

UGANDA / JUDGMENT

In Re: Sanyu Nowelia [child] (Family Cause 242 of 2013) [2014] UGHCFD 14 (3 March 2014) [2014] UGHCFD 14

COURT

HC: Family Division (Uganda)

BEFORE

Tuhaise, J

CASE / FILE NUMBER

Family Cause 242 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

FAMILY CAUSE 242 OF 2013

IN THE MATTER OF ARTICLES 139(1) & (2) OF THE CONSTITUTION OF THE REPUBLIC OF
UGANDA AND SECTIONS 14, 33 AND 39 OF THE JUDICATURE ACT CAP 13

AND

SECTION 2, 3, 4, 5,6 AND THE FIRST SCHEDULE OF THE CHILDREN ACT CAP 59 AND SECTION
98 OF THE CIVIL PROCEDURE ACT AND ORDER 52 RULES 1 & 3 OF THE CIVIL PROCEDURE
RULES

IN THE MATTER OF EMMANUELA NOWELIA SANYU (CHILD)

AND

IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY JESSE WILLIAM STEEL
AND SUMMER ANNE STEELE

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application for legal guardianship brought by notice of motion under Articles 34, 139 of the Constitution; sections 14, 33 and 39 of the Judicature Act, cap 13; section 98 of the Civil Procedure Act cap 71; sections 2, 3, 4, 5 and 6 of the Children Act; and Order 52 rules 1 & 3 of the Civil Procedure Rules. The applicants are seeking the following orders:-

1. Jesse William Steele and Summer Anne Steele be appointed legal guardians of the child Emmanuela Nowelia Sanyu.
2. The applicants be permitted to emigrate with the child to their home country to fulfill their parental obligations.
3. Costs of this application be provided for by the applicants.

The grounds of the application are that:-

1. The child was abandoned by her mother immediately after birth at Martyrs Clinic and Maternity Home in Kirombe Kampala.
2. The child was handed over by the hospital to Action for Children which then settled the child in Queen Esther Palace Transition Home.
3. Efforts to trace the child's mother or any known relatives have proved futile.
4. The child is in need of a family which the applicants are ready and willing to provide.
5. Other than the applicants no one has expressed an interest in parenting this child.
6. The applicants are financially stable, have no criminal record, have a stable family, have been assessed and found to be capable of looking after the child.
7. It in the best interests of the child that this application is granted.

The application is supported by the affidavits of the applicants and of Betty Wuzu the Child Protection Officer of Action for Children, Liziki James of Martyrs Clinic and Maternity Home, and, on the request of this court, that of Mukiza Emmanuel the Ag Probation and Social Welfare Officer Kampala Capital City Authority (KCCA). The said officer's report was also already on the court record.

The applicants were in court together with the child, among others, when the application came up for hearing.

The background is that the child was born to Annet Kyomuhangi on 15/11/2012 at Martyrs Clinic and Maternity Home in Kirombe Kampala. Kyomuhangi abandoned the child immediately after birth at the same clinic. The matter was reported to police and a case was recorded. The child was handed over by the clinic to Action for Children which settled the child in Queen Esther Palace Transition Home. There were efforts to trace the child's mother or any known relatives but they have proved futile.

In his written submissions, learned Counsel Isaac Mugume for the applicants reiterated the facts and grounds of the application. He cited ***In the matter of an Application by Niall John Philyaw and Christine Marie (Johnson) Philyaw For the Legal Guardianship of Patrick Kisembo MA 0008/2013, HC, Fort Portal*** to support the application. His submissions were briefly that this court has the jurisdiction to hear and determine the application, that the applicants satisfy the legal requirements of being granted legal guardianship of the child, and that it is for the welfare of the child that such order be granted.

Article 139(1) of the Constitution and section 14 of the Judicature Act, cap 13, give the High Court unlimited original jurisdiction in all matters. Section 98 of the Civil Procedure Act empowers the High Court to invoke its inherent powers to grant remedies where there are no specific provisions. In all matters concerning children, the best interests of the child shall be the primary consideration. This is a legal principle contained in Article 34 of the Constitution, the Children Act, and various international conventions ratified by Uganda concerning the rights of children.

