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

MISCELLANEOUS CAUSE NO. 20 OF 2018

IN THE MATTER OF APIO SARAH AND ACHEN CLAIRE (CHILDREN)
AND
IN THE MATTER OF A PETITION FOR APPOINTMENT AS ADOPTIVE PARENTS OF APIO SARAH AND ACHEN CLAIRE (AGED THREE YEARS) BY JASON MURLE SMITH AND JILL MARIE SMITH

RULING

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

This petition was presented by **JASON MURLE SMITH (first petitioner) AND JILL MARIE SMITH (second petitioner)** though Nyombi & Co., Advocates seeking an order to adopt **APIO SARAH and ACHEN CLAIRE** (hereinafter collectively referred to as the children). The application was filed on 05/06/2018 under enabling provisions of the Constitution of Uganda, the Judicature Act, and the Children Act and Children (Amendment) Act 2016 and Rules (hereinafter referred to as the Act).

Both petitioners filed statutory declarations in support of the application with supporting documents. Additional affidavits were filed by Opio Ouma, the probation and social welfare officer Jinja, Opira Richard (biological father), Oloya Comboni (maternal grandfather), Adule Rose (paternal aunt), Olwoch Samuel (paternal uncle), of the children respectively, as well as Ssenyondo Ernest a local council leader. The affidavits collectively, gave the antecedents of the petitioners, the children's background, recommendations and other relevant information. The contents although not reproduced here, will be considered in my ruling.

In addition to the pleadings, on 20/9/18, the Court met and interviewed the petitioners and their witnesses and was able to see the children who are the subject of this application. The information given during those interviews shall also be considered in my ruling.

It is stated briefly in the petition that the petitioners are both aged 35years. They were legally married on 28/12/2007and have between them four biological children. They are normally resident at 39 Lancer Lane, Hampton VA 23665 in the USA and when in Uganda, live at Plot 7, House No A3, Iganga Road, Jinja District. The 1st applicant is gainfully employed as a staff sergeant in the USA Department Air Force while the 2nd petitioner is a home maker. They have fostered the childrenfor more than one year and now wish to obtain a formal adoption order whose conditions they are prepared to comply with.

Not much detail was given of the children or their background in the petition. However, I was able to gather from the supporting documents that: -

(a) The children are female twins born to Opira Richard and the late Ayoo Everline on 15/4/2015.
(b) Both are citizens of Uganda
(c) Presently in *de facto* custody of one William Edema Administrator of M/s Welcome Home Ministries Africa (hereinafter referred to as the Home)
(d) Under foster care of the petitioners vide a foster care certificate issued by the PSWO on 09/01/2017.

It was stated by Mr. Edema in his affidavit that the children were received in the Home on 25/5/2015 for care and protection and placed under their formal protection under a Care order of the Kagoma Magistrate's Court, dated 24/6/2015.

That the primary objective of the Home is take care and provide assistance for abandoned children with no parents or guardians, or those whose relatives are not prepared to have them. That the policy of the Home is give care to such children for one and a half years from the date of inception after which they are resettled with their families or, with the assistance of the probation and social welfare officer, Jinja (hereinafter referred to as PSWO), locate suitable families ready to foster or adopt them.

According to the second petitioner, their desire to adopt developed even before they were married and has been nurtured through their marriage. That searching through the Net, they encountered the children and immediately got into touch with Life Adoption Services, the agency responsible for the children's adoption case who gave them details of the children's social, medical and developmental history. This culminated into their first visit to Uganda in January 2017, and attachment to the Home where more details of the Children were given and formal fostering pursued. That due to work commitments at home and the 2nd petitioner's health, thepetitioners had to return to the USA and the children are now in the care of Mr. Edema, the petitioners' legal attorney. That the adoption case is now under the management of Carolina Adoption Services, though whom the petitioners continue to send maintenance for the children and keep abreast of their welfare.

