

UGANDA / JUDGMENT

In Re: Nassozi Immaculate (Child) (Miscellaneous Application No 208 of 2014) [2015] UGHCFD 1 (12 January 2015) [2015] UGHCFD 1

COURT

HC: Family Division (Uganda)

CASE / FILE NUMBER

Miscellaneous Application No 208 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO 208 OF 2014

ARISING OUT OF FAMILY CAUSE NO 37 OF 2014

IN THE MATTER OF NASSOZI IMMACULATE (CHILD)

AND

IN THE MATTER OF AN APPLICATION BY SHERWOOD ZIMMERMAN AND LISA ZIMMERMAN

FOR REVIEW OF LEGAL GUARDIANSHIP OF THE CHILD NASSOZI IMMACULATE

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application for review of a guardianship order in respect of a child Immaculate Nassozi brought by notice of motion for orders that the information provided in the legal guardianship application Family Cause No 37 of 2014 be reviewed. The application is based on the grounds contained in the affidavits of the applicants Sherwood Zimmerman and Lisa Zimmerman, Emmanuel Kafuuma the biological father of the child, Alice Nalunga the biological mother of the child, and Namulindwa Resty. The grounds are that:-

1. The biological parents of the child have been found to be alive.
2. This honourable court was lied to, hence being misled.
3. The lies made to this honourable court were an attempt to help the child.
4. The child's biological parents have consented to the legal guardianship.

5. The application is made in the best interests of the child.

The background to the application is that on 11th April 2014 this court granted a guardianship order to the applicants regarding the child Immaculate Nassozi vide Family Cause No 37 of 2014. The order was granted based on evidence adduced before this court, including that the child had lost both her parents and was in the care of the Greenhouse Orphanage in Kampala. The applicants have however filed an application for review of the said order to review the information provided in Family Cause No. 37 of 2014, in that the court had been lied to and misled about the parentage of the child.

The hearing of the application was attended by the 2nd applicant Lisa Zimmerman, the child Nassozi Immaculate, the mother of the child Alice Nalunga, the father of the child Emmanuel Kafuuma, Namulindwa Resty, and Ronald Mukiibi the Probation and Social Welfare Officer of Wakiso District. This court interviewed each of the said persons on oath as an addition to their affidavit evidence on the court record. Court was also availed DNA results of the child, Alice Nalunga, and Emmanuel Kafuuma. The applicants were represented by Counsel Rebecca Mugabi assisted by Counsel Judith Ndagigye who filed written submissions.

The applicants' affidavit evidence is that they presented Family Cause No 37 of 2014 based on information that the child was a total orphan having lost both parents. They verily believed the information to be true. It is their evidence that it later came to their knowledge that the child's biological parents are alive and were not appropriately named in the former application; that the said parents are peasants with no reliable source of income to provide for the child; that the child is still vulnerable and in need of care despite her parents being alive; that the biological parents have consented to the application; and that the applicants are still willing and able to provide for the child.

Lisa Zimmerman the 2nd applicant, on being examined by this court, reiterated her sworn affidavit evidence. She testified on oath that after being granted a guardianship order in April 2014, the United States of America (USA) Embassy informed them of their investigations revealing that the parents of the child were still alive; that they eventually met the real parents of the child; that a DNA test was conducted on the child and her parents; that despite the emotions of anger and sadness they suffered on knowing the truth, plus the lies earlier told to court by the child and her biological mother, among others, they are willing to parent the child whom they have enrolled in an international school and are catering for.

The child Nassozi Immaculate testified on oath that she is now attending Acacia International School in Kampala; that she had earlier told court that both her parents are dead; that it was not true that her parents were dead; that Alice Nalunga was her biological mother; that she had been told to lie by a one Kevin; that this time she was telling the truth; and that the applicants were catering for her needs in Uganda.

Ronald Mukiibi the Probation & Social Welfare Officer Wakiso District testified on oath that he had visited the mother of the child Alice Nalunga and the father of the child Emmanuel Kafuuma, who have nine children; that their source of income is minimal; that his analysis is that they cannot sustain the child; that the child will have a better welfare with the applicants; that the child had not been staying with the parents and there was a gap. The said Officer's report on the situation of the child reiterating the same matters is also on court record.

