

UGANDA / JUDGMENT

In Re: Onen Cliff Mills and Laker Joy Onen (Minors) (Miscellaneous Civil Application No. 0022 of 2018) [2018] UGHCFD 6 (25 September 2018)

[2018] UGHCFD 6

COURT

HC: Family Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Civil Application No. 0022 of 2018

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

MISCELLANEOUS CIVIL APPLICATION No. 0022 OF 2018

IN THE MATTER OF AN APPLICATION FOR A GUARDIANSHIP ORDER

AND

IN THE MATTER OF ONEN CLIFF MILLS AND LAKER JOY ONEN (MINORS)

AND

IN THE MATTER OF AKELLO LUCY..... APPLICANT

Before: Hon Justice Stephen Mubiru.

RULING

This is an ex-parte application for Legal Guardianship of a six year old boy-child Onen Cliff Mills and a seventeen year old girl-child, Laker Joy Onen, made by their biological mother, Ms. Akello Lucy. The application is made by way of notice on motion pursuant to section 44 (1) (a) of *The Children Act*, section 14 (1) of *The Judicature Act*, and order 52 rules 1 and 2 of *The Civil procedure Rules*.

In the affidavit supporting the application, the applicant avers that the biological mother of both minors and is ordinarily resident at Layibi Central "A" and "B", Tegwana Parish, Pece Division in Gulu District. She has all along been providing the basic needs of both minors since the death of their father Onen Cliff Richard which occurred in the year 2012. She desires to continue to do so

and that her custody and authority over the two minors is accorded legal recognition, hence this application. She is currently an Aesthetic Officer at Adjumani Hospital by virtue of which she has the financial capacity to cater for the needs of the two minors.

She was self-represented at the hearing of the application and she stated that; she is the biological mother of both children whose father died in 2012. The family sat down and chose people to administer the estate. They applied for a certificate of no objection which was granted about three years ago. They have never proceeded to obtain the grant. They said the estate is indebted and they feared to be followed up. They are using the estate property and are not supporting the children. They sold part of the land she was left with without consulting her and she never benefited from the money. She has two children of the deceased the subject of this application, one a girl is aged 17 years and the boy is six years old. She was not legally married to the deceased but was cohabiting with him and on his death she still lives the house where they lived together. The relatives of the deceased want to sell the land, including the area that she occupies. She has been looking after the two children and catering for all their needs. She needs the grant to protect the interests of the minors better. The estate of their late father is indebted but she cannot resolve the matter until she has a legal status that enables her pursue solutions. She was advised she needed to obtain this authorisation first.

A guardian is a person who is given the legal power to make decisions for another person because he or she is considered not competent to decide for himself / herself. Guardianship is thus a legal relationship between a competent adult (the guardian) and a person who because of incapacity, such as minority, is incapable of taking care of his or her own affairs (the ward). The guardian makes decisions on behalf of the ward. The guardian, by virtue of that status, is authorised to make legal, financial, shelter, education, food and health care decisions for the ward, but may be required to seek court approval for various decisions, especially those regarding the investment and disposal of the property of the ward. A guardian must always act in the best interest of the ward. In such cases, the guardian will manage the ward's finances and property and provide records to the court. The guardian acts as the legal parent of the ward for the entirety of the guardianship. Although the guardian has the same responsibilities to care for the child as a parent would, a guardianship does not sever the legal relationship that exists between a child and his or her biological parents. Instead, it co-exists with that legal relationship.

That means the guardian takes full legal and physical custody of the child and can make all the decisions about the physical care of the child that a parent would make. A guardian can be anyone: parents, relatives, friends of the family, or other people suitable to raise the child. Without limiting the parental rights of parents as the natural guardians of their children, no person, whether a parent or otherwise, has any power as a legal guardian, except on appointment by a court. Because guardianship creates a legal relationship conferring upon the guardian some say in the child's future, for an applicant to qualify as a guardian, he or she must be an adult of sound mind, should have a genuine interest in the child's welfare, there must not exist any conflict of interest between the applicant and the child, the applicant must physically be able to fulfil the responsibilities, must be able to handle the physical demands of raising a child, must

have enough time to care for the child, must not be likely to exploit or abuse the child, must be able to afford to raise the child, either through his or her own income or through assets left for the care of the child and shares the basic known values and morals of the child, such as religion, or should have values or morals the court would feel comfortable being instilled the child, while bearing in mind that "society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done" see (*Re L (Care: Threshold Criteria) [2007] 1 FLR 2050*).

