

UGANDA / JUDGMENT

# In Re JJ (An Infant) (Adoption Cause No. 030 of 2019) [2020] UGHC 5 (22 January 2020)

[2020] UGHC 5

## COURT

High Court of Uganda

## BEFORE

Luswata, J

## CASE / FILE NUMBER

Adoption Cause No. 030 of 2019

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT Jinja****ADOPTION CAUSE NO. 030 OF 2019****IN THE MATTER OF JJ (INFANT) AND IN THE MATTER OF A PETITION FOR ADOPTION BY 10 RACHEL ELIZABETH JANTZI****RULING****BEFORE: HON. LADY JUSTICE EVA K. LUSWATA****15 Introduction:**

**RACHEL ELIZABETH JANTZI**, the petitioner filed this petition through M/s Mugisa Namutale & Co., Advocates, seeking an order to adopt **JJ** (hereinafter referred to as the child). The petitioner filed the principle affidavit in support of the application with supporting 20 documents. Additional affidavits were filed by Emily Claire Henderson and Eunice Matte, the founder and social worker (respectively) with the Ekisa Ministries (hereinafter Ekisa). The affidavits collectively gave the antecedents of the petitioner, the child's background, recommendations from various authorities and 25 persons, and other relevant information. The contents although not reproduced here, will be considered in my ruling.

The petitioner's counsel Alice Mayanja, filed written submissions as directed and in addition, on 22/08/2019, the court met and interviewed the petitioner and her witnesses, and was able to see the child who is the subject of this application. That interview and 5 counsel's submissions shall also be considered in my ruling.

It is stated briefly in the petition that the petitioner is a citizen of Canada, unmarried and first arrived in Uganda in October 2015. She is not related to the child but resides with him at Plot 3 10 Kyesimiira Road, Jinja Uganda. She further states that she is liable to contribute to the child's maintenance and that she has not given, or taken any payment or reward in consideration for the adoption of the child. She continued that she is currently fostering the child and now seeks his formal adoption with all necessary directions 15 providing her with full and permanent parental rights.

Some brief facts concerning the child were also provided. In addition to these, I was able to gather from my interface with the petitioner and other supporting evidence and documents that the 20 child the subject of this application: -

- (a) Is a citizen of Uganda and a child of the male sex
- (b) At the point of filing the application, he was aged eight years having been born on 25/9/2010 and a birth certificate is available
- 25 (c) His biological parents are unknown since he was found abandoned in Kawaala, Kampala
- (d) He is resident in Jinja
- (e) Is afflicted by symptoms of autism spectrum disorder and epileptic palsy
- (f) Presently \*in de facto\* custody of the applicant who is his 5 foster parent.

### **A brief background of the child**

Ms. Claire Henderson revealed in her affidavit that she is the founder of Ekisa Ministries (hereinafter Ekisa), a registered NGO 10 that she set up to care for children with special needs. That the child was found abandoned at Kawala in Kampala on 18/6/2011 and the matter was referred to the Kawala Police Post and eventually to the Mulago Police Station. He was admitted to the acute care unit of Mulago hospital because he was suffering from 15 malnutrition, pneumonia and had diarrhea. After receiving treatment and nutritional support, he was referred to Ekisa through the probation and social welfare officer of Jinja (hereinafter the probation officer).

20 The child was admitted into Ekisa on 6/7/2011. The first medical examination showed that he was underweight, had cerebral palsy and delayed developmental milestones. He was named Joshua in addition to the name J given to him while at the Mulago Hospital. As he grew older, symptoms pointing to autism became apparent. 25 His custodial care by Ekisa was formalized on 7/10/11 by a Care Order of the Family and Children Court of Bugembe and extended.

That when the petitioner joined Ekisa in 2016, she showed interest in fostering the child and her application was granted on 6/11/2018 when she was issued with a foster care order upon the recommendation of the probation officer and LCI Chairperson, 5 Kimaka Village.

