

UGANDA / JUDGMENT

In Re: Apio Joyce, & Kisakye Grace & Anor (Adoption Cause No. 013 of 2018 and Adoption Cause No. 027 of 2018) [2018] UGHCFD 13 (10 December 2018)

[2018] UGHCFD 13

COURT

HC: Family Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

Adoption Cause No. 013 of 2018 and Adoption Cause No. 027 of 2018

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

ADOPTION CAUSE No. 013 of 2018 ADOPTION CAUSE No. 027 of 2018

IN THE MATTER OF THE CHILDREN (AMENDMENT) ACT, 2016

AND

IN THE MATTER OF APIO JOYCE AND N THE MATTER OF KISAKYE GRACE AND TIBITA SHAKIRA

AND

1. BENJAMIN ANDREW MAJORS

.....

PETITIONERS

2. KATHERINE JOYCE DAVIS MAJORS

BEFORE HON. JUSTICE MICHAEL ELUBU**RULING**

The Petitioners in this matter are BENJAMIN ANDREW MAJORS (1st petitioner) and KATHERINE JOYCE DAVIS MAJORS (2nd petitioner) who brought two petitions for the adoption of APIO JOYCE, KISAKYE GRACE and TIBITA SHAKIRA (the children).

The petitions were argued separately. However having carefully considered both, I find that the petitioners are common to each application; all children involved are based in Jinja and currently living with the petitioners; the law under which the petitions have been lodged is the same for both petitions; and finally the petitions make the same kind prayers, namely for the adoption of the children.

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Therefore, this Court acting on its own motion, has consolidated the petitions under Order 11 rule 1 and will deliver one ruling in respect of both applications.

The Petitions are supported by the affidavits of both Petitioners. They have also filed accompanying affidavits - in case of KISAKYE GRACE and TIBITA GRACE an affidavit from NAMBEKO FLORENCE, who is the maternal grandmother of the children; Mary Namugaya, the maternal great grandmother of the children; and MUSENZE MAJID the biological father of the TIBITA SHAKIRA.

The affidavits attached to the petition in respect of APIO GRACE are deposed by the petitioners; OKENY SAMUEL, a paternal uncle of the child; OKOT ATULEM, a paternal great uncle; and ACHAN ROSE, the biological mother of the child.

Background

The background to these applications is that BENJAMIN ANDREW MAJORS and KATHERINE JOYCE DAVIS MAJORS got married on the 12th of March 2015. Their marriage was celebrated in the County of Williamson, in the State of Wisconsin in the United States of America. Attached to the petition is a copy of their certificate of marriage. They both hold American passports and are citizens of that country. This Court has seen copies of their passports. BENJAMIN ANDREW MAJORS is currently employed as the Community advocate of Amazima Ministries, A Non Governmental Organisation, where the second petitioner, KATHERINE JOYCE DAVIS MAJORS is the Country Director. Amazima Ministries was set up by the 2nd petitioner in 2007 and cares for vulnerable children.

All the children were living with the 2nd petitioner by the time she got married to the 1st petitioner.

The petitioners also have one biological child between themselves and have adopted 7 Ugandan children ranging from the age of 9 to 19 years.

APIO JOYCE (F) was born on the 9th of October 2003, and lives with the petitioners at their home at Plot 2 Kisinja road in Jinja. She has lived with the 2nd petitioner since she was 8 years old. A foster care order was granted in respect of the child on the 27th of August 2010. The 2nd petitioner had received the child for the first time when Joyce was living with Oyet Jackson, her maternal uncle. At the time Oyet had taken to drink and could not properly care for the child. That the 2nd petitioner visited the biological mother of the child, ACAN ROSE, in Ogom Akuyam village in Pader district and expressed a desire to adopt Joyce. ACAN ROSE had no objection. The child's father was reported dead by the paternal relatives.

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TIBITA SHAKIRA was born on the 3rd of March 2001. She has been living with the 2nd petitioner since 2009. Her biological mother is ERIMA CHRISTINE who had the child with one MUSENZE MAJID. The two lived together for a while. When TIBITA was about 2 years old, ERIMA and MUSENZE had misunderstandings and separated. That ERIMA went to live with her mother (NABEMBEKO FLORENCE) but left after a while leaving TIBITA behind. She came back later and collected the child whom she took to live with her grandmother – Namugaya Mary (the child's great grandmother).

KISAKYE GRACE is ERIMA CHRISTINE's second daughter who was born on the 4th of September 2006. Her father is unknown. In 2007 ERIMA took KISAKYE to one NAMUGAYA MARY, who is ERIMA's grandmother and Kisakye's great grandmother. She left Kisakye in Namugaya's care. At the time KISAKYE was disabled - unable to walk or talk. Shortly after ERIMA brought TIBITA, her first daughter and left both children with Namugaya.

