

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
FAMILY CAUSE NO. 001 OF 2022

IN THE MATTER OF NYANGOMA SCOLASTIKA AND KAHWA MARY (MINORS)

AND

IN THE MATTER OF AN APPLICATION FOR LEGAL GUARDIANSHIP BY KAGEYE ANNET BEATRICE

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BEFORE: Hon. Justice Isah Serunkuma.

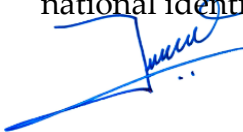
RULING

The applicant herein Ms. Kageye Ann brought this application under Article 139(1) of the Constitution of the Republic of Uganda, Sections 14,33, & 39 of the Judicature Act, Section 3 and 1st Schedule 1(a) of the Children's Act, Section 98 of the Civil Procedure Act and
20 Order 52 rules 1, 2 & 3 for orders that.

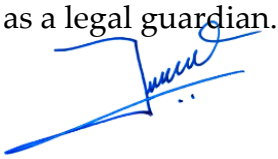
- a. This honorable court is pleased to appoint Ms. Kageye Annet Beatrice (the applicant) as the guardian of Nyangoma Scolastika and Kahwa Mary (hereinafter referred to as "Minors").
- b. This honorable court grants authority to Ms. Kageye Annet Beatrice to take responsibility for managing the upbringing of Nyangoma Scolastika and Kahwa Mary (minors) till they attain the age of 18 years or complete their education; and
- c. Costs of the application are met by the applicant.

The applicant further stated the grounds upon which this application is premised in her affidavit in support which include.

- 30
1. That the applicant is a Ugandan of sound mind. A copy of the passport and national identity card are hereto marked "A" and "B".



2. That the applicant is the paternal aunt to the minors having been a biological sister of their father.
3. That upon the death of the father of the two above-mentioned minors she took over the responsibility of their upbringing and welfare.
4. That the father of the above-mentioned minors by the name of Anthony Asimwe died leaving the two above-mentioned minors very young and their mother abandoned them and left them at the mercy of their paternal aunt and the current whereabouts of the minors are unknown to the applicant. A copy of the death certificate is hereto attached and marked "C".
- 10 5. That the above-mentioned minors are aged 15 and 10 years respectively as of now and therefore the *1st Schedule paragraph 1(a) of the Children's Act Cap 59*, applies to them. Copies of the birth certificates are marked "D" and "E".
6. That upon the mother of the two above-mentioned minors leaving them at their paternal auntie's mercy, the two minors started living with one Eredwina Kabanaku her friend who lives in Uganda as the applicant is currently working abroad and based in the United Kingdom. A copy of Eredwina Kabanaku's national identity card is marked "F".
7. That the biological father of the above-named minors passed away leaving them with no property which can generate income that can cater for their welfare and
20 the two minors wholly depend on the applicant.
8. That the applicant has been managing the interest and welfare of the minors without legally being appointed by the court.
9. That the two minors are incapable of managing their affairs thus leaving the applicant, their paternal aunt as the only person who can manage their upbringing as a legal guardian.



10. That it is in the best interest of the two minors that the applicant is appointed a guardian of the said minors and be authorized to be responsible for meeting their needs.

Representation and hearing.

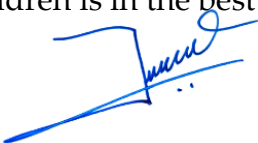
The applicant is represented by Counsel Baryabanza Aaron of M/s Baryabanza & Co. Advocates.

Submissions

Counsel submitted that the issue for determination in this case is whether it is in the best interest of the children that the petitioner be granted a guardianship order. Counsel submitted that the guiding principle in cases involving children is that the welfare of the children should always be paramount and the interests of the petitioner in such cases should not be averse to that of the children as per Section 3 of the Children's Act. Counsel added that the applicant should be a person of sound mind and have the means to meet the social and economic needs of the child. Counsel relied on the case of *RE. Onen Cliff Mills and Laker Joy Onen Misc. Application No. 022 of 2018.*

Counsel further relied on the paragraphs contained in the applicant's affidavit and submitted that the applicant is the paternal aunt of the minors who took responsibility for their upbringing and welfare upon the death of their father and having been abandoned by their biological mother and went to an unknown destination. Counsel added that the applicant is the most suitable person to take care of the two minors.

Counsel further submitted that courts in Uganda have over time granted guardianship orders to relatives of the children who demonstrate that their intention to deal with the children is in the best interest and for the welfare of the children involved.



Counsel added that the applicant's suitability as the best person to be appointed legal guardian to the two minors in this application has been demonstrated by her zeal and readiness to take responsibility for providing the said two minors immediately upon the death of their father in 2016 and has continued to do so to the present day. Counsel prayed that this application be allowed and that the applicant be appointed guardian to Nyangoma Scolastika and Kahwa Mary.

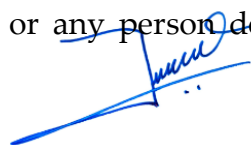
Court Analysis

This is an ex parte ruling regarding the legal guardianship of both Nyangoma Scholastika and Kahwa Mary (herein referred to as "minors"). Initially, under the Children's Act Cap 10 59, Guardianship was never provided for, and neither were any procedures and terms stated therein. However, it is now settled law that legal guardianship of children is provided for under *Section 43A of the Children's (Amendment) Act 2016*. This section provides for the circumstances under which the order for guardianship can be granted and to whom, depending on the type of guardianship order being sought.