Alice Nalunga the child's mother testified on oath before this court that she was earlier told to lie to court; that she does not stay with the child's father; that the father is a drunkard and does not look after the children; that she stopped staying with the child in 2008; that she gave the child away because she did not have a job to provide for her; that she appreciates the implications of granting a guardianship to the applicants and her eventually being adopted by the applicants in the USA; and that she is willing to give up her parental obligations. She also signed a written consent to an order of legal guardianship which is on the court record, and annexed a copy of the child's birth certificate to her affidavit.

Emmanuel Kafuuma testified on oath that he is the child's biological father; that he neglected the child because he was still taking care of others; that his son took the child to Kampala when she was still young; and that he is physically weak following three accidents. He further stated in his sworn affidavit that the implications of legal guardianship and eventual adoption of the child were explained to him by the applicant's counsel in a language he understands and he is giving the child away voluntarily and willingly. He also signed a written consent to an order of legal guardianship which is on the court record.

The DNA Test Report availed to this court reveals that the probability of Emmanuel Kafuuma's paternity to Nassozi Immaculate is 99.998%, and the probability of Alice Nalunga's maternity to Nassozi Immaculate is 99.998%. According the report, the alleged father and mother of the child are not excluded as the biological father and biological mother of the tested child. The affidavit evidence availed to this court also reveals that Immaculate Nassozi is a child of Emmanuel Kafuuma and Alice Nalunga. The evidence further shows that the parents of Nassozi Immaculate are living apart. They gave up the child around 2009 and have since never catered for her. Despite numerous probes by this court, both parents testified on oath that they were consenting to the guardianship order and eventual adoption of the child voluntarily and willingly and had not been given any incentive. There is evidence that the child has not been living with the parents since 2009. The child was previously under the care of Greenhouse Orphanage which eventually connected her to the applicants.

Section 3 of the Children Act cap 59 provides that the welfare principle and the children's rights set out in the First Schedule shall be the guiding principles in making any decision based on the said Act. The welfare principle includes the ascertainable wishes and feelings of the child in light of 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 sex, age, background and other relevant circumstances; any harm 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 child's care in

meeting the child's needs. Section 4 of the same Act provides that a child is entitled to live with her parents or guardians, but where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate the child from the parents, the best substitute care available shall be provided for the child.

This court condemns the lies told to court during the hearing of Family Cause No. 37/2014. The lies were told by not only the child's mother, but also the child, found by court to be of understanding age, and by Resty Namulindwa. The said three have regretted having lied to court in Family Cause No. 37/2014. They are among others who did not appear before court during the hearing of the instant application. Nevertheless, this court is not a vindictive court and will not allow emotions to override the welfare principle, which, as stated above, is the overriding factor or guiding principle in all matters concerning children.

The adduced evidence shows that the biological parents of the child are Alice Nalunga and Emmanuel Kafuuma. The mother of the child is not employed. She no longer stays with the child who was born to her and Kafuuma Emmanuel on 1st July 2005. She surrendered the child to Greenhouse Orphanage around the year 2009 when the child was only four years old. The father of the child has never supported the child in terms of availing her basic needs in life. Both parents have consented to guardianship of the child being granted to the applicants. The child, having been found to be of understanding age by this court, testified on oath that she has been living at a Guest House and was attending International School at the expense of the applicants. She stated that though she would like living with her parents they cannot take her to school. The Probation and Social Welfare Officer, whose report on the situation of the child is on court record also testified on oath before this court recommending that guardianship of the child should be granted to the applicants. The position of the applicants still remains that they are suitable, able and willing to avail a home to the child. They are already catering for her education at an international school in Uganda.

After analyzing the foregoing freshly adduced evidence and applying the legal provisions highlighted above, this court finds that despite the changed circumstances regarding the child's parentage, which now is that both parents of the child are alive, the child remains vulnerable and in need of a permanent home where she can grow up and be loved.

This court has inherent powers under section 98 of the Civil Procedure Act to make such orders as may be necessary for the ends of justice. Section 100 of the same Act gives discretion to this court to amend any defect or error in any proceeding in a suit and all such amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceedings.

In that respect, the information provided in Family Cause No. 37 of 2014 is reviewed. It is, in the circumstances, in the child's best interests that her legal guardianship be granted to the applicants on basis of the evidence freshly adduced in this application.

All the orders in Family Cause No. 37 of 2014 are repeated and incorporated in this application based on the freshly adduced evidence before court.

Dated at Kampala this 12th day of January 2015.

Percy Night Tuhaise

Judge.

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