The Law:

It is provided in Section 3 of the Children (Amendment) Act that;

> *"(1) The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines 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.*

I believe the two crucial points to note of our current law is that under all circumstances, the welfare of the child shall be paramount before any consideration is made by this court to allow an adoption. See for example **Payne vs. Payne (2001) EWCA 166** and **B vs. B (1940) CH 54.** This principle has been well followed by our courts. See for example **Deborah Alitubeera Civil Appeal No. 70/2011** and **Re AM Adoption Cause No. 12/2017**. Secondly, inter-country adoption or specifically, a non-citizen of Uganda is allowed to adopt only in exceptional circumstances and even then, only if they fulfill the conditions under Section 46 of the Act which provides that: -

> *"(1) A person who is not a citizen of Uganda may <u>in exceptional circumstances</u> adopt a Ugandan child, if he or she:*
>
> *(a) Has stayed in Uganda for at least one year;*
>
> *(b) Has fostered the child for at least one year under the supervision of the 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 officer of other competent authority; and*
>
> *(e) Has satisfied the court that his or her country of origin will respect and recognize the adoption order.*

Emphasis of this Court.

Even then, under Section 46(4) of the Act, my Court has powers in exceptional circumstances to waive any of the requirements mentioned above.

Our law does not define exceptional circumstances. In my view, they would be or amount to unusual, extraordinary or not-typical circumstances surrounding the upbringing or commonly associated with the upbringing of a child. Of course the court should consider these to be dependent on the circumstances of each individual case.

A new addition to our law appears in Section 46 (5) of the Amendment Act, by which certain persons are now permitted to give information that would assist courts to determine that the best interests of the child are protected. These include advocates, probation and social welfare officers or a guardian *ad litem* for the children. That list may not be exhaustive and the court may, depending on the circumstances presented, invite information from other sources.

Further in Section 46 (6) & (7) of the Amendment Act, adoption should be the last recourse for children and the court is enjoined to consider a continuum of comprehensive child welfare services before international adoption. These would include a broad range of services and community based family centered alternative care options which may either be family preservation, kinship care, foster care or, institutionalization.

Do the petitioners qualify to be adoptive parents?

The children Act and its amendment have provided a check list of the conditions for an intercountry adoption.

Both petitioners are 21 years older than the children and furnished proof to show that they have no criminal records in Uganda and their home country. They have both received suitable recommendations of their suitability as adoptive parents

from the mandated authorities in the USA and Uganda. I shall return to the content of those recommendations later in this ruling.

It is conceded by both petitioners that they have not lived in Uganda for a continuous period of one year. It is therefore certain that they have carried out their fostering duties in and out of Uganda. I am mandated to evaluate the reasons advanced for their absence in Uganda before I can agree to exercise my discretion on whether to waive the requirements under Section 46 of the Act.

Both petitioners are residents of the USA. The 1st petitioner is in full time employment, and the 2nd petitioner, a stay home mother with the primary role of taking care or their four biological children. According to the petitioners, they have since January 2017, on alternative dates, visited with the children in Uganda. Their visits would range for periods between one and six weeks. On her second visit here, the 2nd petitioner made the decision to relocate to Uganda to carry out fostering duties. She moved to Uganda with her four biological children whom she home schooled in Uganda. Six weeks into her stay here, she contacted severe malaria and was advised to return home to receive adequate treatment. The1st petitioner then returned to Uganda in May 2017 to collect his family. Their next visit to Uganda was in September 2018 to attend the adoption hearing.

The requirement in our law is that both petitioners (where a joint petition is filed) should remain in Uganda for a continuous period of one year, and to foster the subjects of the adoption for the same period. The reason for this, and I fully concur, is for the petitioners to have the opportunity to acclimatize themselves to our culture and way of life and also bond with their charges. (See for example **Saunders Terry Tobin and Semujju Cromwell Clifford (Minors) M/A No. 10/2017)**. This is the ideal situation. However, I have in my earlier rulings

recognized the fact that it may not be practically possible for both applicants (especially if they are married couple) to be in Uganda for the required period. There may be many reasons for this; some being work related and/or family commitments. I have insisted however that for a married couple, where possible, at least one of petitioners should remain in Uganda for a significant period to acclimatize themselves about the way of life of the children they are interested in and for them to carry out meaningful fostering. (See for example **In the matter of Katumba Francis and Nakitende Aisha (Infants). Adoption Causes Nos. 16 & 17/2018 Jinja High Court)**.

