

UGANDA / JUDGMENT

In the matter for guardianship Order by Turyatemba (Miscellaneous Cause 18 of 2024) [2024] UGHC 1039 (17 October 2024) [2024] UGHC 1039

COURT
High Court of Uganda

BEFORE
Wagona, J

CASE / FILE NUMBER
Miscellaneous Cause 18 of 2024

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT FORT PORTAL 3
MISCELLANEOUS CAUSE No. 0018 OF 2024 IN THE MATTER OF CHILDRENS' ACT
CAP. 62 AS REVISED AND 6 IN THE MATTER OF RWENZIGYE TURYATEMBA CALVIN
(MINOR) AND IN THE MATTER OF AN APPLICATION FOR A GUARDSHIP ORDER 9
BY FRED TURYATEMBA (APPLICANT) BEFORE: HON. JUSTICE VINCENT WAGONA
RULING**

12 Introduction:

This ruling determines the motion ex-parte commenced by the applicant under the provisions of section 3 of the Children's Act, section 98 of the Civil Procedure Act

15 and Order 52 rules 1 and 3 of the Civil Procedure Rules for orders that:

**(1)A Guardship order doth issue to FRED TURYATEMBA in respect of RWEZIGYE
TURYATEMBA CALVIN, a minor.**

- 18 (2)An order doth issue allowing the Applicant to deal with property comprised in Kibale Block 59, Plot 156 and 157 at Galilaya, Kamwenge District by mortgaging the same.
- 21 (3)That costs of taking out the application be provided for.

Grounds of the Application:

The motion is grounded on the affidavit in support of the motion deposed by Mr.

24 Fred Turyatemba thus:

- 1. The applicant is the biological father of Rwezigye Turyatemba Calvin who is a minor aged 14 years. The applicant and the minor are co-directors in 3 Club Afreka Hotel and further co-own land comprised in Kibale, Block 59, Plot 159 at Galilaya, Kamwenge District.
- 2. The minor is a student at Mengo Senior Secondary School (Kampala) in 6 senior one and there is need to raise school fees for him. The applicant finds it reasonable to mortgage the property and raise money for the business that will keep generating income for school fees to the minor.
- 9 3. The application has been brought in the best interest of the minor and thus it is fair and just that it is allowed.

Hearing and Representation:

12 *M/s Abaine – Buregyeya & Co. Advocates* appeared for the applicant. Learned counsel filed written submissions which I have duly considered.

Issues for determination:

- 15 1. Whether it is in the best interests of the minors that a guardianship order is granted to the applicant in respect of the property in issue.
- 2. What remedies are available to the parties?

18 Submissions of the Applicant:

Under section 3 of the Children's Act Cap. 62 and Article 3(1) of the UN Convention on the rights of the Child, in all matter involving children, the overall 21 consideration should be the welfare of the child. In all decisions taken by courts,

institutions and administrative authorities involving children, the guiding principle should be best interest of the child involved.

- 3 The applicant seeks to be appointed a legal guardian of the minor. Section 1(k) of the Children Act defines a guardian as a person with parental responsibility of a child. Under section 43H(1) of the Children Act, protection of a child goes beyond
- 6 physical protection to include all rights, duties, powers ad responsibility which a law imposes on a parent of the child. In *Rwabuhemba Tim Musinguzi v Harriet Kamukume, HCMA No. 142 OF 2009,* it was observed that parents have a 9 fundamental right to care and bring up their children and such right is constitutional. A suitable guardian should be one legally recognized to make binding decisions concerning health, financial and property rights among others, of the minor.

- 12 In the present suit, the minor is reflected as one of the proprietors of the property in issue. Under the contracts Act however, he has no capacity to contract per section 11(1)(a) of the Contracts Act since he is below the age of 18 years. The applicant
- 15 seeks to obtain a loan using the suit land as collateral. He is incapable of doing so without a guardianship order. The minor is a biological child of the applicant and it was for good intentions to include him as one of the proprietors. The loan the
- 18 applicant seeks to secure is to ensure that he provides basic needs to the minor to cater for his wellbeing.

Consideration by Court:

- 21 Section 1 of the Children's Act Cap. 62 defines a *'guardian'* as a person having parental responsibility for a child. The Black's Law Dictionary 4th Edition says that *'guardian'* connotes a person lawfully invested with the power, and charged with the
- 24 duty, of taking care of the person and managing the property and rights of another

person, who, for some peculiarity of status, or defect of age, understanding, or selfcontrol, is considered incapable of administering his own affairs.

3 Section 3(1) of the Children Act Cap. 62 provides that:

"The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person 6 *determines the question in respect to the upbringing of the child, the administration of the child's property, or the application of any income arising from that administration."*

- 9 It thus follows that court and all authorities of government in examining or taking decisions involving children, the paramount consideration should be the best interest. (See:**In the Matter of an Application for Legal Guardianship by Musisi Sulaiman**
- 12 **Nsubuga Family Cause No. 19 of 2023**). Thus Courts must act in the child's best interests, meaning the best that can be done in the circumstances (See: **Bromley's Family Law, 8th Edition, p. 336, 337 & 341**& **In the Matter of Joyce Alituha 15 (minor), Court of Appeal Civil Appeal No. 70 of 2011**).

