

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
FAMILY CAUSE 286 OF 2013
IN THE MATTER OF MATOVU JOHN (CHILD)

AND

**IN THE MATTER OF AN APPLICATION TO BE APPOINTED AS THE LEGAL
GUARDIAN OF MATOVU JOHN (AGED TWELVE YEARS) BY DONNA RAMOS
HOLLAND**

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application for legal guardianship brought by notice of motion under articles 139(1) and 34(1) & (2) of the Constitution; sections 14, 33 and 39 of the Judicature Act, cap 13; and sections 3, 4, & 5 of the Children Act. The applicant is seeking the following orders:-

1. Donna Ramos Holland be appointed legal guardian of Matovu John.
2. The child be allowed to immigrate to USA to live with Donna Ramos Holland.
3. Costs of this application be provided for.

The grounds of the application are that:-

1. The child is a single orphan having lost his mother.
2. The father of the child is a peasant with no reliable source of income to take care of the child.
3. The surviving relatives of the child cannot afford to take care of him.
4. The child was admitted to the care of a children's home by the probation and social welfare officer upon the request of the maternal grandmother.
5. The applicant wishes to provide the child with a home, parental love and care.
6. This application is for the welfare and benefit of the child.

The application is supported by the statutory declaration of the applicant; and the affidavits of Kiyaga Joseph country director M/S The Suubi Project, Matovu Godfrey biological father of the child, Nanteza Ruth maternal grandmother of the child, Katende Ezra maternal uncle of the child, Serunjogi Nathan Mutyaba maternal uncle of the child, Maria Antonia Nakakawa paternal grandmother of the child, Lwanga Joseph local council 1 chairperson Kamuli Kikamulo

Nakaseke district, and Luswata Joan senior probation and social welfare officer Nakaseke district.

The applicant was in court when the application came up for hearing. The child was also in court, together with those who had sworn affidavits relating to this matter.

Matovu John is a child of Nabukalu Ephrance and Matovu Godfrey. He lost his biological mother Nabukalu Ephrance in May 2005. His father and mother had separated by the time of his mother's death. His father cared for him and his sibling but he and his sibling were later removed from their father and taken to their maternal grandmother Nanteza Ruth as they were in a very poor health condition. The grandmother later became too weak to care for them. As a result Matovu John and his sibling were placed under the care of Ssubi Project. The applicant got to know about Matovu John through Cheryl Sargent one of the directors of the Ssubi Project. She seeks this court to grant her legal guardianship of the child and to allow her to immigrate and live with him in the United States of America (USA).

In his written submissions, learned Counsel Charles Majoli for the applicant reiterated the facts and grounds of the application. He submitted that John Matovu is a needy child with no relative willing to take care of him, that there are special circumstances justifying the sole applicant, a female, taking the child, a male, under legal guardianship, and that the order, if granted, will be in the best interests of the child. He cited *Evelyn Atukwase Brianne Gamelin (infant) FC 118/2010*; *Bernie Hansen & Patricia Hansen FC 78/2009*; and *Re Man infant SCCA No. 22/1994* to support the application.

The Children Act does not specifically provide for guardianship orders. However, article 139(1) of the Constitution, read with section 14 of the Judicature Act, cap 13, give the High Court unlimited original jurisdiction in all matters. Section 98 of the Civil Procedure Act empowers the High Court to invoke its inherent powers to grant remedies where there are no specific provisions. In all matters concerning children, the best interests of the child shall be the primary consideration. This is a legal principle contained in Article 34 of the Constitution and the Children Act, as well as in various international conventions ratified by Uganda concerning the rights of children.

Section 3 of the Children Act, read with the first schedule to the same Act, sets out the criteria to be followed in applications of this nature. These are the ascertainable wishes and feelings of the child in light of his or her age and understanding; the child's physical, emotional and educational needs; the likely effects of any changes in the child's circumstances; the child's age, background and other circumstances relevant in the matter; any harm that the child has suffered or is at the risk of suffering; and, where relevant, the capacity of the child's parents, guardians or others involved in meeting his or her needs.

The applicant is applying for legal guardianship of Matovu John, including being allowed to travel with him outside Uganda to the USA. The Court of Appeal in *Deborah Joyce Alitubeera*

& Richard Masaba Civil Appeals No. 70 & 81/2011, when addressing a similar situation, emphasized the importance of the welfare principle and the need for applicants to travel with the children to their home countries.