In determining the child's welfare, the court is required under the first schedule of the Children Act to have regard to various factors. These are the ascertainable wishes and feelings of the child 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 age, background and 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 meeting his or her needs.

The evidence on record shows that the child was abandoned by her biological mother at a clinic immediately after she was born. Annexure D to Betty Wuzu's affidavit shows that the child was later placed under the foster care of Queen Esther Action for Children at the age of six months. The affidavit and report of the Probation and Social Welfare Officer, KCCA, which is on the court record, confirm this. There is also evidence that Queen Esther Transition Home, through the New Vision of 1/12/2012, called upon the child's mother or relatives to claim the child but no one did.

The evidence on record reveals that the applicants are citizens of the United States of America (USA) who are married to each other. They have one child. The 1st applicant is employed as a field biologist in the fish habitat restoration projects at Grande Ronde Model Watershed and Associate Pastor at the Calvary Chapel La Grande. The 2nd applicant is a home maker but she works part time as Treasurer and Youth and Mission Minister for Calvary Chapel of La Grande. They both have no criminal record, as revealed by a document signed by a Lola Lathrop of La Grande Police Department, USA, annexed to the 1st applicant's affidavit as I. They are recommended in the Home Study report to be suitable persons to parent a child as they have the necessary resources of health insurance, financial means and emotional stability. They are also recommended by Emmanuel Mukiza the Probation and Social Welfare Officer of KCCA. The applicants came to know about the child through Holt International Children's services.

The Children Act does not specifically provide for guardianship orders. However, the constitutional and other statutory provisions highlighted above empower this court to award guardianship orders.

Section 1 of the Children Act defines “guardian” to mean a person having parental responsibility for a child. A guardian must be a person who is ready to place himself/herself, in relation to the child, in **loco parentis** for purposes of its care and welfare. A guardian should have the child in his/her charge and actually look after it. A guardian should be able to exercise powers of control over the child. A guardian should ensure that the physical well being of the child is cared for, and that its legal rights are protected. A guardian should be a person who can reasonably be expected to take whatever action may be necessary or desirable on behalf of an infant. See ***Nabyama Moses alias Nabyama Abasa Family Cause No. 76/2011***.

In this case, I find that where the child’s biological mother has abandoned her, and where she cannot be traced, the applicants are the next best suited persons to look after the child. On basis of the adduced evidence, the applicants meet the requirements of legal guardianship. Denying them to look after the child would deprive the child of the available opportunity of being in a home where she is loved and parented by a couple willing to take her on and offer her a family to grow in. This is more suitable than being in a children’s home where the child’s stay is temporary. This is a proper case where, through a guardianship order, the child will get a home, love, care and basic needs for her nurturing and development in life which the applicants are willing to avail. It will be in the child’s best interests to allow this application.

The applicants are also praying this court to allow them travel with the child to their home country to enable them fulfill their parental obligations towards the child. In ***Deborah Joyce Alitubeera & Richard Masaba Civil Appeals No. 70 & 81/2011*** the Court of Appeal, when addressing a similar situation, emphasized the importance of the welfare principle and the need for the applicants to travel with the children to their home countries.

In my opinion, based on the foregoing authorities, a guardian can only be enabled to fulfill his/her legal obligations effectively if he/she is enabled to travel and live with the child under his/her legal guardianship.

I accordingly make the following orders on terms I consider fit for the welfare of the child:-

1. Jesse William Steele and Summer Anne Steele are appointed legal guardians of Emmanuela Nowelia Sanyu.
2. The applicants are permitted to emigrate with the child to their home country to fulfill their parental obligations.
3. The legal guardians are directed to obtain a Ugandan passport for the child using her current names.

4. The legal guardians 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 she attains 18 (eighteen) 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 legal guardians in USA to the Ministry of Foreign Affairs of Uganda at Kampala; the Embassy of the USA in Kampala; and the Ministry of Justice and Constitutional Affairs.
6. The legal guardian shall immediately communicate any changes of addresses to the authority mentioned above.
7. Costs of this application will be met by the applicants.

Dated at Kampala this 3rd day of March 2014.

Percy Night Tuhaise

Judge.

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