

UGANDA / JUDGMENT

In Re: Kambale (Infant)

(Family Cause No. 0003 of 2018)

[2019] UGHCFD 5 (9 May 2019)

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COURT

HC: Family Division (Uganda)

BEFORE

Musene, J

CASE / FILE NUMBER

Family Cause No. 0003 of 2018

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THE REPUBLIC OF UGANDA**IN THE MATTER OF THE HIGH COURT OF UGANDA AT FORTPORTAL****IN THE MATTER OF THE CHILDREN ACT, CAP 59 AS AMENDED BY ACT NO. 16 OF 2016****FAMILY CAUSE NO. 0003 OF 2018****AND****IN THE MATTER OF A PETITION FOR THE ADOPTION OF KAMBALE MOSES BY JACOB DANIEL HANKS AND STEPHEN MAUVLYN BRAUN-HANKS****BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE****Ruling**

The Petitioners, Jacob Daniel Hanks and Stephanie Mauvlyn Braun-Hanks are represented by Counsel Isaac Mugume. The petition is brought under **Section 44 (b)** of the Children Act and the orders sought are as follows;

1. Jacob Hanks and Stephanie Mauvlyn Braun-Hanks be appointed adoptive parents of the child Kambale Moses.
2. That this Honourable Court waives the statutory requirement for 21 year age difference between the petitioners and the child.
3. That the statutory requirement for 1 year stay and fostering period be waived.
4. The family name 'Hanks' be added onto the child's names.

5. Such other order be made as deemed necessary.

Background of the Petitioners

The Petitioners are American citizens. Jacob Daniel Hanks is the holder of an American Passport No. 551187660. Stephanie Mauvyln Hanks is the holder of America passport No. 550882667. They are residents at 134 Bella Way Belmont, North Carolina, 28012, USA. Jacob is 30 years old while Stephanie Mauvyln Hanks is 31 years old. They are married and Jacob is employed as a Human Services Specialist by the Mecklenburg County Department of Social Services and also works part-time with Home Depot while Stephanie is a home maker. The Petitioners do not have any criminal record in Uganda or anywhere else. The Petitioners have been providing for the Child's needs for 4 years now and all his medical bills.

Background of the child

The child Kambale Moses aged 12 years is born to Olanya John Bosco and Kabugho Faith now deceased. He is currently under the care and custody of Kiiza George a resident of Buswa, Sissa SuB-County, Kajjansi Town Council who was granted a care order by the Magistrates Court of Kajjansi on the 8th day of July 2016. George Kiiza is a friend of the Petitioners who met in 2013 while they had come for missionary work and travelled with him to Fair Earth Human Wellness Foundation a community based organisation in Kasese to install a water harvesting system. That Fair Earth Human Wellness Foundation also runs a children's Home and this is where the Petitioners met Kambale Moses who was brought there due to his disabilities.

The petitioners developed an interest in the child and wished to foster the child with the view of adoption and George confirmed that the relatives had failed to look after the child and his mother eventually died in July 2009. The grandmother upon learning about the petitioners desire to adopt the child she consented willingly. The child's maternal uncle Bwambale Koloneri also willingly consented. The Petitioners have been taking care of the child since 2013 while under the custody of George Kiiza. Olanya the step father of the child was located and also consented to the adoption of the child and relinquishing his parental rights.

Issues

1. Whether the petitioners are eligible to adopt the children?
2. Whether it is in the child's best interest that the order of adoption is granted to the petitioners?

Issue 1: Whether the petitioners are eligible to adopt the children?

The Petitioners in the instant application are aged 30 and 31 years respectively while the child is 12 years of age. Counsel for the Petitioners quoted **Section 14** of the Children Act as amended that provides that, Court may in exceptional circumstances waive any of the requirements specified in subsection (1). That the Petitioners have shown commitment towards the child and their capability to parent the child for the past 4 years by providing for his needs. They have been in

constant communication with the child and he has bonded with them well. Thus, the 21 years age difference should be waived in the best interest of the child since none of his relatives can take care of him and the Petitioners are able willing to take care of him.

