was duly supervised as was required by the law. I therefore came to the conclusion that the respondent did not prove to the court, before the adoption order was granted, that she complied with the provisions of s.45 (4) of the Children Act.

I am convinced that the respondent had no ill intention towards the child that is the subject of this application. It was demonstrated when she and the child appeared before this court on 4/03/2010 that

the child is emotionally attached to her. I also have no doubt that she paid the bills to ensure that the child was returned to good health. Also that she has provided for his educational needs since he started school. However, I doubted the bona fides of Nalule in this sorry tale. Given her various depositions, I came to the conclusion that she perpetrated a series of prevarications calculated to put the child out of the reach of his natural mother, the applicant. I was also led to believe that this was partly for her personal benefit because in paragraph 10 of her supplementary affidavit in this application she stated as follows:

> *"That I had no employment at the time and although I tried my level best, it was very difficult for me to look after my brother and the said child, given the fact that I was also taking care of other two children (sic) of my late brother to wit: Tonny Kawuma and Joan Namboze."*

Previously, she had stated as follows in her affidavit in support of Victoria Kalungi's application for a care order:

6. *That as requested by Victoria Kalungi I took up custody of the child and she used to give us assistance and she told me to take him to International Hospital at her own costs whenever sick since for her she was due to travel out of the country shortly.*

7. *That however we all used to survive on Victoria's handouts since I was not employed, but after the death of Joseph Ssebuliba on 26th March 2005 I had to look for employment for my survival and consequently had to hand over custody of the child to Victoria for proper care and upkeep in July 2005 and she has since remained with him.*

The fact that Nalule admitted that at some point she was unemployed and she depended entirely on handouts from the respondent for the maintenance of the child and his siblings, Joan and Tonny, leads me to the unfortunate conclusion that she may have held onto the child to ensure that the respondent continued to support her and the other two children.

Although it was stated here and in the court below that Victoria Kalungi was related to the deceased Joseph Sebuliba by virtue of his marriage to her deceased sister, I think that the respondent’s continued support to Nalule and the child’s siblings while the child was in Nalule’s care may be construed as consideration for the adoption, however subtle. The Magistrates Court did not consider this aspect of the application before it. When awarding the adoption order, the court based its decision on ss. 44 and 45 of the Children Act, and in passing concluded that it was in the best interests that the adoption order be granted. However, s.48 (1) (c) of the Children Act provides that one of the duties of the court in an application for adoption is to ensure that the applicant, or any person on behalf of the applicant, has not paid or agreed to pay money or anything in place of money to the parent, guardian or any person in charge of the child in consideration of the adoption of the child. I have already stated that there appears to have been some consideration for the adoption. In that regard therefore, the adoption order was improperly obtained, to say the least.

I am required to set aside the impugned adoption order. Coming to the decision required caused me some anxiety about the effects that such an order will have on the child. It is not everyday that adoption orders granted in this country are set aside, especially in respect of children adopted by citizens. This case is therefore not only tragic and complex but also unique. It requires that careful procedures be employed to save the child from the trauma of being too hastily removed from a family that he has always thought of as his own, only to be cast into the unknown. But all is not bleak because though she seems to have been the unwitting cause of this tragedy, Nalule is still known to the child as his relative. She will have to participate in the rectification of this debacle.

But before I come to my decision, I must point out that the decision to be made in this matter must be one that balances the legal tenets in s. 3 and para.1 of Schedule 1 to the Children Act, that the welfare of the child in issue must always be the paramount consideration in such decisions, against the interests of observing and respecting the public policy that adoptions ought to be safe. I will deal first with the question of the welfare of the child.

What is meant by the statutory provision that the child’s welfare is “paramount”? The answer is to be found in the speech of Lord McDermott in **J v. C [1970] AC 668 at page 710** where it was held that welfare connotes:

> “a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood.”

“Paramount consideration”, as Lord Mac Dermott continued, means a consideration which “rules upon or determines the course to be followed”. Paragraph 3 of Schedule 1 Children Act provides that in determining any question relating to the circumstances set out in paragraph 1 of schedule 1, the court or any other person shall have regard in particular to:

a) the ascertainable wishes and feelings of the child concerned considered in the 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, sex, 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, guardians or others involved in the care of the child in meeting his or her needs.

I am therefore required to carry out an assessment of the considerations above vis-à-vis the situation of the child now before this court.

It would be pointless to try and establish his wishes because the child in question is still very young and impressionable. Asked which parent he would prefer to stay with he would most probably chose the respondent for he knows no other parent. His emotional needs at the moment would also most probably be to remain with the parent with whom he has formed a bond, the respondent. She is also most likely better able to take care of his educational and physical needs as is evident from the school that he attends and the medical care that she has provided since he came into her care. There certainly will be adverse effects if the child has to move from one home to another but this may be a necessary evil given the questions of his identity that may develop in adulthood. He will have to move from the familiar to the unfamiliar probably in more constrained financial circumstances and

he will have to meet new members of family that he had not met before. The possibility of suffering harm is not excluded given that he has a chronic illness for which he is under constant medical attention.
I have taken all the above factors into account but I still have to consider the aspect of public policy and its links to welfare. Sadly, this is a case of an unlawful adoption where the child went to live with a new family contrary to the provisions of the Children Act. There is concern that the process of adoption in this country is not properly regulated. There is a fear that I hold but which is also felt by the wider public that the adoption of children in this country may be on its way to being transformed into a market and characterised by a one-way flow of children from poor families to families that are financially better endowed.

There is also concern about the burgeoning reality of international adoption which has been transformed into nothing short of a market regulated by the capitalist laws of supply and demand, and characterised by a one-way flow of children from poor countries or countries in transition to developed countries. There is a strong likelihood that the inadequacy of adoption laws and the increased frequency of inter-country adoptions in this country have led to the development of dishonesty, subterfuge, criminality and exploitation of the vulnerable. The possibility exists that the courts have unwittingly been led to participate in a subtle kind of child trafficking whose proportions have not yet been established. This is especially so because many children were orphaned during the war in Northern Uganda. Many children have also been orphaned by AIDS. Because of the grave danger posed to such children by illegal adoptions, courts need to be very firm in situations were the inadequate laws on adoption in Uganda are not respected. I therefore have no alternative but to make the following orders:

a) The adoption order that was granted to Ms. Victoria Kalungi Namakonzi on 30/04/2009 in respect of Peter Sebuliba, alias James Namansa is hereby set aside;

b) The Probation and Social Welfare Officer who participated in the process and made the report to the lower court, Mr. Opio Ouma shall take charge of the process of ensuring that the child is re-united with his biological mother;

c) Victoria Kalungi Namakonzi and Nalule Prossy will cooperate with the Probation and Social Welfare Officer to facilitate this transition by supporting the child to form a bond with his biological mother;

d) All parties involved shall behave in a civil manner towards each other to enable the child to make this difficult transition into his future;

e) Mr. Opio Ouma shall submit quarterly reports to this court about the process of re-integrating the child into his natural family for a period of one year, the first of such reports to be submitted by the 3/09/2010;

f) I make no order as to costs so as to facilitate the spirit of cooperation that is required to help the child make the transition back into his biological family.

Irene Mulyagonja Kakooza

JUDGE

02/06/2010