

UGANDA / JUDGMENT

In the Matter of Ithungu & Mbumbu (infant) (Civil Appeal Number 172 of 2015) [2016] UGCA 5 (27 April 2016) [2016] UGCA 5

COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 172 OF 2015

IN THE MATTER OF ITHUNGU ROLIVIN AND MBAMBU ROSEL1NE(CHILD)

VERSUS

IN THE MATTER OF AN
APPLICATION FOR A
GUARDIANSHIP ORDER
BY :

APPELLANTS GRAEME CHRISTOPHER SANDELL AND BETHANY NOEL NELSON
(Appeal from the ruling and Order of the High Court of *Uganda at Fort portal*
sitting at Fort Portal delivered by His Lordship *Justice Batema.* N. D. A on the 20h
day of August 2015 in Family Cause No. *001 of 2015)*
CORAM: HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA

JUDGMENT

Background

The appellants, Graeme Christopher Sandell and Bethany Noel Nelson,

are American citizens as well as husband and wife. They filed Family Cause No. 001 of 2015 in the High Court of Uganda at Fort Portal seeking orders that they be appointed legal guardians of Ithungu Rolivln and Mbambu Roseline (children).

As legal guardians, the appellants further sought to be charged with the responsibility of taking the children into their personal care and custody in order to provide for their physical, social and spiritual needs. The applicants being non-Ugandans further sought to be granted leave to take the children into their custody and live with them at their perpetual place of residence 9106 N.

Oswego Avenue, Portland, Oregon 97203 United States of America (herein after referred to as “U. S. A”)

The said children are siblings whose parents are both deceased and were in the care and custody of their maternal aunt, Night Hellen.

The trial Judge granted the order for legal guardianship over the children. Ithungu Rolivin and Mbambu Roseline. However, he ruled that the appellants are not allowed to take the children out of Uganda, Dissatisfied with the decision of the trial Judge relating to that restriction of moving the children out of Uganda, the appellants lodged this appeal.

The memorandum of appeal dated 10th September 2015 contained the following grounds of appeal:

1. The Learned trial Judge erred in law and fact when he failed to properly direct himself on the welfare principle and law regarding children and arrived at the wrong conclusion that the appellants are not permitted to immigrate with the infants outside Uganda until after 3 years.
2. The Learned trial Judge erred in law and fact when he denied the appellants permission to immigrate with the infants outside Uganda until after 3 years.
1. The Learned trial Judge erred in law and fact when he ruled that the infants be left with a trusted person or institution to look after

them on the appellant’s behalf for 3 years.

1. The Learned trial Judge erred in law and fact when he failed to consider the best interests of the children.

The appellants prayed that this Court allow the appeal and grant them the following orders:

1. The ruling of the Learned trial Judge in Family Cause No.001 of 2015 be set aside.
2. The appellants be permitted to immigrate with the children to United States of America (U. S. A) in order to fulfill their obligations as legal guardians
3. Costs of the appeal be borne by the Appellants.

Representations

The appellants were represented by Mr. Okello Oryem Alfred from M/s Okello-Oryem & Co. Advocates and Mr. Isaac Ebiro Ekirapa from M/s Ekirapa & Co. Advocates.

Submissions

Mr. Ekirapa, counsel for the appellants submitted that following the appointment of the appellants as legal guardians of the said children by the High Court, parental responsibility was bestowed upon them by virtue of Sections 1(k) and 1(o) of the Children Act, Cap. 59 and that the appellants should be allowed to perform these responsibilities. He contended that it was wrong for the trial Judge to rule that as legal guardians, the appellants would not be allowed to take the children out of Uganda considering that the said appellants are not resident in Uganda. That instead, the appellants have a permanent place of abode in the United States of America, 9106 N Oswego Avenue Portland, Oregon 97203 as deponed by Graeme Christopher Sandell in his affidavit, sworn on 25th March 2015.

Counsel argued that the trial Judge having granted legal guardianship to the appellants and later on restricted them from traveling with the said children implied that the purpose of that grant was defeated.

Counsel further submitted that Section 4 of the Children Act provides for the right of a child to live with his parents or guardians and it is only proper that the appellants being guardians should stay with the children. He argued that the appellants as legal guardians have the duty to maintain the children in terms of medical needs, shelter, education, clothing and this would be best done if they are living with the children. He stressed that this duty cannot be properly fulfilled when the appellants are in U. S. A and the children are left in Uganda in another person's care.

Counsel pointed out that the children's parents are deceased and the extended family (relatives) in whose hands these children would fall are unable to provide for these children. To this effect, he referred to the affidavits of Night Hellen, a maternal aunt; Thembo Absolom Biatsi and Maate L. Byatsi, paternal uncles; and Mughuma Mark a maternal uncle who state that they are very poor and cannot take care of the two children. Counsel submitted that it is not in the best interest of the children to stay in an institution or with relatives who cannot support them.

