

UGANDA / JUDGMENT

In Re: M.N. [infant] (Adoption Cause No. 289 of 2013) [2013] UGHCFD 22 (17 December 2013)

[2013] UGHCFD 22

COURT

HC: Family Division (Uganda)

CASE / FILE NUMBER

Adoption Cause No. 289 of 2013

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[Editor Note: Certain personal details and information have been redacted from this judgment to preserve the privacy of minors.]

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

ADOPTION CAUSE NO 289 OF 2013

IN THE MATTER OF THE CHILDREN ACT

AND IN THE MATTER OF THE CHILDREN (ADOPTION OF CHILDREN RULES) SI 59 – 1

AND

IN THE MATTER OF N. M. (INFANT)

AND

IN THE MATTER OF AN APPLICATION FOR AN ADOPTION ORDER BY E. C. M.

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application brought by petition for orders for the adoption of N. M by the petitioner; that the adoption order granted vide Adoption Cause No. 5/2012 be nullified; and for such further or other orders as the nature of the case may require.

The facts of the case are that the applicant, a dual citizen of Uganda and America, successfully applied for an adoption order as a Ugandan to the M... chief magistrate's court in respect of N. M (infant). When she presented the order for purposes of obtaining a visa for the infant to travel

with her to America, it was rejected by the American embassy which demanded for an order issued by the High Court of Uganda. The petitioner then filed this petition before this court. The petitioner attended court together with the infant and the infant's grandmother when this petition was being heard.

I have carefully listened to the submissions of learned counsel Birungyi Cephas. I have also analyzed the application and perused the ruling of the learned chief magistrate of the M... court, and considered the law applicable to this situation.

The petition and supporting affidavits of the petitioner and a one M. K. reveal that the child is a Ugandan female aged five years whose parents are deceased. She was left under the care of her grandmother M. K.. The petitioner is a daughter of M. K. and a paternal aunt to the infant. The petitioner, aged 46 years, resides and works in the United States of America (USA), is a citizen of Uganda by birth and of the USA by naturalization. She does not have a criminal record as revealed by the report annexed to her affidavit. She has been evaluated and found suitable to adopt a child by the Probation and Social Welfare Officer of M... Division in Kampala. The grandmother of the child M. K. has consented to the adoption of the child by the petitioner.

Section 46(1)(b) of the Children Act requires non Ugandans to have fostered a child for at least thirty six months, among other requirements, before they qualify to adopt the same child. In this case, the petitioner is a citizen of USA but also holds Ugandan citizenship. The aspect of her being a citizen of USA and residing there renders this petition to be legally an intercountry adoption within the meaning of section 46 of the Children Act. This could be the reason the American Embassy insisted on the High Court order rather than a magisterial order since intercountry adoptions can only be handled by the High Court. In that respect the petitioner has locus to be heard by this court on the petition for adoption.

The circumstances of this case are peculiar. The applicant holds dual citizenship of Uganda and the USA. She is also the infant's paternal aunt already taking care of the infant. The requirement to foster the infant for thirty six months under section 46(1)(b) of the Children Act applies to non-Ugandans. In that respect, being a Ugandan, her having fostered the infant for only two years and nine months, as opposed to the required thirty six months, would be no hindrance to her being qualified to adopt the child. Besides, it was held **In Re Muhairwe & In re an Application For An Application For An Adoption By Birgitte N. Markussen & Han H Philipsen HCT – OO – FD – 0100 – 2008** 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. It is evident the infant is a total orphan. The paternal grandmother, who is also the petitioner's mother, under whose care the infant was left, has consented to the adoption as required under section 47 of the Children Act.

I consider the foregoing findings to be factors rendering this case an appropriate case where no insistence should be attached to the thirty six month fostering period. Also see **Re Nakawesa, Namanda & Katongole (infants) Adoption Cause 164/2011**, Lugayizi J*; **In the matter of Paul Kaddu & in the Matter of a petition for an Adoption Order by Steven Kaddu & Olga Kaddu Adoption Cause No. 46/2013***, Mukiibi J.

The petitioner also prayed this court to nullify the order issued in Adoption Cause No. 5/2012. I have not come across any statutory provision or authority, and learned counsel did not cite any, where a court nullified an order of a lower court in absence of an appeal or a revision, particularly where such order is well founded and not illegal as was the case in the instant situation. The facts of the instant situation are similar to those in **Khardra Mhamme Warsame FC 89/2012**(Mukiibi J). In that case the applicant intended to migrate to Canada with her children. The American embassy did not issue a visa requesting that she first obtains a custody order from the High Court. The sharia court in Uganda had granted her divorce and custody of the children. The learned Judge ruled that the sharia court made a valid decision. He respected and stood by the order given by the sharia court in respect of custody of the two children.

The High Court has unlimited original jurisdiction in all matters as stipulated in Article 139(1) of the Constitution and section 14 of the Judicature Act. Section 33 of the Judicature Act empowers the High 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 or matter is entitled to in respect of any legal or equitable claim properly brought before it. This court also has inherent powers under section 98 of the Civil Procedure Act to make such orders it deems fit for the ends of justice.

In the circumstances of this case, in line with the foregoing authorities, where there is already an existing court order from a lower court which has not been appealed against, and which is not illegal, or where no reasons for nullifying it exist, and to avoid the existence of two valid court orders on the same issue, the appropriate remedy would be to invoke this court's inherent powers. I find it appropriate to confirm the order rather than nullify it. This is done in the interests of justice, and for the welfare of the infant who needs a home, love and care. The petitioner is willing to avail such home, love and care. Denying the applicant her prayer to adopt the child would deprive the infant the basic necessities of life including a home, love and care by a close relative, in absence of her parents. The adoption of N. M. by the petitioner initially issued by the lower court is confirmed. Costs of the petition are to be borne by the petitioner.

Dated at Kampala this 17thday of December 2013

Percy Night Tuhaise

Judge.

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