

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT JINJA**

**MISC. CAUSE NO. 053 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP**

**ORDERS BY JUSTIN NTULE NAMUMBYA**

**AND**

**IN THE MATTER OF NM OF 13 YEARS AND NEP OF 7 YEARS OLD**

**RULING**

**BEFORE: HON. LADY JUSTICE EVA K. LUSWATA**

**This is my ruling in the matter.**

This is an application brought under Section 3, 4, and 43(A) & (B) of the Children Act as amended, the Judicature Act and Civil Procedure Act and Rules, for an order that the applicant Ms. Justin Ntule Namumbya be appointed the legal guardian of NM and NEP (herein after referred to as the children).

The grounds for the application briefly are that;

1. The applicant is a biological sister of the late Kyoziira Justine, the mother of the children and that before the death of Ms. Kyoziira, the children were in the custody of the applicant.
2. That Kyoziira Justine (herein after called the deceased) died intestate and was survived by the two children who are the subject of this application and there is no other person to take care of them, save for the applicant.

3. That before her death, the deceased was a single mother, single handedly brought up and cared for these children, and their father is unknown.
4. That the purpose of the guardianship order is to enable the applicant to arrange for the children to benefit from the privileges of her employment like education and medical cover.
5. That the applicant claims to have a permanent home at Kitanaba village, Kitanaba Parish, Buwenge Sub-County Kagoma, in Jinja District and works in Germany.
6. The applicant in addition states that she has no adverse interest against the children, because she has taken care of them since the deceased passed on, and it will be in their best interest if the application is granted.

Legal guardianship is provided for under section 43 of the Children amended Act (as amended).

Under section 43A, guardianship of children can be applied for by citizens of Uganda, and the conditions to be fulfilled are in section 43B; that is:

- a) That the applicant must be a person above the age of 18 years.
- b) The application shall be made in the High Court and the form of the application is provided.
- c) The application shall be accompanied by a report of the probation and social welfare officer.

I have confirmed from the passport and national identity card of the applicant that she was born on 25<sup>th</sup> August 1986, which would make her 33 years. The two documents confirm her to be a citizen of Uganda, and therefore eligible to apply for guardianship.

The application is being made before me in the High Court. I note however that the application was not accompanied by the report of a probation and social welfare officer, which I believe is a serious omission. I will address that in my decision.

I have confirmed from the two birth certificates provided that NM was born on 26<sup>th</sup> May 2005, which would make her 14 years. On the other hand, NEP was born on 25<sup>th</sup> August 2011, which would make her 8 years. They are both minors who can be the subject of a guardianship order.

I have also confirmed from the death certificate provided, that one Kyoziira Justine died on 13<sup>th</sup> September 2014, from natural causes at the age of 42. It is stated in the two birth certificates that the name of the father is Kagoda Eronda.

Ms. Adikini Esther represented the applicant and made brief oral submissions before me.

### **The law**

The law on this matter has been briefly stated. In my decision, I shall be guided by the provisions of Article 34(1) of the Constitution and section 3 and 4 of the Children Act as amended.

It is provided in section 3 that the Welfare Principle and the rights of the child set out in the first schedule shall guide the Court in making any decision pertaining to children. It is also provided in section 4, that every child is entitled to live with his or her parents or guardian and they will be placed into special care or substitute care only if there is need for such an order. See for example, in the **matter of David Twesigye (an infant) HCMA 4/2008 (Fort Portal)**

It is trite that the Welfare principle of the child shall be paramount in an application like the one before me. Welfare Principle was not defined in our laws but with successive decisions, there is sufficient precedent that it pertains to all that is in the best interests of the child, after all relevant circumstances have been considered. See for example **J Vrs C (1970) AC 668**. Every Court is enjoined to make a decision that caters for the best interests of the child in question.

Also by guidance, the criteria to be considered before I determine the question of guardianship in this application, would be for example, the ascertainable wishes and feelings of the children concerned, their physical, emotional and educational needs, any likely effects of any changes in their circumstances, their age, sex, background and any other matter that is relevant. It is also important to consider any harm that the child has suffered or is at risk of suffering and where relevant, the capacity of their biological parents or others involved in their care to meet their needs. (See Rule 3, 1<sup>st</sup> Schedule Children Amendment Act). I shall keenly use those guiding principles in my decision.

