

UGANDA / JUDGMENT

In Re: Birabwa Mutaka (Adoption Cause No. 014 of 2018) [2019]

UGHCFD 2 (21 March 2019)

[2019] UGHCFD 2

COURT

HC: Family Division (Uganda)

BEFORE

Luswata, J

CASE / FILE NUMBER

Adoption Cause No. 014 of 2018

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

IN THE MATTER OF THE CHILDREN ACT, CAP 59 AS AMMENDED BY ACT NO. 16 OF 2016

ADOPTION CAUSE NO. 014 OF 2018

IN THE MATTER OF THE PETITION FOR THE ADOPTION OF BIRABWA MUTAKA BY JONATHAN PATRICK MCLEOD AND MARY FRANCES CHRISMAN

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

Jonathan Patrick Mcleod and Mary Frances Chrisman (herein after the Applicants), nationals of the United States of America, are a married couple and residents Plot 15 Kisinja Road in Jinja District. They have moved this Court seeking an order for the adoption of BIRABWA MUTAKA (hereinafter referred to as the child) with an additional order for costs. The application is presented under the Children Act (as amended), but the Court will in addition consider other enabling law.

The application is supported by several affidavits including those made by Jonathan Patrick Mcleod (hereinafter referred to as the 1st applicant) on 03/05/2018 and the grounds advanced for the application are briefly that;

1. The father of the child is unable to take care of her and the whereabouts of the mother are unknown. The biological father has consented to this application and irrevocably released the child to the applicants
2. The child has been under the foster care and custody of the applicants since November 2015 and they have since then been meeting her material, physical, emotional, medical and spiritual needs.
3. The Social Welfare Officer of Jinja (hereinafter referred to as the welfare officer) has recommended the applicants as suitable adoptive parents and that the adoption will be in the child's best interests
4. The applicants have no criminal record and are financially stable with capacity to meet the child's needs

Both applicants, the child, Fred Lule her biological father, Kaluuya Nyende her maternal grandfather, Biingi Jane her paternal grandmother and Nalwanga Margaret a social worker, attended the Court hearing of 20/9/18. Counsel Isaac Mugume who represented the applicants filed written submissions and these as well as responses of those present at the above hearing will be considered in my ruling.

Under Section 4 of the Children Act (as amended) (hereinafter referred to as the Act), it is the right of every child to stay with their parents or guardians. However, the same Act allows for substitute care when the circumstances require. Such substitute care would include adoption.

The old and new position of our law has emphasized the welfare principle as paramount in any decision to be made with respect to matters involving rights of children. There being no definition of the term in our Act, the definition given by the Court in *JVC (1970) AC 668* can be helpful;

*“when all 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 interest of the child...”**

Further, Section 5 of the Act makes it a duty for every parent, guardian or any person having custody of a child to maintain that child. In particular, that duty gives a child the right to education and guidance, immunization, an adequate diet, clothing, shelter and medical attention. The guardians should in addition protect the child from discrimination, violence, abuse and neglect.”

It is further provided in the Section 3 of the Act (as amended) that in determining any question relating to circumstances set out in the Act, the court shall have regard in particular to:-

1. *The ascertainable wishes and feelings of the child concerned, considered in the light of his or her age and understanding;*
2. *The child's physical, emotional and educational needs;*

3. *The likely effect in any changes in the child's circumstances;*
4. *The child's age, sex, background and any circumstances relevant in the matter;*
5. *Any harm that the child has suffered or is at the risk of suffering;*
6. *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.*

In his decision of **David Twesigye (an infant) HCMA No. 0004 of 2008 (at page 4, 5 and 6)** Justice Chigamoy Owiny Dollo while considering an application for guardianship gave some useful insight to the welfare Principle. He held that:-

“...while the primary right of a child is to grow up under the tutelage of his or her parents, or parent, for the obvious reasons of emotional attachment; if it is shown to the satisfaction of a competent authority, and in this case the court, that vesting legal guardianship of the child in the applicants, it would serve the best interest of the child, then it would be proper for this court to make an order removing such child from the parent. Court has to weigh the emotional loss of staying with ones parents against the opportunities that would come with the relocation away from the hands of the parents.....”

I am strongly persuaded that those same principles would apply for adoption.