The 2nd petitioner and NAMUGAYA worshiped at the same church and got to know each other. The 2nd petitioner started offering some help to the children and had them enrolled in school. It was around this time that the 2nd petitioner brought TIBITA to live with her. Later Namugaya also took Kisakye Grace and the 2nd petitioner has lived with both children since. On the 27th of August 2010, the 2nd petitioner was granted a Foster care order in respect of both TIBITA SHAKIRA and KISAKYE GRACE.

The Petitioners now pray for orders that:

- a. An order for the adoption of the children, APIO JOYCE, KISAKYE GRACE and TÍBITA SHAKIRA be made.
- b. Costs.
- c. Further orders as the Court may deem the nature of the case requires.

Against this background the issues for this Court's determination are:-

- i. Whether this Court has jurisdiction to grant the orders prayed for.

- Whether the Petitioners qualify for an adoption orders prayed for. ii.

Whether such orders would be in the best interest of the children. iii.

1. Whether this Court has the jurisdiction to grant the orders prayed for

Section 44(1)(b) of **The Children's Act Cap 59** stipulates that applications for adoption by non-citizens of Uganda shall be made to and handled by the High Court.

Both petitioners are American citizens and fall under Section 44 (1) (b) of the Children Act.

I am also mindful that The High Court of Uganda under Article 139(1) of The Constitution of The Republic of Uganda is clothed with unlimited original jurisdiction in all matters.

In the circumstances it is well within this Courts mandate to handle an application of this nature.

2. Whether the Petitioners qualify for an adoption orders prayed for.

The law requires, under Section 45(1) of The Children's Act, that applicants should be at least 25 years old and where the application is made by spouses then one of them be no less than 21 years older than the child. The other spouse must also give his/her consent to the application.

The 1st petitioner **BENJAMIN ANDREW MAJORS** was born on the 11th of October 1986 which makes him 32 years of age today. He is the elder of the petitioners as **KATHERINE JOYCE DAVIS MAJORS** was born on the 2nd of November 1988 making her 30 years old. The youngest of the children is Kisakye Grace who is 12 years old today. She is therefore 20 years younger than the 1st petitioner and 18 years younger than the second. Apio Joyce who was born on the 9th of October 2003 and is 15 years old today. She is 17 years younger than the 1st petitioner. **TIBITA SHAKIRA** was born on the 3rd of March 2001. She is 17 years old.

It is therefore clear that it is only in respect of **KISAKYE GRACE** where the 1st petitioner meets the strict age requirement stipulated in Section 45 (1) of The Children Act. Mr Obiro Ekirapa, Counsel for the petitioners, prays for this court to waive the age difference requirement in view of Section 3 of the Children Act which provides that the welfare principle 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.

He also cited the decision of Justice Musoke Kibuuka in **Adoption Cause No 31 of 2004** In the Matter of Paula Robertson and Cynthia June Robertson where it was held:

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"... it does appear to me that the conditions specified in Section 46 of the Children Act are not mandatory on account of reason that the welfare principal specified in Section 3 of the same Act is paramount. Its application overrides the other provisions of the same Act. Thus an adoption order may not be refused to be granted where the refusal is evidently contrary to the welfare of the child involved'.

Looking at the unique circumstances of this case, all the children have been living with the 2nd petitioner for more than 8 years. She obtained foster care orders for them on the 27th of August 2010. There are two elder children, Nangendo Hope Majors aged 19 years, and Wasagali Zuula Majors aged 18, for whom the High Court granted the petitioners Adoption orders on the 20th of July 2016 and 7th of March 2017 respectively. The three children who are the subject of this application are of age. On inquiry by this court, all indicated their wish and desire for the orders to be granted. More on this later.

The law sets specific conditions for an inter country adoption which are found in Section 46 of the Children Act. They include evidence to show that the petitioners have lived in Uganda for a period of not less than a year; that they have fostered the child for at least one year; that they do not have a criminal record; that they have a report from the Probation and Social Welfare of their country showing suitability to adopt a child; that they satisfied the Court that their country of origin will recognise and respect the adoption order; that where the parents of the child are known, it is necessary for their consent to be given.

There is evidence that the 2nd petitioner has lived in Uganda since the year 2007. The 1st petitioner first came to Uganda in 2011 and got married to the 2nd Petitioner on the 12th of March 2015. The two have a home registered in their names located at Plot 2 Kisinia road in Jinja. They both work with Amazima Ministries which was set up by the 2nd Petitioner and is a Christian organization that also renders care to the vulnerable.