It is stated in the affidavit of the applicant that children's mother, Kyoziira Justine is deceased and that fact has been confirmed. During her interview in court, she explained that the father of the children Kagoda Eronda is not known. He was not known to the applicant or her family and she was given that name by the deceased's father who also didn't know Kagoda. It seems Kagoda has never been part of the children's lives, to the extent that NMS confirmed she has never met him and does not know him. This would mean that the children who may not be full orphans, have no available biological parent. The other existing adult in their lives has been their great grandmother Ms. Alici

Namwebya Nambuya of Kitanaaba, where they stay during the absence of the applicant in Uganda for the larger part of the year.

I have not confirmed the age of Namwebya, but being a great grandmother, I would imagine she is of advanced age and therefore, would need any support she can get. It has also been revealed (although not confirmed by medical evidence) that the younger child is [REDACTED] and that the older child is a [REDACTED]. I would place such children in the vulnerable category, and therefore immediate attention is required to meet their special needs.

In her affidavit and submissions before me, the applicant has presented herself as a person who is ready, prepared and capable of supporting these children. Being a maternal aunt, she is their closest relative. She has looked after them for the last five years; they know her very well and have shown as much in court.

The applicant has confirmed that she currently resides in Nuernberg Germany where she is employed as a Travel Consultant with the Deutsche- Bahn (DB) Transport System of Germany. She earns about 32,000 Euro per year, which would translate into about Shs. 128,000,000 per year. She has a residence permit but remains a citizen of Uganda. She has already placed these two children in school; in particular, the older child has been placed in a special school to develop hand on skills in hair dressing, and the younger child is in boarding school. She has revealed that between them, the children pay about Shs. 500,000/= per term in school fees, and to that, you would add other necessities of life.

Considering her earnings in Germany, I believe the applicant is financially comfortable should be able to look after the material needs of these children. She has also submitted that with this order, she will

be able to have the children added as beneficiaries to her employment entitlements especially medical aid and education. This of course will be for the benefit of these children. Save for the material needs, she has taken the trouble to visit the children at least one to three times a year and when she does, she lives with them in Kitanaaba and I believe is able to bond with them physically and emotionally as she takes care of them.

I have noted that there was a serious omission of not obtaining a probation officer's report. Such a report would have been useful to the Court to evaluate the applicant as a suitable person to be appointed a guardian. The probation officer would have been in a position to visit, interview and observe the relationship of the children with the applicant and their current status. He/she is expected to have the special skills to carry out such an assignment.

That notwithstanding, although I have not been able to observe the applicant and the children in their local and domestic environment, I have observed the applicant in court and interviewed her myself. From our interface, I am satisfied that being a maternal aunt who has been in control of their lives and interests for the last five years, even without a probation officer's report, I can make an informed decision on this application. I would accordingly dispense with that report for now, which I have power to do.

I have talked to the children and in that way, picked up their ascertainable wishes. They wish that the applicant continues to look after them, they were both articulate enough on that point. I am sure that the guardianship order should address any likely and necessary changes in the children's circumstances. The applicant has indicated she has plans of having the children live with her more permanently in

Germany, (i.e if her employment continues) so that she can bring them up closer to her as female children. So far, the children's physical and education needs are being met. I have advised the applicant to consider placing the children in better schools. I do not see any risk factor if I grant this guardianship order, in fact, it will be for the betterment of these two children.

For that reason, I allow the application. I am granting the order to state that;

Ms. Justin Ntule Namumbya is appointed legal guardian of NM and NEP.

She will henceforth, have the powers of a guardian as provided for under the Children Act (as amended) and other laws.

However, in order to meet the interests of these children to the satisfaction of the Court, I order that Ms. Namumbya and the children are subjected to a visit by the probation officer in charge of Kitanaaba where they reside and a report generated for the benefit of this Court within 30 days from today. Thereafter, the probation officer should make another visit to the same home after eight months to assess the new situation of these children. Both reports should be filed with the Court at least seven days after they have been generated.

The applicant will meet the costs of this application.

I so Order

Signed

**Eva K. Luswata**  
**Judge**  
**11/12/2019**