Section 44 – 48 of the Children Amendment Act, permits adoption of Ugandan children by non-citizens in exceptional circumstances and with particulars reference to this case, upon fulfilling the following conditions:-

1. The applicants have attained 25 years and are at least 21 years older than the child.
2. The applicants have lived in Uganda and fostered the child under the supervision of a probation and social welfare officer for a period of one year.
3. The applicants have no criminal record.
4. The applicants have received recommendation from their home country concerning their suitability to adopt a child and that that home country will respect and recognize the adoption order.
5. Where the child's parents are known, their consent is mandatory save for specific exceptions
6. The applicants are liable and prepared to support the child

The antecedents of the child given in the application are as follows:-

1. She is of the female sex aged seven years and five months having been born on 20/9/2011
2. She was born to James Lule and Nakirijja Norah both who have declined or an unable to meet her needs

3. A citizen of Uganda currently resident with the applicants at Plot 15 Kisinja Road, Central Division in the Jinja District
4. Under formal foster care placement with the applicants as per a Foster Care Order dated 2/11/2015.

The applicants are non-Ugandan, aged 32 and 31 years respectively at the time they filed the application. They have been legally married since 11/8/2014 and are residing with the child at the address given above. Both petitioners are employed by the Amazima Ministries as videographer and photographer respectively and between them, earn an annual income of about USD 32,600. The child is already part of their household as is their biological child Evergreen Mcleod who was aged eighteen months at the point of filing the application.

The first applicant gave a detailed background of their relationship with the child. Their first contact with her was at the Arise and Shine Uganda, a community based organization that runs a children's home in Jinja (hereinafter referred to as the home) where they both worked as volunteers. The background given by the home through Nalwanga Margaret a social worker, was that the child was placed with them on 3/9/12 upon recommendation of the Kibuye Bandali LCI chairperson and the probation officer. That she was reported to have been abandoned by her mother and her father, one Baliraine Zechariah being unable to look after her. A subsequent DNA test confirmed that Baliraine was not the child's biological father and instead she was fathered by one Lule James who was not prepared to claim or look after her and requested for the Home to take her in. Having received that information, the applicants made the decision to take care of the child and obtained a foster care order from the Welfare officer on 2/11/2015. The child has been in their custody since then. The applicants submit that they have presented documentary evidence to show that they are suitable parents.

Much of what is stated by the applicants has been sufficiently supported by other relevant people who have equally sworn affidavits in support of the application. Lule James confirmed that he at one time had an intimate relationship with Norah Nakirijja in their youth. They separated before the child was born and Lule was later to learn that Nakirijja had remarried but separated from one Baliraine Zakaria and then abandoned the child with Nyende Kaluya her maternal grandfather. He was eventually contacted and agreed to a DNA test which confirmed that he is the child's biological father. When interviewed by the probation officer, he declined to receive back the child for the reason that he was jobless and landless. In court he was emphatic that with his income of about Shs. 10,000 a day, he was unable to look after child and had no objection to the adoption.

Nyende Kaluya the child's maternal grandfather supported much of the above evidence. He stated in his affidavit that his daughter Nakirijja Norah Nambi had a relationship with Lule which resulted into the birth of the child. That Nambi who was a victim of domestic violence, went through multiple relationships before she separated from her last partner and abandoned the child with him in Court, he explained that although married to four wives and had other children living in his home, he was unable to take over custody of the child because of his advanced age

and extended responsibilities. He had earlier consented to the child being fostered by the applicants and he too had no objection to the adoption.

I have noted that the consent of Nakirijja Nambi the mother was not obtained. The report from the Home is that she disappeared after abandoning the child with her then partner Baliraine and has never visited or asked after the child ever since. Lule gave a different version. He stated that he is aware that Nakirijja Nambi is employed as a maid in Busia and they have been in touch whenever Nambi can use her employer's tell phone. In my view, with that information, the applicants should have made an effort to contact Nakirijja Nambi through the same means and obtained her views to the adoption.

I am aware of the importance of parental consent before an adoption can be allowed. The gist of Section 47(1) of the Act is that parental rights should be respected and discarded only if the biological parent is deceased, cannot be found or is incapable of giving their consent. All this must still be considered within the context of the best interests of the child with due regard to the child's wishes having regard to their age and understanding. See for example **Re Michael Lumu Adoption Cause No. 8/2000 followed in Adoption Cause No. 13/2017 in the Matter of Briona Nakayizza**.

