

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

HCT-00-FD-FC-0088-2009

IN THE MATTER OF BENJAMIN NSUBUGA AN INFANT

AND

IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY JASON
STEVE WILLIAM KOVACS AND SHAWNDA LAVET KOVACS

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicants are a married couple living at 3404 Armitage Drive, Charlotte, North Carolina, in the United States of America. They are citizens of United States. They come to this court seeking an order for guardianship of Benjamin Nsubuga, an infant currently in the custody of Sanyu Babies Home, Namirembe, Kampala. Benjamin is estimated to be about one year old. This application is supported by the affidavits of the applicants, Barbara Nankya, the Administrator of Sanyu Babies Home, Akellot Topister, a Counsellor at Action for Children and Sarah Buzabalyawo, the Ag. Probation Officer, Lubaga Division.
2. Benjamin was found abandoned on the 10th March 2009 at Kyengera, Wakiso District. There are scanty details about the recovery. He came into the hands of Action for Children on the same date who provided temporary shelter. Ms Akellot Topister, a social worker with Action for Children referred Benjamin to Sanyu Babies Home. On the 21st April 2009 the Family and Children Court of Mengo at Mwanga 11 Road, Kampala committed Benjamin to the care of Sanyu Babies Home. There is no evidence that any report of abandonment or recovery of Benjamin was made to the Police. This is an unfortunate omission.

3. Jason is 32 years old. Shawnda is 31 years old. They were married on the 14th April 2003 at Denton, Texas in the United States. They are blessed with 4 children aged 6, 5, 3 and 1 year respectively. Jason is employed as a Director of Ministry Development at the Abba Fund of PO Box 1120 Ramseur, NC 27316, USA. Shawnda is a fulltime housewife and homemaker. The applicants and their family have been the subject of an international adoption study by Amazing Grace Adoptions of 1215 Jones Franklin Road, Suite 202, Raleigh, North Carolina 27606, USA, an organisation licensed by the North Carolina Department of Health and Human services as a child placement agency.
4. The Adoption Study evaluates the applicants and states,
‘AGENCY EVALUATION AND RECOMMENDATIONS:
The Kovacs family has been very cooperative and willing to open up themselves to the adoption process and interviews. Jason and Shawnda seem to have a very strong and committed marriage, and they are truly respected in their community. They present as a very loving, devoted and stable family who is ready and able to care for an adopted child as their own. Samuel, Keziah, Karis and even Micah are looking forward to having a baby adopted into their home. Jason and Shawnda are more than adequate to provide for and love another child and they have proved their parenting abilities through the four children they are raising.
This family has met the guidelines for North Carolina regarding inter-country adoption. The child can be adopted according to the adoption laws of the state of North Carolina once they return to the state and post-placement visits have been completed.’
5. The applicants have no known criminal record in the United States. Neither do they have a history of child abuse or neglect. I am satisfied that the applicants, on the facts available to me, are suitable adoptive parents and or guardians. I must now turn to the law and determine whether it is possible for this court to make the order sought.

6. It is clear on the papers before me that the applicants' intention is to adopt the infant in question. However they have not applied for adoption. They have applied for legal guardianship.
7. Clearly the applicants under Section 46 of the Children Act would not qualify on at least 2 out of the 5 conditions that have to be fulfilled. The applicants have not been residents in this country for 3 years and have not fostered the infant in question at all let alone the required period of 36 months. The applicants may fulfil the rest of the conditions. I shall set out Section 46 of the Children Act below.

'46 Intercountry Adoption

- (1) A person who is not a citizen of Uganda may in exceptional circumstances adopt a Ugandan child, if he or she--
- (a) has stayed in Uganda for at least three years;
 - (b) has fostered the child for at least thirty six months under the supervision of a probation and social welfare officer;
 - (c) does not have a criminal record;
 - (d) has a recommendation concerning his or her suitability to adopt a child from his or her country's probation and welfare office or other competent authority; and
 - (e) has satisfied the court that his or her country of origin will respect and recognise the adoption order.'

8. As the clear route of adoption is closed the applicants have resorted to another route, legal guardianship. This application is stated to be made under Article 139 (1) of the Constitution, Sections 14, 33 and 39 of the Judicature Act and Section 3 of the Children Act. The cited provisions do not authorise this court to grant an order of legal guardianship in the circumstances of this case. Firstly because clearly the law that would govern the circumstances of this case is the law related to inter country adoption, which is evaded by the present application unless those conditions raise constitutional issues that may lead to their successful ouster by a competent court. Secondly the provisions cited as the basis for this application do not provide expressly that this court is seized with the jurisdiction to grant orders of the kind now sought.

9. However, the Court of Appeal, in the case of In the Matter of Francis Palmer an Infant, Civil Appeal No. 32 of 2006, and in the case of In the matter of Howard Amani Little, an infant, Civil Appeal No.33 of 2006 held that this court has jurisdiction to grant orders of legal guardianship by a 2 to 1 decision. What that decision does not make clear are in what circumstances should a court issue that kind of order, especially in cases that are akin to inter country adoptions.
10. In that decision the Court of Appeal was divided as to when and how the High Court may grant orders of legal guardianship in the circumstances where the applicants were foreign applicants resident outside this country and whose intention of applying for legal guardianship was to take the children outside this jurisdiction.
11. L M Kikonyogo, DCJ., was of the view that legal guardianship was to be resorted to where the applicants could not fulfil the conditions under Section 46 of the Children Act. C Kitumba, JA., disagreed. Though in agreement with the learned Deputy Chief Justice that this court had jurisdiction to grant orders of legal guardianship, the learned justice of appeal stated that it should not be applicable where the applicants were foreign applicants who did not qualify under Section 46 of the Children Act. To allow such applicants to obtain orders of legal guardianship, while they did not qualify to adopt the children under the Act, would be an infringement of the Act. A Twinomujuni, JA., did not agree that the High Court had the power to grant orders of legal guardianship, such power being only available to Family and Children's Court, by the issue of care orders and appointment of Foster Parents. Nevertheless he concurred in the granting of the order of guardianship proposed by the Deputy Chief Justice.
12. The Court of Appeal decision, given the conflicting legal positions taken by each justice, provides no authoritative guidance as to how this court should exercise its power in granting orders of legal guardianship. In the result, perhaps, I must turn to simply one question. Is the grant of such an order in the best interest of the children?
13. The infant in this case is about one year old. It is not possible to seek his views on the matter. The child's parents whereabouts and details are unknown. Sanyu Babies

Home who have legal custody of the child support this application. So does the Probation and Welfare Officer for Lubaga Division. Care in an institution is only intended to be temporary. The applicants are willing to provide a loving and caring home within which to raise this infant. In fact they are the only ones who have made such an offer. The applicants come well recommended.

14. No governmental support, be it local or central, is available for the care and upkeep of children in distress generally or specifically in the case of this infant. Right now the infant is under the care of a local non-governmental organisation. There is no offer from Ugandans or non-Ugandans resident in Uganda to adopt this child. It is imperative that his stay in an institution be terminated as soon as possible. I find therefore that exceptional circumstances exist for an order to be made in favour of non citizens who are the only viable alternative.

15. I am satisfied, on the information available to me at this stage that it is in the best interests of Benjamin to allow this application rather than refuse it. Accordingly I appoint the applicants legal guardians of the Benjamin Nsubuga.

Signed, dated, and delivered at Kampala this 22nd July 2009

FMS Egonda-Ntende

Judge