

UGANDA / JUDGMENT

Re Nakawesa, Namanda & Katongole (infants) (Adoption Cause No. 164 of 2011) [2011] UGHC 107 (2 August 2011) [2011] UGHC 107

COURT

High Court of Uganda

CASE / FILE NUMBER

Adoption Cause No. 164 of 2011

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

ADOPTION CAUSE NO 164 OF 2011

IN THE MATTER OF TEDDY NAKAWESA, LETICIA NAMANDA AND BEN KATONGOLE (MINORS)

AND

IN THE MATTER OF AN APPLICATION BY NANFUKA HARRIET AND ABBEY KIKONYOGO TO
ADOPT TEDDY NAKAWESA, LETICIA NAMANDA AND BEN KATONGOLE.

Before: Justice E. S. Lugayizi

ORDER

This order arises out of an application that the above named applicants made before this Honourable Court by way of a petition under the Constitution, and sections 3, 4, 5, 45 and 46 of the Children's Act (Cap. 59).

Under the above petition the applicants sought the following orders:

1. an adoption order relating to the above named children;
2. permission to travel with the said children to the USA where the applicants presently reside;
alternatively
3. a guardianship order relating to the said children;
4. permission to travel with the said children to the USA where the applicants presently reside;
5. costs of the application; and

6. any other order Court may deem necessary to issue.

An affidavit which Mr. John Kibirige Kalule (i.e. the grand-father of the above-named minors) swore accompanied the petition. Briefly, the background to the application is as follows:

The applicants were born and bred in Uganda; and are members of the Ganda tribe. In 1995 they got married in Uganda; and migrated to the USA in 2000. In 2010, they became American citizens by naturalization. The 1st applicant is presently 41 years old; and the 2nd applicant 43 years old. They have two children i.e. a daughter who is 9 years old and a son who is 5 years old. They live with their two children in Massachusetts, USA, where they both work. However, they have been visiting Uganda, from time to time, to check on their relatives, especially the minors (i.e. Nakawesa, Namanda and Katongole) who are orphans. All the minors are children of the 1st applicant's elder sister (i.e. Irene Nakayiza); and are 15, 14 and 12 years old respectively. Their mother died in 2002. Thereafter, the minors remained under their father's care (i.e. Peter Mukooza), but he also died in 2004. After that event the minors shifted; and began living with their maternal grand-father (Mr. Kalule) in Kireka. Mr. Kalule, who is the 1st applicant's father, is presently 73 years old. He is also a widower, sickly and living in retirement. In addition 11 of his biological children have, so far, died. This has put him in a very difficult situation, for the burden of looking after all the orphans that his dead children left behind squarely lies on his back. Fortunately, in all this, the applicants have been of great help to him especially insofar as the minors (referred to above) are concerned. They have been sending financial help to him to enable him to meet the minors' medical, educational and other day to day needs.

At the time of hearing the application Mrs. Luswata Kawuma represented the applicants. She explained that the applicants began taking care of the minors as soon as their parents died some 7 or so years ago. They also started the formal process of fostering the minors in 2006. She contended that the applicants were well recommended by all the relevant agencies in the USA which deal with matters of this nature (i.e. the FBI, home studies, etc.); and had fulfilled most of the essential requirements of the law.

With regard to section 46 (1) (a) of the Children's Act (Cap. 59) (which, among other things, lays down the requirement that foreign nationals must have resided in Uganda for at least three years if they are to obtain an order of adoption), in essence Mrs. Luswata Kawuma had this to say:

The above requirement applies **only** to foreign nationals who are not members of an indigenous tribe in Uganda; and have **not** lived in Uganda for at least 3 years. This is so because that group of foreign nationals is not conversant with the social setting and cultural norms of Uganda. Therefore, they require at least a 3 years' stay in Uganda to get an understanding of the above matters so that the subsequent adoption of children from the Ugandan setting might not be an onerous task to them.

Mrs. Luswata Kawuma further insisted that the above provision of law **does not** apply to the applicants who are members of an indigenous tribe in Uganda (i.e. the Ganda); and were born and bred in Uganda. For they fully understand the setting and cultural norms of Uganda; and would, therefore, not find it difficult to bring up the minors if Court granted them an order of adoption.

Mrs. Luswata Kawuma concluded her submissions by pointing out that since the minors are orphans who are currently in the hands of an old, sick and financially struggling widower (i.e. their grand-father) it would be in their best interest for Court to grant the applicants the first two orders sought. Besides, the applicants are the minors' very close blood relations.

In Court's opinion the matters herein raise two main issues i.e.

1. whether the applicants qualify for the grant of the two orders referred to above;

and

1. whether this Court should award costs.

Court will discuss the above issues in turn.