## The Law:

In her submissions, counsel did relate quite well, the current law on adoption: -

It is provided in Section 3 of the Children (Amendment) Act that;

\*(1) The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines any question\* 15 \*in respect to the upbringing of a child, the administration of a child's property, or the application of any income arising from that administration.\*

I believe the two crucial points to note out of our current law is that 20 under all circumstances, the welfare of the child shall be paramount before any consideration is made by this court to allow an adoption. See for example **Payne vs. Payne (2001) EWCA 166** and **B vs. B (1940) CH 54**. This principle has been well followed by our courts. See for example **Deborah Alitubeera Civil Appeal No. 25 70/2011** and **Re AM Adoption Cause No. 12/2017**. Secondly,

inter-country adoption or specifically a non-citizen of Uganda is

allowed to adopt only in exceptional circumstances and even then, only if they fulfill the conditions under Section 46 of the Act specifically: -

5 \*(1) A person who is not a citizen of Uganda may in exceptional circumstances adopt a Ugandan child, if he or she -\*

\*(a) Has stayed in Uganda for at least one year;\*

- \*(b) Has fostered the child for at least one year\* 10 \*under the supervision of the probation and social welfare officer\*
- \*(c) Does not have a criminal record;\*
- \*(d) Has a recommendation concerning his or her suitability to adopt a child from his or her\* 15 \*country's probation and welfare officer of other competent authority; and\*
- \*(e) Has satisfied the court that his or her country of origin will respect and recognize the adoption order.\*

Even then, my court has powers in exceptional circumstances to waive any of the requirements mentioned above.

A new addition to the law appears in Section 46 (5) of the 25 Amendment Act by which certain persons are now permitted to give information that would assist courts to determine that the best interests of the child are protected. These include advocates, probation and social welfare officers or a guardian *ad litem* for the children. That list may not be exhaustive and the court may depending on the circumstances presented invite information from

5 other sources.

Further in Section 46 (6) & (7) of the Act, adoption should be the last recourse for children and court is enjoined to consider a continuum of comprehensive child welfare services, these would include a broad range of services and community based family centered alternative care options which may either be family preservation, kinship care, foster care or, institutionalization.

As I have stated, a non-Ugandan can only adopt a child if 15 exceptional circumstances have been shown. Our law did not define exceptional circumstances. It is my considered view, that such circumstances would entail unusual, extraordinary or not typical circumstances surrounding the upbringing or commonly associated with the upbringing of a child. The Court considers these to be 20 dependent on the circumstances of each case.

### **Does the applicant qualify to be an adoptive parent?**

I have enumerated the conditions preceding on adoption that a petitioner must fulfill before she can be considered as suitable 25 adoptive parent.

She was born on 21/4/1986 and aged 33 years old now. She is 24 years older than the child and has provided proof that she has no criminal record both in her home country and in Uganda. In her letter of 6/9/2018, Ms. Sarah R. Kaggwa, the Honorary Vice Consul

- 5 of the Canadian Consulate in Uganda, confirmed that adoptions outside Canada are recognized and accepted by the Government of Canada. She continued that the Consulate was aware that the applicant had set in motion the process of fostering the child. I would take that to be a recognition by the Government of Canada 10 that they will respect an adoption order of this Court. In addition, the petitioner has received suitable recommendations from the mandated authorities in her home country of Canada and also in Uganda. I shall return to their content later in this ruling.
- 15 Ms. Jantzi stated that she first arrived in Uganda in 2015 and returned on a more permanent basis in April 2016. She is currently a volunteer teacher at Ekisa. It is confirmed that she has lived in Uganda for over three years and has at the time this ruling will be delivered, should have formerly fostered the child since 6/11/2018,
- 20 a period of more than one year.

I can confirm that the petitioner has provided proof to show that she has fulfilled the requirements set in the Act. I will ofcourse also need to inquire into her suitability as an adoptive parent and 25 whether this child is indeed of care and protection by an adoption order.

### **Issue 2 – Whether the application is in the interests of the child:**

The significance of the welfare principle has previously been emphasized in my ruling. According to Regulation 3 (3), 1st 5 Schedule of the Act, it would entail giving regard to;

- \*(a) The ascertainable wishes and feelings of the child concerned considered in the light of his or her age\* 10 \*or understanding.\*

- \*(b) The child's physical, emotional and education needs;\*
- \*(c) The child's age, sex, background and any other circumstances relevant in the matter.\*
- 15 \*(d) Any harm that the child has suffered or is at risk of suffering\*
- \*(e) 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.\*

The testimonies of Emily Claire Henderson the founder, Kisozi Zakayo and Eunice Matte, social workers attached to Ekisa indicate that the child was found abandoned in a Market in Kawaala. He was subsequently referred to Ekisa in July 2011 where he was 25 resident for a long period of time under a Care Order. There have been efforts to track the child's relatives by making inquiries through the Old Kampala Police Station, local authorities in Kawaala and Mulago Hospital. In addition to those efforts, adverts were placed in the Bukedde Newspaper and radio announcements in the Simba and CBS Radio stations. No relative or person with information of his background has ever been found. On 1/12/2016., the Senior Medical Officer, Mulago confirmed that ever since the child was admitted in 2011, they have never obtained any leads as to who may be responsible for his abandonment.