Counsel also prayed that the one year fostering period be waived since the child was being taken care of by the Petitioners friend George as their attorney as they provided for the child's needs. He relied on **Section 14(b)** of the Amended Children Act No. 16 of 2017 and the case of **In the matter of Amari Daphne F. C 47 of 2017** where court held that;

"...fostering a child for one year does not mean having physical custody of the child. It includes any conscious effort made by the prospective petitioner(s) to support a child through any practical arrangement. Such support may be channelled through a parent or relative of the child or any other person having physical custody of the child. He termed this arrangement as "constructive fostering."

Counsel for the Petitioners added that the two requirements be waved since the child has urgent medical requirements and that they have been in communication for 4 years whereas they provided for him and are willing to take full responsibility over him and all his needs. That the petitioners also have no criminal record and have been found suitable as adoptive parents by their country and also a probation and social welfare Officer of Kasese.

I have carefully considered the submissions of Counsel for the Petitioners. The petitioners are American citizens and therefore this is a matter that is governed by provisions of inter country adoption. Suitability as adoptive parents under inter-country adoption is premised on the satisfaction by this court that the requirements under **Sections 45 and 46** of the Children Act, (as amended) are fulfilled.

Section 45 (1) (a) provides that an order of adoption may be granted to a sole applicant or jointly to spouses, where the applicant or at least one of them has attained the age of 25 years.

Sections 46(a) (as amended by section 14 of Act No. 16 of 2016) entitles any person who is not a Ugandan citizen to adopt a Ugandan child if he has stayed in Uganda for at least one year. Furthermore, **section 46(b) as amended by section 14 of Act. No. 16 of 2016)** provides for the petitioners to have fostered the child for at least one year under the supervision of the Probation Officer, who must submit a report to assist Court to arrive at a fair decision.

Under **Sections 46(c) of the Act**, the petitioner must not have a criminal background and must therefore present to court evidence of such clearance. Furthermore, **Sections 46(d)** provides for the requirement of a recommendation on suitability to adopt from the Probation and Social Welfare Office in the petitioner's home country.

Indeed the Petitioners have been taking care of the child's needs for over 4 years through George. They have been found as suit adoptive parents both here and in their country not to mention they have no criminal record. The petitioners prayed to this Court to waive the fostering period. **Section 14** of the Children (Amendment) Act 9 of 2016 amended **Section 45(4)** as follows:

“The Court may in exceptional circumstances waive any of the requirements specified in Subsection (1)”.

The Petitioners prayed to waive the condition as regards the 21 year age difference and the 1 year fostering period. This is a case that concerns a child with disabilities that needs urgent medical attention and Courts are in place to dispense justice and this case the child's best interests are paramount.

In the case of *Re Muhairwe & In re an Application For An Adoption By Birgitte N. Markussen & Han H Philipsen* HCT – OO – FD – 0100 – 2008 it was stated that the requirements in **section 46** are merely directory not mandatory, and that it is possible, in appropriate cases, where the best interests of the child in question militate towards waiving the fostering period.

I therefore find the Petitioners as suitable adoptive parents and as per the law and authorities cited above I waive the two conditions prayed for.

Issue 2: Whether it is in the child's best interest that the order of adoption is granted to the petitioners?

Counsel for the Petitioners quoted **Section 3** of the Children Act on the Welfare Principle of the child and the case of *In the matter of Deborah Alitubeera and in the matter of Richard Masaba, C. A No. 70 and 81 of 2011*, where Court re-emphasised that the welfare principle is a paramount consideration in making decisions in matters concerning children. The child as already mentioned is disabled and the petitioners have been providing for him since 2013. The relatives of the child have granted consent wilfully in compliance with **Section 47** of the Children's Act. The child has no mother and the relatives are unable to take care of him.

A child is defined under **section 2** of the Children Act, Cap. 59 as any person below the age of 18 years. The child in this case is seven years, and therefore falls within the meaning provided in the Act.