In determining the suitability for the applicant to be granted a legal guardianship order, courts also consider the wishes of the child **(see: In the Matter of Owori* 18 *Malcom Ombudo, Owori Melchizedek Kalenge and Constance Joyce**

MajeriAkello, Msc. Cause No. 33 Of 2020)

In **the Matter of an Application for Legal Guardianship By Musisi Sulaiman* 21 *Nsubuga (supra)** court further observed that:

> *'"Unless there are exceptional circumstances, a biological parent is the best person to provide care for the child and ensure that the child's*

rights, including property rights, are protected and preserved until he/she is of age; In most instances like in this case the child has come 3 *to own property because the parent has gifted or bequeathed it; so where a child has property it should in the most ideal situations be protected by the biological parent until the child is of majority age."*

- 6 A guardian stands in a fiduciary relationship with a minor. This was ably brought out in a persuasive dicta by the supreme court of Jamaica in *B v C and the Office of the Children's Advocate [2016] JMCA Civ 48* thus;
- 9 *'"The appointment of guardian, would mean that the child remains a ward of the court until the child either attains majority, or until further order of the court. The guardian, upon appointment as such, becomes an officer of* 12 *the court, for the purposes set out in the appointment. The result of the status of wardship was also briefly described in In re N (Infants) at page 530. There, Stamp J said: "...the effect of the infant becoming a ward of* 15 *court was that he or she could not be taken out of the jurisdiction without the leave of the court and could not marry without the leave of the court; and I have no doubt whatsoever that many infants were married and taken* 18 *out of the jurisdiction of the court without their parents being aware that a contempt of court was being committed..." (Emphasis supplied). In addition to those restrictions, the court is also obliged, where the child has property,* 21 *to ensure that the circumstances of the child and the plans for the child's future must be carefully set out and mentioned. Those obligations must not be taken lightly or blindly."*

Thus where a guardian is appointed with specific instructions regarding the minor's property, such instructions or orders must be strictly complied with. Thus any 3 powers or mandate executed by a guardian beyond what is allowed in the order do not bind the minor and may be challenged by minor upon gaining majority age or set aside by court.

The applicant herein is the biological father of the minor (Rwenzigye Turyatemba Calvin) who was born on 11th July 2010 thus he is 14 years of age per the passport 9 and birth certificate attached to the application. In the birth certificate, the applicant is indicated as the biological father of the minor. The applicant deponed that he bought land comprised in FRV HQT373, Folio 14, Block(Road) 59, Plot 157 at 12 Galilaya and registered it in the names of his children that is Turyatemba Calvin, Arinaitwe Conrad and Komugabe Flavia. The rest are of majority age and consented to the mortgage of the property in issue save for Turyatemba Calvin who is still a 15 minor. The minor is also a shareholder in Club A Freka Hotel Ltd. The certificate of

- incorporation of the company and acticles of association are attached. That applicant intended to pledge the property in issue as collateral for a loan in the Bank to be able
- 18 to get additional capital to invest in the business to generate income that will meet the daily needs of the minor and school fees being that the minor is a senior one student at Mengo Secondary School. An admission letter for the minor and a report 21 card to confirm the minor is in school are attached.

I have carefully examined the documents presented by the applicant and the law 24 applicable. The minor and her sister indicated on the title could not have raised money to purchase the land in issue or incorporate Club Afreka Hotel Ltd where they are shareholders; I believe it was the applicant or both parents making such

strides to station a brighter future for their children. I thus believe, that the applicant and the mother of the minor Nakalule Florence who is involved in the process cannot

- 3 do anything that may harm the interests of their own children. It was the love for their children that caused them to register the property in issue in their names. The intended loan that the applicant seeks to secure is to boost business which in turn is
- 6 expected to generate income to pay school fees for the minor and other daily needs. I believe the application in issue is motivated by the best interests of the minor who should be able to stay in school, which requires money which the applicant may not
- 9 be able to raise without a boost in form of a loan.

I therefore find that the applicant has demonstrated that the application in issue and 12 the orders it seeks are in the best interest of the minor. The applicant however remains held in a fiduciary relationship with the minor to ensure that all decisions taken in respect of the amount to be secured as a loan or on how to invest such money 15 to be in the best interests of the child and to ensure that the loan is paid back. This application therefore succeeds with the following orders:

- **1. A guardianship order is hereby issued to the applicant in respect of 18 the interest and transactional powers of Rwenzigye Turyatamba Calvin (Minor) in land comprised in KibaleFRV HQT373, Folio 14, Block(Road) 59, Plot 157 at Galilaya, Kamwenge District.**
- **21 2. The extent of the powers to act for and on behalf of the minor as a guardian is limited to pledging the land in issue with any financial institution(s) or person(s) to secure a loan for purposes of investing in 24 business that will generate income to meet the daily needs and necessities of the minor.**

- 3. The powers in (1) and (2) above shall not include the power to sell the property in issue and the applicant shall put in place efforts to ensure 3 that the loan secured using the property in issue as collateral is promptly paid.
- 6 4. No order is made as to costs.

It is so ordered.

9 Vincent Wagona High Court Judge FORTPORTAL

DATE: 17/10/2024

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