In the determination of suitability of an applicant for guardianship of a child, Court is guided by sections 3 and 4 of *The Children Act* that require it to be guided by the welfare principle and best interest of the child. In applying that principle, the court will consider the relationship between the child and potential legal guardian, whether the applicant is the child's preference, whether the applicant is in position to provide the best stability and continuous care for the child, he or she can best fulfil the child's needs, the moral character, fitness, and conduct of the potential guardian. The court will look at what is in the best interest of the child to make sure the child is raised in a safe, stable, and loving environment. A guardianship order ought to be motivated by the overriding requirements pertaining to the child's best interests.

An applicant for legal guardianship may show that he or she is the best suited to care for the child by establishing that he or she is ready and willing to carry out the parental responsibilities for the child. In the instant application, the is the biological father of the child, has custody of the child and has been catering for her needs such as feeding, shelter, education and medical care. He already has three other children and appears to have coped well this far with the pressures of caring for the child in respect of whom he has presented this application. Parents are the natural guardians of the persons of their minor children, and they ordinarily have the right to their custody, control, care, services and earnings, and it is their duty to support and educate them. In order to deny or deprive a parent legal guardianship of his or her minor child, the evidence must clearly establish the unfitness of the parent to have such custody and that the welfare of the child requires that the parent be denied or deprived of such guardianship.

Where the child has real property to his or her name, the guardian should be capable of taking control over the child's real and personal estate, and make decisions in the best interests of the child. Her interests should not be adverse to those of the child, in the estate for which she proposes to act as manager. She should be able to keep safely the property of the child. She must be capable of not permitting any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the court, but must so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the child or the successors of the child at the close of her

guardianship, in as good condition as she received it.

I have considered the material before me and the submissions made by the applicant. I have found that there does not exist any obvious conflict of interest between the applicant and the two children. The applicant has already demonstrated, by caring for them, that she is capable of putting their needs before her own needs. I find that the applicant is an adult of sound mind, and has a genuine interest in her biological children's welfare, she is physically able to fulfil the responsibilities of a guardian, will be able to handle the physical demands of raising both of them, has enough time to care for both of them, is not likely to exploit or abuse them and is able to afford to raise them using her own income.

I have considered the fact that she is their biological mother and that she now cares for them and the two children are entirely dependent on the applicant in all their humanly needs. I am unable to find any adverse interests between the applicant and any of the two children. I have no reason to doubt the applicant's ability to prevent the potential abuse, neglect and exploitation of the two children, to take control over their real and personal estate as beneficiaries of the estate of their late father, their personal welfare, and to make decisions in the best interests of the two children. I accordingly hereby appoint Ms. Akello Lucy, ordinarily resident at Layibi Central "A" and "B", Tegwana Parish, Pece Division in Gulu District, as the legal guardian of his biological children;- Laker Joy Onen aged seventeen years and Onen Cliff Mills aged six years, both of the same address.

Furthermore, except as otherwise provided by law, the court is further empowered to make such orders as it may think fit for the management of the estate of the child. The guardian shall, before entering upon her duties as guardian, execute and file in this guardianship proceeding a non-cash bond, without sureties, which court has in the circumstances of this application considered necessary for the protection of the children and their estate upon distribution, conditioned upon the faithful discharge by the guardian of her authority and duties according to law. The bond is in essence security given by her as the manager for due administration of the children's estate. The applicant should, in the circumstances execute a non-cash bond of Uganda shillings 500,000/= (five hundred thousand) for the due administration of the two children's estate. This bond will be without sureties. By that bond, the applicant shall undertake to act as a fiduciary and to perform, diligently and in good faith, as a prudent person would in managing her own property, not with regard to speculation but with regard to conservation and growth, and the specific duties and powers assigned by the court.

Lastly, in the execution of her obligations, the applicant shall not without special, express permission of court, mortgage, charge, or transfer by sale, gift, surrender, exchange or otherwise, any immovable property of the two children, or lease any such property for a term exceeding 5 years or invest any funds belonging to the estate of which she is manager in any company or undertaking in which she herself has a direct personal interest, nor purchase immovable property out of the property of the children, without the prior express consent of the court. The applicant shall meet the costs of this application.

Dated at Gulu this 25th day of September, 2018.

Stephen Mubiru

Judge

25th September, 2018..

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