The evidence on record shows that Matovu John is a single orphan who lost his mother. His father is a peasant with no reliable source of income. His maternal grandmother Nanteza Ruth who was taking care of him became physically weak and she requested her sons to look after the child. Her sons could not afford to take care of him and he was admitted to the care of a children's home by the probation and social welfare officer.

It is evident Matovu John is in need of a family to grow in and be cared for. The Ssuubi Project which has legal custody of the child is an institution which cannot provide a permanent home for him. The affidavit evidence on record reveals that the applicant desires to parent the child. She has one child aged 17 years. She has been found to be suitable parents by Jenna Howard LMSW a social study specialist of M/S Legacy Adoptions and Surrogacy whose home study on the applicant is annexed to the applicant's affidavit as **C**. She is employed by Winfree Academy Charter School in USA as a life transition coach as per annexure **B** of her affidavit

The applicant has also been recommended by Luswata Joan the senior probation and social welfare officer Nakaseke district (from where the child hails) in her report annexed as **B** to her affidavit. The report from Arlington Police Department, Tarrant County Texas, USA, annexed to the applicant's affidavit as F, reveals that she has no criminal record. The health reports attached to her affidavit as **D** reveals her to be in good and healthy condition.

Section 1 of the Children Act defines "guardian" to mean a person having parental responsibility for a child. It was stated in **Nabyama Moses alias Nabyama Abasa Family Cause No. 76/2011** 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.

I have noted that the applicant is a female sole applicant in respect of a male child. Ordinarily, as deduced from adoption laws and case law there is a principle that applicants of this nature should only be granted where there are exceptional circumstances to justify orders of this nature. The principle specifically applies in adoption matters, but I find no reason to depart from it in this case of guardianship which also requires this court to address the best interests of the child.

The child John Matovu is aged twelve years and ten months, having been born on 20/05/2001, while the applicant is aged thirty seven years. The applicant has a child aged 17 years, who is thus older than John Matovu. All the relatives of John Matovu who swore affidavits in this case, including his biological father Matovu Godfrey, deponed that they consented to the applicant

being guardian of John Matovu. John Matovu's biological father, in addition to his sworn affidavit, testified before this court that his lawyer explained to him the legal implications of legal guardianship and he freely agreed with the arrangement. He deponed in his affidavit that he is HIV positive. This is evidenced by medical forms annexed as C to his affidavit. Joan Luswata the senior probation and social welfare officer Nakaseke district who made investigations into the background of John Matovu also supported the application and recommended the applicant for legal guardianship. John Matovu himself was interviewed on oath by this court. He was found to be of understanding age. His testimony to court was that he fully appreciated the circumstances of the application, and that he agreed to be taken under legal guardianship by the applicant whom he said was going to be his mother. I consider these to be special circumstances to justify grant of legal guardianship to the applicant in respect of John Matovu.

In this case, I find that where the child's biological father or relatives are unable to care for him, and where they are showing no interest in looking after him, and where the child, who is of understanding age, is willing to be taken up by the applicant under legal guardianship, the applicant is the next best suited person to look after him. On basis of the adduced evidence, the applicant meets the requirements of legal guardianship. Denying her to look after the child would deprive him of the available opportunity of being in a home where he is loved and parented. This is a proper case where, through a guardianship order, the child will get a home, love, care and basic needs he is currently enjoying temporarily at the Ssuubi Project. It will be in his best interests to allow this application if the child is to enjoy the said basic needs permanently in the course of his growing up.

I accordingly make the following orders on terms I consider fit for the welfare of the child:-

- a) Donna Ramos Holland is appointed legal guardian of Matovu John.
- b) The child is allowed to immigrate to USA to live with Donna Ramos Holland.
- c) The legal guardian is directed to obtain a Ugandan passport for the child using his current names.
- d) The legal guardian shall submit once a year, photographs and a report on the state of health, progress and welfare of the child to the Registrar, Family Division of the High Court of Uganda at Kampala until he attains 18 (eighteen) years of age or until directed otherwise.
- e) The Registrar of the High Court shall furnish a copy of the orders in this ruling, together with the address of the legal guardians in USA to the Ministry of Foreign Affairs of Uganda at Kampala; the Embassy of USA in Kampala; and the Ministry of Justice and Constitutional Affairs of Uganda.
- f) The legal guardian shall immediately communicate any changes of addresses to the authorities mentioned above.
- g) Costs of this application will be met by the applicant.

Dated at Kampala this 17th day of March 2014.

Percy Night Tuhaise

Judge.