Under **Section 3** of the Children Act, as amended, Court must examine a number of criteria before making any decision in relation to the child. Such criteria includes the ascertainable wishes and feelings of the child concerned considered in light of his or her age and understanding; the child's physical, emotional and educational needs, the likely effects of any changes in the child's circumstances; the child's 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 or her needs.

Section 5 of the Children Act places a burden upon parents, guardians or any person with custody of a child to maintain it and ensure that its rights to education, food, shelter, clothing and access to medical facilities are provided. Here the petitioners proved to Court that they are able and willing to take care of the child.

Section 4 (2) of the Children Act stipulates that;

“Subject to subsection (1), where a competent authority determines in accordance with the laws and procedure applicable that it is in the best interest of the child to separate the child from his or her parent, the best substitute care available shall be provided for the child.”

Section 6(2) of the Children Act enables court to pass on parental responsibility to the relatives of either parent, or by way of a care order, to the warden of an approved home or to a foster parent. Thus in all these stipulations it is settled law that in all matters to do with children, the welfare of the child is of paramount importance.

The term Welfare was defined in **Pulkeria Nakagwa versus Dominico Kigunda (1978) HCB 310** where it was stated that though not capable of an exact definition, it means, in relation to custody of children that all the circumstances affecting the well-being and upbringing of the child have to be taken into account.

Court therefore has to do what a wise parent acting in relation to a child for its best interests ought to do. Welfare is not measured by money alone nor by physical comfort only. The word must be taken, by its widest sense, to include the moral and the religious welfare, the physical well being of the minor as well as the affection. (See: **Lough versus Ward 1945 2 ALL ER 338**).

Consent of the child's parents is therefore a key aspect to adoption and can only be dispensed with where the parent is deceased, cannot be found or is incapable of giving consent, or the spouses are separated and living apart and the separation is likely to be permanent. (See: **Sections 45 and 47 of the Act**).

Thus in the case of **Re Michael Lumu, Adoption Cause No. 8/2000 (unreported)**, it was stated that the purpose of the consent under that section was to emphasize the right of the parent over the child. His parental right should only be discarded in the interest and welfare of the child.

Section 48 (1) (b) of the Children Act as amended provides that the Court shall, before making an adoption order be satisfied that the order if made shall be for the welfare of the child, due consideration being given to the wishes of the child having regard to his or her age of understanding. This section is in line with the guiding principle in Section 3 of the same Act that provides for the Welfare Principle of the Children's Rights set out in the First Schedule to the Act as guiding principles in decisions concerning children.

Counsel also submitted that he had informed the Petitioners about the effect of the adoption order. Our laws provide for an Adoption children Register under **Section 54** of the children Act as amended, where particulars of the adoptions under the Act are registered.

Section 51(b) of the same Act, provides that there shall vest in, and be exercised by, and enforceable against the adopter all such rights, duties, obligations and liabilities in relation to the future custody, maintenance and wedlock of the child, that is all the parental rights transfer to the adoptive parents.

The best interests of the child are with the Petitioner as submitted since the child has no biological parents and the relatives are not in position to look after him. The Petitioners have been taking care of the child since 2016 meaning that they are mindful of his best interest.

In the interest of justice, **Section 33** of the Judicature Act and **section 98** of the Civil Procedure Act gives the High Court inherent powers to make orders that may be necessary for the ends of Justice.

I accordingly find the Petitioners as suitable adoptive parents to the child Kambale Moses and in the best interest of the child the Petition is accordingly allowed with the following Orders:

1. Jacob Hanks and Stephanie Mauvlyn Braun-Hanks be appointed adoptive parents of the child Kambale Moses.
2. That this Honourable Court waives the statutory requirement for 21 year age difference between the petitioners and the child.
3. That the statutory requirement for 1 year stay and fostering period be waived.
4. The family name 'Hanks' be added onto the child's names.
5. This Adoption Order shall be furnished to the Consular Department in the Ministry of Foreign affairs and Permanent Secretary Ministry of Gender, Labour and Social Development.
6. Costs of this Petition shall be borne by the Petitioners.

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WILSON MASALU MUSENE

JUDGE

09/05/2019

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