The 2nd petitioner stated that her intention was to relocate and remain in Uganda for a significant period. Her testimony is credible because she made the move together with her four biological children. The fact that she had a permanent place of abode at which she home schooled them, and fostered the children, is an indication of that permanency. It is understandable that the 1st petitioner, an employee of the American Air Force, could not relocate to Uganda for similar periods. Like everywhere in the World, the forces are known to be much regimented and as explained for him, he would require clearance from his employer any time he intends to exist the boarders of the USA which is limited due to the nature of his work, which is of high security. Indeed, at least one of the spouses has to keep down a job in order to sustain the family.

The 1stpetitioner's stay in Uganda was cut short by her illness. I believe, malaria as a tropical disease, would be best treated in Uganda, and indeed, the facilities here are adequate. However, the 1st petitioner was advised to get treatment back home. It is understandable that being a foreigner, her immunity to the disease would not match that of for example, a Ugandan who was born and bred here. Again, she could hardly look after four young children while ill. The relevant provisions of the

Children Act were meant to cater for the best interests of Ugandan children but not to act as an unbearable hardship to prospective applicants for adoption. Grave illness in a new country would have both a psychological and physical impact on the patient, and the decision to return home was the best in the circumstances.

Under such circumstances I would agree to waive the requirement that the petitioners should have resided in Uganda for a continuous period of one year, prior to filing the application.

Issue 2 – Whether the application is in the best interests of the children:

The significance of the welfare principle has previously been emphasized in my ruling. According to Section 3(3) of the Amendment Act, it would entail giving regard to;

(a) The ascertainable wishes and feelings of the child concerned considered in the light of his or her age or understanding.

(b) The child's physical, emotional and education needs;

(c) The child's age, sex, background and any other circumstances relevant in the matter.

(d) Any harm that the child has suffered or is at risk of suffering

(e) Where relevant the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.

It was stated by Opira Richard the biological father of the children, that Ayoo Everline their mother passed away on 25/05/2015 when they were only ten days old. Upon advice of village mates, he sought the assistance of the Home who agreed to take on and look after them. With the assistance of the PSWO and LCI

chairman, the necessary paper work and court orders were secured and the children were formerly placed under the custody of the Home. That information was confirmed by both the PSWO and Ssenyondo Ernest the LCI Chairperson, Bukaya East Village, Njeru East Parish, Njeru Town Council in Buikwe District.

During the proceedings in Court, Opira who is now resident in Kitgum, stated that he was employed as a builder earning on average income about Shs. 10,000 (approx. $ 2.63) a day. He has five other children aged between five and sixteen years respectively. He is a single father, and thus the principal care giver and sole bread winner. He confessed that he was not prepared to have the children back because he cannot afford to care or sustain them and was very positive about the adoption. He has met with and approved both petitioners. The other paternal and maternal relatives in Court, all peasant farmers, voiced similar predicaments and sentiments in their evidence. Oloya the grandfather has 28 grandchildren and other dependants. Adule the aunt, is a single mother of five children, with no source of income. All were clearly unable to take on any extra responsibilities and were in favour of the children being adopted by the petitioners.

My evaluation of the above evidence is that these children are in need of special care and attention. They were orphaned when very young. Their biological father as the only surviving parent could not look after them. He surrendered them to the Home under whose care and custody they have remained for the last four years. Owing to the policy of the Home, they have overstayed and it was for that reason that the administrators of the Home sought out a suitable family to adopt them. All the immediate relatives have proved to be financially and socially incapable of taking up parental responsibilities and have conceded that adoption would be the best alternative option for these children. The biological father has met with and approved the petitioners, and since his identity and address in known, the

petitioners should over time, be able to maintain ties with him and the children's other siblings and relatives.

