

UGANDA / JUDGMENT

In Re: Kakembo(infant) (Family Cause No 169 of 2014) [2015] UGHCFD 210 (14 April 2015)

[2015] UGHCFD 210

COURT

HC: Family Division (Uganda)

BEFORE

Tuhaise, J

CASE / FILE NUMBER

Family Cause No 169 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY CAUSE NO 169 OF 2014

IN THE MATTER OF THE CHILDREN ACT CAP 59

AND

IN THE MATTER OF ADOPTION OF MARK KAKEMBO OF KONGE BUZIGA ZONE, KANSANGA, GGABA ROAD, MAKINDYE DIVISION, KAMPALA CITY

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is a petition brought by **Angel Nakazibwe**, a sole applicant, for adoption of a child **Mark Kakembo**. The petitioner seeks orders that an order for the adoption of the child **Mark Kakembo** be made under the Children Act with all the necessary directions; the costs of this petition be provided for by the petitioner or otherwise as the court may direct; and for such further and other orders as the nature of the case requires and in the discretion of this honourable court.

The petition is supported by the affidavits of the petitioner **Angel Nakazibwe**. The petitioner did not appear physically in court, but was represented by her attorney **Veronica Najjemba**. This court requested however that the petitioner avails it with a notarized copy of her passport, together with that of her spouse, **Ronald Mulindwa**, which was accordingly done. This court interviewed on oath the child **Mark Kakembo**, the petitioner's mother **Robina Nanfuka**, and **Bukenya Patrick** Probation and Social Welfare Officer (PSWO), and the child's paternal uncle,

George Batte, Learned Counsel Isingoma Esau for the applicant filed written submissions.

The background is that the male child, **Mark Kakembo**, aged 15 years, is a child of **John Bamweyana** and **Nakito Rose** of Nabbingo village, Wakiso District. He was born on 12/12/1999. His parents are both dead. He has been living with the petitioner's mother **Robina Nanfuka**. The petitioner is a citizen of the United States of America (USA) but was born and bred in Uganda. She is a cousin to the child and has been rendering him direct financial and welfare support.

The application was addressed by this court along the following issues:-

1. Whether the High Court is seized with the jurisdiction to entertain the matter.

Section 44(1)(b) of the Children Act provides that an application for an adoption order may be made to the High Court where the child or the applicant is not a citizen of Uganda, and court may, subject to the said Act, grant the application. This court therefore has the jurisdiction to hear and determine this application where the applicant is a citizen of the USA but the child is a Ugandan.

2. Whether the petitioner qualifies to be appointed the adoptive parent of the child.

Section 45(1)(a) of the Children Act provides that an adoption order may be granted to a sole applicant or jointly to spouses where the applicant or at least one of the applicants has attained the age of twenty five years and is at least twenty one years older than the child. Section 46 of the same Act provides that a person who is not a citizen of Uganda may, in exceptional circumstances, adopt a Ugandan child if he/she has stayed in Uganda for at least three years; has fostered the child for at least thirty six months under the supervision of a PSWO; does not have a criminal record; has a recommendation concerning his/her suitability to adopt from his/her country's PSWO or other competent authority; and has satisfied the court that his/her country of origin will respect and recognize the adoption order.

In this case the adduced evidence shows that petitioner, a sole applicant, is citizen of the United States of America (USA). This is adduced from the sworn affidavit evidence and the annexed copies of her passport. The petitioner's being a citizen of the USA places her within the legal requirements of section 46 of the Children Act. There is no evidence showing whether or not the applicant has dual citizenship of both Uganda and the USA. There is evidence, however, that the petitioner was born and bred in Uganda. Currently, she is a citizen of the USA as is adduced from her passport and her sworn affidavit. She is a cousin to the child in that the child was born by her late uncle and aunt.