Do applicants qualify for the grant of the said orders?

First of all, it is not a secret that the applicants are foreign nationals. Therefore, to answer the above question this Court must, among other things, discuss the requirements of the law in section 46 of the Children's Act (Cap. 59), which read as follows:

“46. Intercountry adoption.

1. ***A person who is not a citizen of Uganda may in exceptional circumstances adopt a***

a Ugandan child, if he or she –

1. ***has stayed in Uganda for at least three years;***
2. ***has fostered the child for at least thirty-six months under the supervision of a probation and welfare officer;***
3. ***does not have a criminal record;***
4. ***has a recommendation concerning his or her suitability to adopt a child from his or her country's probation and welfare officer or other competent authority; and***
5. ***has satisfied the court that his or her country of origin will respect and recognize the adoption order.”***

Court will not waste time discussing the requirements of the law in paragraphs (c), (d), and (e) of sub-section (1) of the above section. For it believes they are straightforward; and have been proved by an abundance of evidence on the court record.

Therefore, it will only concentrate on discussing the legal requirements spelt out in sub-section (1) above, (i.e. exceptional circumstances); paragraph (a) above, (i.e. a stay in Uganda for at least three years); and paragraph (b) above, (i.e. fostering a child for at least thirty-six months under the supervision of a probation and social welfare officer).

With regard to exceptional circumstances Court has this to say: **Collins English Dictionary & Thesaurus at page 390** defines the adjective **“exceptional”** as follows: **“forming an exception; not ordinary ...”**.*

Consequently, what Court must look for in this area of the case is this: Whether the applicants (who are foreign nationals) have proved that their case is an exception or not ordinary; and therefore justifies the application herein.

First of all, there is evidence on the court record showing that the applicants are very close blood relations of the minors (i.e. the 1st applicant is the younger sister of the minors’ mother; or in other words, their maternal aunt).

Secondly, the applicants are Ugandans by birth and descent; and are members of the Ganda tribe, just like the minors.

Thirdly, there is also evidence on record showing that the minors are orphans (i.e. both of their parents died between 2002 and 2004); and since then, the minors have been living with their grand-father. Their grand-father is a 73 year old retired accountant. He is also a widower, sickly and financially over-burdened. In short, he is struggling very hard to look after himself and the minors.

Considering everything mentioned above, Court is satisfied that the applicants have proved that although they are foreign nationals their case is an exception or not ordinary. It is unique, special and justifies the application herein.

With regard to fostering of the minors for at least thirty-six months under the supervision of a probation and welfare officer Court will first of all define the word **“fostering”**.*

According to **Collins English Dictionary & Thesaurus at page 448**, the above word means the act of being **“involved in the rearing of a child by persons other than his natural parents...”**.*

Therefore, Court will engage in the discussion below with the above definition in mind.

There is evidence on the court record to show that in 2006 the applicants obtained a foster care order from the district probation and social welfare officer of Mukono authorizing them to foster the minors. In addition, the authorities concerned have been doing the necessary supervision.

There is further evidence on the court record to show that since the death of the minors’ parents, the applicants have been heavily supporting the said minors with finances and in other ways. They have been doing so, directly or indirectly through the minors’ grand-father.

Therefore, in view of the foregoing this Court is satisfied, too, that the applicants have succeeded in proving that they have fostered the minors for at least thirty-six months under the supervision of a probation and welfare officer.

Concerning whether the applicants have proved that they have stayed in Uganda for a period of at least 3 years, this Court is in full agreement with the submissions of counsel for the applicants touching that area of the case.

It seems the legislature could **not** have intended that foreign nationals falling in the applicants' category ***(i.e. members of an indigenous tribe of Uganda* *who were born and bred in Uganda*)** should be required to fulfill the above condition again and again!

Indeed, the applicants fulfilled that condition long before they left Uganda to migrate to the USA where they became American citizens in 2010. For that reason, it would be absurd to require them to go through that formality a second time.

In view of the foregoing, Court is satisfied that the applicants have proved that the above requirement of the law does not affect them.

All in all, therefore, Court is of the opinion that the applicants qualify for the grant of the first two orders referred to above; and they are hereby granted.

Whether Court should award costs?

In view of Court's decision above the applicants will pay their counsel the costs involved in this matter; and it is so ordered.

It is also hereby further ordered that a copy of this Order shall as soon as possible be registered with the Registrar-General's office at the Ministry of Justice.

E. S. Lugayizi (J)

2/8/2011

Read before: At 2. 35 p.m.

The 1st applicant

Ms. Sikhoyi Naome holding brief for Mrs. Eva Luswata Kawuma who represents the applicants

Ms. Cissy Nakayima c/clerk

E. S. Lugayizi

Judge

2/8/2011

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