10 It was also stated by Ms. Henderson, that early on after his admission, the officials at Ekisa observed that the child had symptoms such as delayed speech, repetitive behavior, obsession with a narrow range of interests, difficulty in expressing wants and needs, needing extra support in self-care needs, learning disability 15 etc. They concluded that those symptoms most likely indicate autism. During the proceedings in Court, the petitioner supported that diagnosis but conceded that the child had never been submitted to a specialist to confirm their suspicions. I thereby directed for the child to be evaluated by a pediatric specialist in that 20 area, in order to confirm the child's illness and also obtain recommendations for his future treatment and care.

My order was followed and the petitioner then presented a report by Dr. J. S. Byarugaba a senior consultant pediatrician/pediatric 25 neurologist who compiled a report dated 8/9/19. Her assessment is that the child showed deficits in social communication and

interaction. She determined that he has hallmark symptoms of Autism Spectrum Disorder. She advised that the child requires an individualized program for his education and continuation of multidisciplinary therapy. On the other hand, Ms. Sue Murr a 5 volunteer consultant and registered physiotherapist in Uganda, explained the child's motor problems in more detail and she too advised that he requires specialized treatment which should be obtained as early as possible for better results.

10 I am persuaded by the different testimonies and expert reports that this is a child who was totally abandoned and has special needs. Before being placed in foster care, he had lived with Ekisa for nearly seven years, a period long enough to impact his development negatively. I believe Ekisa with her team of dedicated staff has 15 offered him all that is possible to ensure that his special needs are met; more is needed.

I was able to observe the child in Court. The physical symptoms described above were very apparent. The child was restless, devoid of activity around him and required assistance from the applicant to sit and move. As stated by the specialists and Ekisa staff, he will require round the clock attention and as he grows older, personal attendants which Ekisa probably cannot afford. The need and urgency for specialized medical treatment is understood. It is crucial for this child to enjoy a near normal life. It is confirmed that

such specialized services are not available in Uganda at the moment.

In conclusion I am persuaded that this child should not be returned into institutional care. His circumstances are such that he requires to be placed in loving home with adoptive parents that understand and can meet his special needs. His physical, psychological and social needs can no longer be met by Ekisa and his development is at risk of deterioration if institutional care is resumed. He is a suitable candidate for adoption and thus the application is in his best interests.

### **Whether the petitioner is a suitable candidate to adopt**

- The applicant who has no biological children is currently a 15 voluntary teacher at Ekisa. She has a long history of dealing with children with special needs and related that her desire to adopt a child with such needs was motivated by her childhood and training. She grew up with friends with special needs but treated them as equal. Later, she pursued a bachelor's degree in Kinesiology with a 20 minor in psychology and after graduation, added a diploma in early childhood development. That training was instrumental during her term of five years working with preschool children with special needs.
- 25 She first came to Uganda in 2015 for a short stint and it was then that she met the child when he was only nine months old. However,

their relationship developed much more when the applicant returned to Jinja on a more permanent basis in April 2016. That although she loved all the children in Ekisa, she developed a stronger bond with this child and very well understands his special needs and ailments. On 18/3/2018 she submitted her expression of interest to foster the child and formal fostering begun on 6/11/2018 with the approval of the probation officer. She continued that during the fostering period, she has come to understand his needs much better and is confident that with her 10 educational background and personal commitment, she is capable of looking after him and giving him the best care with institutional care cannot provide.

The petitioner was very well spoken for by her witnesses, parents, 15 relatives, friends and other people working in the field of abandoned children. Matte and Kisozi the social workers at Ekisa are well versed with the child's situation and his relationship with the petitioner. According to Kisozi, after the petitioner expressed her wish to adopt the child, she was allowed a time of reflection and on 20 return, she confirmed that her wishes had not changed. The matter was presented to the Alternative Care Panel who approved the fostering. It was only then that the child was discharged from Ekisa and moved into the petitioner's home. Both social workers and

Ms. Henderson expressed no reservation to the petitioner's intentions. 25 In her recommendation, Ms. Henderson indicated that she and the petitioner had spoken at length about the adoption and the latter

understood the commitment and responsibility required to be a parent of a child with special needs.

It was invariably stated by her supporters that the petitioner loved 5 and cared for the child as her own, and with her training, she had the capabilities to meet his special needs. Officials from Ekisa have continued to visit the child and the petitioner at the latter's home. It was reported that their bond is now stronger, and the child's physical wellbeing and health has greatly improved. Kisozi was 10 emphatic that the child should not be returned into institutional care in which he had lived for too long. On her part, Ms. Henderson advised that due to his special needs, the child will likely require on ongoing care and support into adulthood which institutional placement cannot provide.