The child's father, **Bamweyana John**, died in a motor accident in 2004 and his mother, **Nakitto Rose**, died of cancer in 2006. The relevant death certificates are collectively annexed to the petitioner's supporting affidavit as **E**. The petitioner's mother **Robinah Nanfuka** lives with the child and the petitioner is responsible for the child's education and all other needs.

The petitioner is shown to be a sole female applicant in respect of a male child. Court cannot in the said circumstances grant an adoption order unless satisfied that there are special circumstances. In this case I find that there are special circumstances in that the petitioner is related to the child and has been solely responsible for his support as a cousin. The child himself testified under oath before this court that he has been living with the petitioner's mother. The petitioner, who is a cousin to the child, has, according to the affidavit evidence on record, already adopted the child's two elder brothers, **Martin Ssesanga** and **George Ssozi**, who are living with her in New York.

The child **Mark Kakembo** is revealed by the copy of his birth certificate on the court record to have been born on 12/12/1999. He is currently aged 15 years and three months. Being above 14 years of age, his consent to the adoption is required. A copy of the said consent is on the court record.

The petitioner, who is aged 33 years, is above 25 years, but is less than 21 years older than the child. The law as highlighted above requires that in addition to attaining the age of at least twenty five years, the applicant should be at least twenty one years older than the child. This restriction or condition is set out in section 45(1) of the Children Act. It applies to both local and inter country adoptions, more so, if read with section 46(2) of the same Act. This court finds that the petitioner is not compliant with said condition or restriction in terms of her age difference with the child she seeks to adopt.

The adduced evidence also shows that the petitioner is a spouse to a one **Ronald Mulindwa** who lives with her and their children, one of whom is a biological child, in the USA. Section 45(1)(b) of the Children Act requires that where a married person is applying as a sole applicant, as is the case in the instant case, the other spouse must give his consent. **Ronald Mulindwa's** consent is on the court record with a notarized copy of his passport.

The reports of 10/08/2013 prepared by New York State Office of Children & Family Services, Criminal History Review Unit, on the petitioner and **Mulindwa Ronald**, which are on the court record, show that the petitioner and her spouse **Mulindwa Ronald** do not have a criminal record. The PSWO, in his report on record, has recommended the petitioner as a suitable person to adopt the child. The Adoptive Home Study Report of M/S Jewish Child Care Associates of New York also recommends the petitioner's request to adopt the child as a well thought out plan.

Under section 47 of the Children Act, the consent of the child's parents is necessary if the parents are known, but it may be dispensed with if the parents are incapable of giving it. The adduced evidence shows that the child's parents are both dead. However **Robinah Nanfuka** who has been living with the child after his parents' death, has signed consents to the adoption of the child. **Robinah Nanfuka** also testified under oath before this court where she reiterated her agreeing to the child being adopted by the petitioner who is also his relative. The record also contains the consent of **Batte George** the child's paternal uncle, who also testified under oath before this court that he agreed and fully appreciated the petitioner adopting the child.

***3. Whether the application is in the best interests of the child*.**

Section 3 and the first schedule of the Children Act provide that the welfare principle shall be of paramount consideration when making decisions concerning children. The court shall in particular have regard to the ascertainable wishes and feelings of the child concerned considered in light of his/her age and understanding; the child's physical, emotional and educational needs; the likely effect of any changes in the child's circumstances; the child's age, sex, background and any other circumstances relevant in the matter; any harm that the child has suffered or is at the risk of suffering; and where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his/her needs.

The evidence adduced before this court shows that the child **Mark Kakembo** is a total orphan having lost both parents. The petitioner has sponsored his education in addition to availing him basic necessities. The petitioner has already adopted the child's two elder brothers and lives with them in New York. The petitioner stated in her petition and supporting affidavit that she was neither given, nor did she give anything as consideration to adopt the child.