Mr. Okello Oryem, co-counsel for the appellants faulted the trial Judge for not advancing any reasons for restricting the appellants from immigrating with the children to U. S. A. Instead, the trial Judge, ruled that the order sought by the appellants to take the children out of Uganda was a way of circumventing the 3 year rule before adoption could legally be granted, which counsel submitted was not a finding of fact but mere conjecture.

Both counsel prayed that this appeal be allowed and that this Court permits the appellants to travel with these children to live with them in order to provide and take care of them.

The Court's decision

As we proceed to resolve this appeal, we find it imperative to appraise our duty as a first appellate Court as provided for in Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. The rule states:

*"...(1) On any appeal from a decision of the High Court *acting in the* exercise of its original jurisdiction, the court may—*

1. reappraise the evidence and draw inferences of fact; *and*
2. in its discretion, for sufficient reason, take additional *evidence or* direct that additional evidence be taken by the trial court *or by a* commissioner... ” (Emphasis added)

Whereas the appellants raised 4 grounds of appeal, in our view the real contention is whether the High Court Order that the appellants are not allowed to take the children outside Uganda is in the best interest of the said children. The trial Judge in his very brief (4 paragraph) ruling held that:

"... Upon perusing the application and affidavits in support *thereof* and the attachments, **am** satisfied that the applicants *qualify* to become the legal guardians of the infants. Since the application is *not opposed*, it is hereby granted ***except that the legal guardians are:** not ***allowed to take the infants outside Uganda*** (Emphasis ours)

The latter part of that ruling is what forms the gist of this appeal. It is now a settled principle of the law that in all legal actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the child's welfare shall be the primary consideration. This is contained in Article 34 (1) of the Constitution of the Republic of Uganda, 1995 (as amended); Section 3 and the 1st Schedule to the Children Act; international conventions to which Uganda is a party such as the United Nations Convention on the Rights of the Child (Article 3(1)); the African Charter on the Rights and Welfare of the Child (Article 4(1)); as well as textbooks on family law notably Bromley's Family Law, 8th Edition specifically pages 336 and 341, authorities counsel for the appellants have relied upon.

Section 3 of the 1st Schedule to the Children Act provides the criteria and guiding principles in applications of this nature which require the Court to have regard in particular to:

- a) The ascertainable wishes and feelings of the child in light of his or her age and understanding;
- b) The child's physical, emotional and educational needs;
 1. The likely effects of any changes in the child's circumstances;
 2. The child's age, background and any other circumstances relevant in the matter;
 3. Any harm that the child has suffered or is at the risk of suffering;
- f) Where relevant, the capacity of the child's parents, guardians or others involved in meeting his or her needs.

Counsel for the appellants submitted that the trial Judge did not advance any reasons for refusing the appellants from traveling with the children

abroad where they live. In this regard, the trial Judge held that:

“...the order to take out the children is most likely another way of circumventing the 3 year rule before adoption. The guardians are free to live with the children in Uganda or to leave them in the custody of a trusted person or institution to look after them on their behalf.

After 3 years of interaction with the kids, the legal guardians will be free to apply for automatic adoption here in Uganda or in their country of origin.”

We are alive to the increasing criticism of inter-country adoptions in Uganda that has led to the belief that guardianship orders are being used to circumvent the 3 year fostering rule before adoption as required under Section 46(1)(b) of the Children Act. It is our considered view that each case should be assessed on its own facts and merits and not a blanket generalization. The Trial Judge’s decision was very brief and no detailed reason was given for his findings. We agree that the trial Judge’s conclusion was not based on clear evidence. The proceedings too were equally brief. We cannot therefore establish what the trial Judge considered to come up with such findings. With respect to the trial Judge, we find that recording of the proceedings left a lot to be desired.

We also do not see where the trial Judge considered the welfare report provided by Mr. Kitanywa Sowedi, a Senior Probation and Social Welfare Officer, Kasese district which we found to be largely negative. In our view, a welfare report is very critical when dealing with matters involving children. It is not unimportant as counsel seemed to suggest to us. This is because a welfare report guides the Court on the existing conditions of the child and general circumstances which Court has not had the opportunity to witness itself. The probation officer’s visit is akin to visiting locus in quo in land matters. Court is thus obliged to take into account the probation officer’s findings and inquire into them where necessary in order to make a wholesome assessment. This in our view would be in the child’s best interest. It would also be a good practice that even on appeal, a probation officer should be in Court with the latest assessment of the merits of an application such as this since the best interests of a child can change from time to time and this Court must always inquire into such merits.

In this matter, the probation officer raised a number of valid concerns therein which should have been addressed. For instance, it is in dispute who the real father to the children is. The late Byatsi Samu is said to be the children’s father and yet the probation officer asserts that during his visit to the children’s home he discovered that the children were coached to say that the late Byatsi Samu was their father but that the true identity of their father is allegedly Byatsi Isaiah; who is still alive. The trial Judge should have ordered for verification of the true father of the children because natural parents have superior rights over their biological children in case they are capable of taking care of the children. The trial Judge was duty bound to carefully evaluate all the evidence on record and to take into account the best interests of the children. This was not done.