The provision further lays out the considerations that this court must consider before granting any guardianship order. The provision also grants this court under *Section 43B (b) of the Children's (Amendment) Act 2016* the jurisdiction to entertain such an application. Henceforth, I have perused and put into consideration the pleadings and annexures attached to this application. The application raises three issues which I believe 20 require to be tackled hereunder

Whether the applicant should be appointed as the legal guardian of the minors.

One of the major principles in these applications involving children is the welfare principle laid out under *Section 3 of the Children's (Amendment) Act 2016* which defines it as the paramount consideration whenever the state, a court, a tribunal, a local authority, or any person determining any question in respect to the upbringing of a child, the



administration of a child's property, or the application of any income arising from that administration. In determining any question regarding the welfare of the child, the court should consider the following.

- (a) The ascertainable wishes and feelings of the child concerned, with due regard to his or her age and understanding.
- (b) The child's physical, emotional, and educational needs.
- (c) The likely effects of any change in the child's circumstances.
- (d) The child's sex, age, background, and any other circumstances relevant to the matter.
- (e) Any harm that the child has suffered or is at the risk of suffering; and
- 10 (f) Where relevant, the capacity of the child's parents, guardian, or any other person involved in the care of the child, and in meeting the needs of the child.

In addition to the above, this court under *Section 43F (1) of the Children's (Amendment) Act* should before making a guardianship order satisfy itself that.

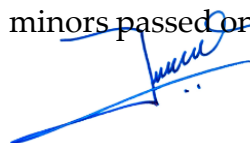
"(a) There is no known relative or next of kin of the child.

(b) The relative or next of kin are unwilling or unable to take parental responsibility for the child.

(c) Consideration has been given to the wishes of the child, having regard to the age, and understanding of the child, wherein the view of the court, the child can understand the guardianship proceedings; and

20 *(f) Where the child is twelve years of age or above, his or her consent to the guardianship has been obtained, unless the child can't express his or her consent."*

Paragraphs 4 and 8 of the applicant's affidavit in support indicated that the father of the minors passed on as per the death certificate marked annexure "C" and that their mother



abandoned them as a result. The applicant is the one who has overseen their welfare including their education, food, health, shelter, and clothing since 2016. Furthermore, at the hearing of the case on 4th September 2023, when the minors were brought to court for purposes of identification, both informed this honorable court that their Aunt Kageye who lives in London is the one who pays for their school fees. This evidence indicates that the minors have no one else to take care of them apart from their auntie, the applicant herein who has provided for their needs since 2016 when their father passed on.

10 Despite considering the welfare principle in the circumstances, the court is also required to pay keen attention to the applicant/petitioner who seeks to be appointed by this court as a legal guardian of the minors. *Section 43F (2) of the Children's (Amendment) Act 2016* lays out the conditions that this court should satisfy itself with before appointing the applicant as a guardian. These include;

“(2) The court shall before making a guardianship order satisfy itself that the applicant—

(a) has continuously lived in Uganda for at least three months.

(b) does not have a criminal record; and

(c) has a recommendation concerning his or her ability as a guardian from a probation and social welfare office or other competent authority in Uganda or the applicant's country of residence.”

20 Section 43A states who can apply and be appointed by the court as a legal guardian as hereunder.

“(1) This Part applies to the guardianship of children in Uganda by citizens of

Uganda.



(2) A person who is not a citizen of Uganda shall not be eligible to apply for legal guardianship."

Paragraph 1 of the applicant's affidavit in support states that the applicant is a citizen of Uganda. However, under paragraph 6, the applicant deponed that she is currently working abroad and based in the United Kingdom. This evidence indicates that the applicant has dual citizenship. The same information is confirmed by the averments of the minors during identification who stated that their auntie Kageye lives in London and just sent money for the Minors' school fees and welfare. The law as noted above requires the applicant to have continuously lived in Uganda for at least three months, and that the
10 applicant has no criminal record and has a recommendation from a probation and social welfare officer or other competent authority concerning the applicant's ability as a guardian.

As already noted above, the paramount principle in the affairs concerning children such as the current one is their welfare and their protection as minors. Considering the evidence presented by the applicant, it is noted that no evidence has been adduced concerning the applicant's criminal record neither was any recommendation attached to her affidavit in support of a probation and social welfare officer or any competent authority regarding her ability to be a guardian.

In my view, I believe that such restrictions being mandatory as per the law should be
20 enforced to protect the children who are not able to make their own decisions lest they be rendered nugatory. The above-mentioned provisions therefore must be fulfilled by the applicant who in this case mainly resides abroad in the United Kingdom and the fact that this application was brought to this court to take the minors out of the country.

For someone who mainly resides out of Uganda in the United Kingdom, a recommendation from the probation and social welfare officer or a competent authority



is a mandatory requirement before the grant of a guardianship order. The fact that the applicant is sending the minors' school fees and other monies to help with their welfare is not sufficient ground to satisfy this court to appoint her as their legal guardian. As a result, this court finds that the applicant has not exhausted all the necessary conditions for the grant of a Guardianship Order. The application is therefore dismissed.

I so rule and order.

DATED and Delivered on this 29th day of February 2024.

A handwritten signature in blue ink, appearing to be 'Isah Serunkuma', written over a horizontal line. The signature is stylized and includes a large initial 'I'.

10 **Isah Serunkuma**
JUDGE