It is evident that Nakirijja Nambi is very aware of her child's existence and current situation, information that must have been related by Lule whenever they communicate. It is on record that she abandoned this child at a very tender age with her partner well knowing that he was not the biological father. The child was then entrusted in institutional care for two years before the applicants graciously agreed to begin fostering her. She has lived with them for over three years and did in court express her desire to continue living with these two people that she now calls mummy and daddy. The photographs attached to the 1st applicant's affidavit depict that she is very happy and contented in her current station of life. She is now nearly eight years old and it will not serve her best interests to reunite her on a permanent basis with a biological mother who is virtually a stranger to her now and who was not ready to raise her in the first place. I would thus exercise my powers under Section 47(2) of the Act to waive that the requirement for Ms. Nakirijja Nambi's parental consent.

Beyond the contents of their application and affidavits, I was able to see and interview both applicants, the child and her father and grandparent. The applicants demonstrated a serious commitment towards proper upbringing of the child whom they plan to bring up with their biological daughter Evergreen. They provided certificates of good conduct clearing them of any criminal record. They are both in good health and have been certified to be mentally, physically and emotionally capable of raising up a child.

The applicants have in addition filed with Court a home study report compiled by Wasatch International Adoptions, a Hague certified and licensed adoption agency based in the State of Utah in the USA. It was reported that the applicants had subjected themselves to a professional evaluation in Uganda. It is also reported that they demonstrated honesty and determination in the entire process of adoption. They prepared well by receiving on line training in international

adoption and counseling. They are both in gainful employment and between them, earn a monthly income of about Euro 6000. They own a home and are planning to have their own children. Those facts demonstrate that they are able to meet the child's immediate and long terms needs.

It was also confirmed that both applicants had received formal education in their formative years and reported high job satisfaction at the Home. That the fostering period had proved useful in preparing them for adoption and they had demonstrated willingness to carry out a mutual parenting role with respect of the child who they will bring up in the Christian faith to which they belong. It was in addition reported that the applicants lived in a spacious home within a quiet residential area that was pleasant and safe. The applicants did indicate that in the event of their demise or disability, adequate arrangements were made for their biological daughter and the child to be brought up by their close friends Jacob and Taylor Radovich, also resident within Jinja.

The reports of both probation officers of Kamuli and Jinja equally strongly recommended the applicants as suitable adoptive parents of the child. Joshua Mboizi the probation officer of Kamuli gave a brief background of the child and showed that she was in a vulnerable state at the time he received her case yet none of her relatives was willing to take care of her. He therefore placed her in the temporary care of the home. He visited the applicants after the child was placed with them and confirmed that they had fully bonded with her for the two years she had been living with them. The probation officer of Jinja who also made a social inquiry with regard with this adoption, visited with the applicants who demonstrated readiness and willingness to parent the child and evaluated them to be suitable adoptive parents.

I too had an opportunity to observe the child with the applicants in Court. They were clearly bonded to each other. The applicants answered my questions with confidence. The 1st Applicant reported that the family intended to remain in Uganda where he and the 2nd applicant worked and that the child was already attending a local school. In my view, these applicants already have attempted to understand the local culture and because they intend to continue living in Jinja Uganda, any shock this child would suffer due to displacement into a new family is minimized if not eliminated. Should the applicants choose to return to their home country, they are encouraged to bring back the child to visit her family and hold onto the cultural identity that is very important to any individual. Although not indicated in their affidavits, their counsel has confirmed that he explained, and the applicants understood that the effect of the adoption shall be to legally entrust the child to them with all pertaining obligations, duties and rights. They are prepared to include the child in their respective wills and will disclose to her the adoption once she attains 18 years.

In summary, the applicants have fulfilled the requirement of intercountry adoption under the Act. I am of the opinion that the welfare of this child will be best be served if she lives with them as their adopted daughter. I therefore allow the application and order as follows:-

1. The two applicants **JONATHAN PATRICK MCLEOD** and **MARY FRANCES CHRISMAN MCLEOD** are jointly granted an adoption order with respect to the child **BIRIBAWA MUTAKA**.
2. The applicants are allowed to travel with the child to the United States of America or other place that they may choose to reside in order for them to fulfill their obligations as adoptive parents.
3. The applicants shall register this order with the Uganda Registration Services Bureau, Ministry of Justice and Constitutional Affairs within seven (7) days from the date of their appointment as adoptive parents.
4. The applicants shall furnish the American Embassy in Uganda with a copy of this order within thirty (30) days hereof.
5. The applicants shall file with the Deputy Registrar of this Court at least once every three years (until the child attains the age of 18 years), a report showing her progress.
6. The applicants shall meet the costs of this application.

I so order.

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EVA K. LUSWATA

JUDGE

21/03/2019

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