The second concern raised by the probation officer was that the appellants had not stayed or attempted to stay with the children to create a positive relationship/ attachment since 2013 when they first got to know about the children. At the hearing of this appeal, counsel submitted that

after the grant of legal guardianship, the 2nd appellant, Bethany Noel Nelson had been staying with the children while her husband had returned to U. S. A to work in order to be able to meet their growing responsibilities. Counsel referred to the 1st appellant's affidavit where he stated that 1st and 2nd appellants have jobs in U. S. A as teachers at Rosemont Ridge Middle School and Jackson Middle School respectively. No additional evidence was adduced by the appellants on this issue so this was evidence from the bar. What is clear however is that the children, at the time of the High Court hearing had stayed with the appellants for less than a year.

It is also clear to us that the trial Judge was insistent on the 3 year rule in inter-country adoptions. The Children Act does not specifically provide for guardianship orders so that adoption could automatically follow thereafter. However, the constitutional and other statutory provisions (Art. 139 of the Constitution, Section 14 of the Judicature Act and Section 98 of the Civil Procedure Act) empower the High Court to award guardianship orders. The Court of Appeal in Deborah Joyce Alitubeera & Richard Masaba, Civil Appeal Nos. 70 & 81/2011 noted that non citizenship per se is not a bar to obtaining guardianship orders. The court observed that it is possible for non-Ugandans to obtain guardianship orders in respect of Ugandan minors, unlike in adoption matters where conditions are imposed by section 46 of the Children Act. The discretion is left to court to impose conditions it deems appropriate in the best interests of the child.

Counsel also submitted that following the grant of guardianship, the children had a right to stay with the appellants according to Article 34 (1) of the Constitution of the Republic of Uganda, 1995 (as amended) which provides:

"34. Rights of children

- (1) Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled to bring them up by law

In Nabyama Moses alias Nabyama Abasa (HC) Family Cause No. 76/2011 Mukiibi, J held that 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.

A persuasive quotation was taken from the **inter-American Commission on Human Rights Organisation of American States' Written response to questions by Commissioners at Thematic Hearing on Human Rights of Unparented Children and Related International Adoption Policies** at pages 11-12 where it is stated that "...studies have for decades shown *the* devastating damage done when children are denied a nurturing family, and in recent years these studies have been able to demonstrate the *causal* effects of institutional conditions...even the better institutions *have* proven incapable of providing the personal care that human children need to thrive physically and emotionally...research on children *who* started their early life in institutions demonstrates vividly the damage such institutions do even when the children are lucky enough to

escape *the* institutions at relatively early ages...”

We find that the order for guardianship which was granted by the trial Judge was intended to provide a home, love and parental care to the infants. The probation officer in his report [page 146 of the record] agrees with the appellants that the two infants need care, love and support. This in our finding means that it was in the best interests of the children to move to a better situation than the one in which the Probation Officer found them. That is why in our opinion the other concerns raised by the Probation Officer notwithstanding, the trial Judge granted the guardianship Order albeit with conditions.

If the restriction by the trial judge is left to stand, the children are likely to

suffer or be deprived of the necessities of life like education and guidance, adequate diet, clothing, shelter, medical attention. Since the children are now in the custody and care of the appellants, we think they are in position to meet the children’s physical, emotional and educational needs. The affidavits of the children’s relatives show that they have not done anything to support these infants. Some of these relatives in our view, are capable of taking care of these children but are simply not interested or willing to do so. This is an unfortunate situation but a clear reality. It is therefore in the best interest of the two infants to live with the appellants in their home in U. S. A such that it is easier to provide and care for them.

We therefore quash the trial Judge’s order restricting the appellants from traveling with the children. We accordingly make the following orders on terms we consider fit for the welfare of the infants:

1. The appellants shall be under obligation to make progress reports on the welfare of the children every six months to the Registrar of the High Court at Fort Portal with copies to the Probation and Welfare Officer Kampala and Kasese Districts.
2. The legal guardians are directed to obtain Ugandan passports for the children using their current names.
3. The appellants must furnish their present and all future addresses to the said Registrar and Probation officer.
4. Furthermore, the guardians will also have to facilitate the children to return to Uganda every 3 years so that the children maintain close links with their Ugandan relatives and siblings until they attain the age of majority (18 years).
5. The Registrar of the Court of Appeal shall furnish a copy of the orders in this judgment, together with the address of the legal guardians in U. S. A to the Ministry of Foreign Affairs of Uganda at Kampala; the National Council for Children; the Embassy of USA in Kampala; the Ministry of Justice and Constitutional Affairs of Uganda; and the NGO

No order is made as to costs.

We so Order.

Dated at Kampala, this 27th Day of April 2016

Hon. Justice Richard Buteera

JUSTICE OF APPEAL

Hon. Justice Geoffrey Kiryabwire

Justice of Appeal

HON. Justice Elizabeth Musoke

Justice of Appeal

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