A search by Interpol Kampala shows that there is no criminal record for either petitioner and certificates of good conduct to that effect have been attached. There were also searches for criminal records conducted in the United States of America which yielded negative results. This court therefore concludes that both petitioners have no criminal records.

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The law requires that the Probation Officer make a report on the suitability of the applicants as Adoptive parents. A home study from the petitioners country of origin has also been prepared by a Hague accredited Service provider. There is also a report by the Probation and Social Welfare officer of Jinja. Both reports make a positive overall assessment of the Petitioners. An appraisal of their backgrounds, financial situation, health and personality was made. Members of their community were interviewed.

This Court is also aware that adoptions granted in Ugandan Courts are recognized and respected in their Country.

In Section 46 (6) and (7) the Children Act it is stipulated that an inter country adoption should be considered as a last option in the adoption of a child. That before this alternative is considered a broad range of family centred alternatives should be considered.

The children in both applications were destitute by the time they came in contact with the nd petitioner. Apio Joyce lived with an Uncle who was unable to provide care. Her mother has also indicated that she has no objection giving her up for adoption. Apio has paternal relatives including Okot Atulem, a paternal great uncle, and Samuel Okeny, a paternal uncle. Both attest to the child's destitute circumstances before the care order was granted and state they have no objection to these proceedings.

The same home study and probation reports apply to Kisakye Grace and Tibita Shakira. Grace was disabled at the time she met the nd petitioner. Through a number of medical interventions and procedures, initiated by the nd plaintiff, the child is now able to both walk and speak. Her attached medical history indicates that the procedures were done in the USA. Both children have also been in the care of the nd petitioners since 2010. Before that Erima Christine, the children's mother, had a relationship with Musenze Majid in which they had Tibita Shakira. That relationship broke down and Christine went to live with Nabembeko Florence, her mother (the children's grandmother). Nabembeko faced difficulty maintaining the family. Christine then chose to take Shakira to her grandmother (the children's great grandmother), Mary Namugaya. After about 2 years Christine also took Kisakye Grace to live with her grandmother. At the time Kisakye was disabled sickly and in a bad state of health. Christine's current whereabouts are unknown.

Majid Musenze has consented to Tibita's adoption proceedings. Namugaya Mary and Nabemko Florence have also consented to the adoption. The children are of age and have

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written consent documents. They also orally informed the court that they are in favour of the adoption proceedings.

All but one of the statutory conditions for adoption have been met - that is the condition on age difference between the petitioners and the children. In resolving this I have considered that the other children the petitioners have adopted fall within the same age bracket as the children here. The court in those applications did forego the requirement. I have considered the wishes of the children. I have also looked at the overall best interest of the children. All were destitute. Currently their needs are catered for as there has been a positive change in their circumstances. Grace is receiving life altering medical attention. The children's own relatives and parents do not have the means or the will to attend to the children's needs at this time. It is therefore my finding that it is in the best interest of the children that the court waives the requirement of age difference in this matter. That requirement is hereby waived.

Whether such order would be in the best interest of the infant. iii.

The law requires the Court, when determining questions regarding the upbringing of a child, to consider that child's best interest or welfare as the primary determinant or paramount consideration (See 1st Schedule of the Act).

The Court has for the reasons given above considered the health, emotional, physical and material needs of the children and after carefully evaluating all of them, finds the best interest of APIO JOYCE, KISAKYE GRACE and TIBITA SHAKIRA is served by the grant of this application.

In the result it is ordered as follows:

- a. An order is made for the adoption of APIO JOYCE by BENJAMIN ANDREW MAJORS and KATHERINE JOYCE DAVIS MAJORS.
- b. An order is made for the adoption of KISAKYE GRACE by BENJAMIN ANDREW MAJORS and KATHERINE JOYCE DAVIS MAJORS
- c. An order is made for the adoption of TIBITA SHAKIRA by BENJAMIN ANDREW MAJORS and KATHERINE JOYCE DAVIS MAJORS

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- d. A parental relationship, with all rights, duties, powers, responsibilities and authority, between APIO JOYCE, KISAKYE GRACE and TIBITA SHAKIRA on the one hand, and BENJAMIN ANDREW MAJORS and KATHERINE JOYCE DAVIS MAJORS on the other, is hereby established.
- e. It is ordered that an entry be made in the Register of births and deaths reflecting a change in the parental relationship in respect to APIO JOYCE, KISAKYE GRACE and TIBITA SHAKIRA.
- f. This order shall be served upon The Consular department of The Ministry of Foreign Affairs in Kampala.
- g. Costs of this Petition are provided for.

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Dated at Jinja this 28th day of November 2018

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Michael Elubu Judge

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