The petitioner did not present an evaluation or Home Study report from her country of origin. She explained that she has lived too long out of Canada to obtain one. I agree.

20 Such a report would be useful to guide the Court on the preadoption steps and measures that were taken by the petitioner in her home country, and her suitability to adopt. I note however that the petitioner has been resident in Uganda on a continuous basis since 2016, a period of nearly three years. Under such 25 circumstances, an assessment by authorities and other relevant persons here in Uganda will be more persuasive than those in Canada which she left. It is enough that the Canadian Government has confirmed that they will respect my order once it is made. It was for the same reasons that I made the decision to waive this requirement in **Adoption Cause No. 36/2018; In the Matter of**

5 **Adam Paul**, in respect of a petitioner who had lived outside her home country for a period of 18 months.

Also, the petitioner did not file a probation officer's report directly in support of this petition as required by law. She instead filed a 10 report compiled by the probation officer of Jinja on 18/5/2017, apparently in support of the application to foster the child which was presented to the Alternative Care Panel. I have read the report which was made only a few months before this petition was presented. It is a positive report which supports much of what has 15 been stated by the staff at Ekisa, and other relevant people. The Court relies more on the probation officer report, and it clear that he did visit and evaluate the applicant and that his observations will be useful in my decision. I would thus waive relevant provisions of the Act and consider the report dated 18/5/2017 as sufficient to 20 support this application.

In his report, the probation officer gave a positive recommendation in respect of this application. He stated that the petitioner prepared herself for the adoption by interacting with families that had already 25 adopted. She had the full support of her family in Canada to adopt and they greatly support her financially and spiritually in this

decision. That the petitioner's home environment is sufficient, spacious, clean and safe enough for her and the child to live in. The home is accessible to the main road and the Nalufenya Children's Hospital as well as the school which the child attends. That the petitioner who is selfless, humble and consistent, understands the field of special needs care very well. She has the basics to care for the child and her long interaction with him is sufficient experience of knowing what he needs. He concluded that the child will be in safe hands once placed under the petitioner's care.

In my interaction with the petitioner, I noted that she has the experience and is well versed with the child's condition. I did note the bond they shared and the intuitive attention she gave the child to ensure that he was comfortable and calm. In my view, her resolve to adopt a child in that condition is much more important than her material wealth. She informed court that her services at the school are voluntary but she receives a stipend from her family and other sponsors to the extent of about 10,000 USD per annum. So far, she has been able to take care of her needs and those of the child from that sum, and she can continue doing so. For now she intends to reside permanently in Uganda and support the child in his current school in Jinja which offers a curriculum for special needs children.

I noted that the petitioner's daily routine involves much spiritual intervention which is a positive fact to ensure that the child's social and religious development is equally addressed. The petitioner intends to retain the child's two names to which she may add an African name. She hopes to marry and start a family, but for now, her life is centered on this child, whose interests I strongly believe will be well met if I allow the petition.

Although under S. 45(3) of the Act, adoption by a female of a male child is prohibited, the facts present a situation that deserves special attention. This child was abandoned, perhaps left for dead by a parent who has never bothered to trace him. He has 10 disabilities that require round the clock care by a caring and experienced parent. The petitioner has cared for him since he was a baby and is prepared to continue doing so. She is the only mother he has known and has so far, she has done him no harm. It is in the child's interests that I waive that mandatory provision, which I do under S. 45(3) of the Act.

From all the above, I am persuaded that the facts of this case present exceptional circumstances to permit a non-citizen to adopt the child concerned. By her proven commitment, training, capabilities, experiences and reliable positive references, the petitioner qualifies to be appointed the adoptive parent of the child Joshua Jack. I would accordingly allow the application and order as follows: -

1. The petitioner **RACHEL ELIZABETH JANTZI** is granted an order of adoption in respect of the child **JJ**

- 2. The petitioner may travel with the child to Canada, or any other country that she may choose as residence in order to fulfill her obligations as an adoptive parent.

- 3. I direct that the Registrar of Births and Deaths makes an 5 entry recording this adoption in the Adopted Children Register.
- 4. It is further directed that this adoption be furnished to the consular department in the Ministry of Foreign Affairs at Kampala, and at the Ministry of Gender, Labour and Social 10 Development in Kampala.
- 5. The petitioner shall meet the costs of this application.

I so order.

15 Signed

**EVA K. LUSWATA JUDGE 22/01/2020**

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