These circumstances, in my opinion, are exceptional circumstances rendering the child **Mark Kakembo** who is a total orphan to be very vulnerable and in need of a home, care and love. The child has lost both parents. His relative who brought him up, who is also the petitioner's mother, together with the paternal uncle, have given him up to the petitioner, who also happens to be his close relative. The petitioner is availing the child all necessities of life including education.

The Constitution of Uganda and the Children Act stipulate that a child has a right to have a home and be cared for. The petitioner is able and willing to avail such home to the child. The child's relative has consented to the petitioner's adoption of the child. The child himself, after court had established him to be of understanding age, testified on oath before this court that he was not opposed to being adopted by the petitioner who had already adopted his two elder siblings. The Family Report about the petitioner indicates that the USA where she intends to live with the child as a citizen is ready to respect the adoption order if granted.

All in all I find that the petitioner is compliant with the conditions, restrictions and requirements set out by the Children Act regarding adoption of the child **Mark Kakembo**, save for the requirement which requires her to be at least twenty one years older than the child. I am of the opinion that this is a condition in the law and there is no going around it. In the case of **Paula Robertson and Cynthia June Robertson, Infant Adoption Cause No. 31/2004** cited by counsel, the learned Judge was alluding to the three months fostering period under section 46(1)(b) of the Children Act when he held that the period was merely directory. It is different from the instant case where the issue is on age differences. In that regard, on the adduced evidence, and for reasons given, I am constrained not to grant the adoption order.

I have however considered in detail the circumstances of this case, the adduced evidence, but most important the best interests of the child and the welfare principle. I am mindful of section 98 of the Civil Procedure Act which confers on this court inherent powers to make orders as may be necessary for the ends of justice. I am also mindful of section 33 of the Judicature Act which

empowers this court to grant absolutely or on such terms and conditions as it thinks just all such remedies as any of the parties to a cause is entitled to in respect of any legal or equitable claim properly brought before it so that all matters in controversy are determined and multiplicity of proceedings avoided.

I find this case to have peculiar circumstances in that the applicant though a citizen of the USA, was born and bred in Uganda. She has been supporting and keeping in touch with the child through her mother **Robina Nanfuka**. She is related to the child and has already adopted the child's older siblings. This, in my opinion, is a case where, in the best interests of the child, and in the interests of justice and family cohesion, even if an adoption order cannot be granted due to one condition of age difference not being met, a guardianship order to the applicant in respect of the child would not be misplaced. The adduced evidence already on the court record would justify and support a guardianship order. In my opinion, this is case of a family member continuing with her already existing obligations of supporting a relative but in a legally regulated manner which will allow her to live with the child in a country where she has acquired citizenship and no longer lives in Uganda.

Thus, I decline to grant the adoption order on basis of non compliance with the condition of age difference between the petitioner and the child as set out in section 45(1)(a) of the Children Act. However, in the best interests of the child, in the given circumstances considered above, based on the adduced evidence, and for ends of justice, including avoiding multiplicity of applications, I have invoked this court's discretionary and inherent powers to order as follows on terms I consider fit for the welfare of the child:-

1. The applicant **Angel Nakazibwe** is appointed a legal guardian of the child **Mark Kakembo**.
2. The legal guardian is allowed to immigrate with the child to the USA where she lives.
3. The child shall retain his Ugandan passport in his current names.
4. The legal guardian shall submit once a year, photographs and a report on the state of health, progress and welfare of the child to the Registrar, Family Division of the High Court of Uganda at Kampala until he attains 18 years of age or until directed otherwise.
5. The Registrar of the High Court shall furnish a copy of the orders in this ruling, together with the address of the legal guardian in USA to the Ministry of Foreign Affairs of Uganda at Kampala, and the Ministry of Justice & Constitutional Affairs of Uganda.
6. The legal guardian shall immediately communicate any changes of address to the authorities mentioned above.
7. Costs of the petition shall be provided for by the petitioner.

Dated at Kampala this 14th day of April 2015.

Percy Night Tuhaise

Judge.

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