It has previously been held in our courts that institutionalization of children should be the last option. That orphanages are only intended to be temporary, pending availability of a suitable family and home in which an infant in need of care and protection can be raised. (See for example **In the matter of Michael (an infant) an application by Morse Richard Peterson Jr and Pricket Teresa Renee (M/A No. 33/2006).**

The facts of this case are such that the children have reached the age when they have outgrown the Home, which has in turn, exhausted all avenues of alternative placement and repatriation of the children back into their home. On the other hand, the petitioners are willing to adopt the children and have them join their family permanently. There is no indication that the children will suffer any harm or discrimination in the country to which they are destined.

I have no doubt that the petition is meant to meet the interests of this children, and I hold so.

Whether the petitioners are suitable candidates for adoption of these children.

I had an opportunity to interview both petitionerswho presented as two people committed to take on the responsibility of new members in their family.They are mature and having children of their own, should have horned their parenting skills. The 2nd petitioner being a teacher armed with the requisite training and a home maker, the advantage of the children receiving round the clock care and attention, as well as a good education is real.

The petitioners filed in support of the application, a Home Study report compiled by the Cradle of Hope Adoption Centre Inc, a licensed nonprofit child placement agency in the State of Virginia USA. It was stated in the report that their evaluation in the USA, which was completed for the purpose of an inter country adoption, begun in spring of 2016. It was confirmed that the petitioners take their parental responsibility seriously and enjoy spending time with their children and nurturing them. That they of an age that can adopt children and have prepared themselves psychologically through counseling and training for this new role. They have involved their children by frequently discussing with them about the pending adoption. They are prepared to bring up the children according to strong Christian values and currently attend a Church which is largely African-American. It is hoped that should help the children in settling down in the American way of life. Their immediate family is very supportive of the adoption and arrangements have been made for the children to be taken over by Ms. Karren Willey, the 2nd petitioner's mother in the unfortunate event of the petitioners' inability to raise them.

The petitioners who are reported to be in good health reside in a spacious two storied home, built with support from the 1stpetitioner's employer. Arrangements have already been made for the children to share a bedroom with one of the petitioners' biological daughters. Although the family is supported by the 1st petitioner's income only, the sum of USD 53,500 (approx.) that he earns annually, should be adequate to meet the two new additions to the family. It was concluded in the report that with all matters considered, the petitioners meet the requirements for adoption as required by their home State and they are willing to comply with all post placement or post adoption requirements set by the Republic of Uganda.

In addition, the petitioners filed a report of the PSWO who equally gave a positive recommendation in respect of this application. He reported that he had evaluated the petitioners during the fostering period and found them to be committed to each other and the children. They have not only visited with the children but also met all their physical, social and spiritual needs thus creating a healthy and stable environment for their proper upbringing. He found the petitioners to be religious, hospitable and determined. That through their visits to Uganda, they have managed to create a strong bond with the children that should continue if the adoption is granted. He highly recommended the petitioners as suitable foster parents. That recommendation should equally serve the purpose of an evaluation of the petitioners for the purposes of adoption since it was carried out during the fostering period.

I agree with the above recommendations. I had an opportunity to interview the petitioners and the children's immediate relatives. It was clear that the relatives are comfortable with and have approved the adoption. Equally, the petitioners exhibited resolve and commitment to adopt the children and bring them up as their own. With the preparation they have received in their home country and visits to Uganda, they should be psychologically and socially well prepared for that parental role.

I am persuaded thatthe facts of this case present exceptional circumstances to permit non-citizens to adopt the children concerned. By their proven capabilities, experiences and reliable positive references, the petitioners qualify to be appointed the adoptive parents of the children Apio Sarah and Achen Claire. I would accordingly allow the application and order as follows: -

1. The petitioners Jason Murle Smith and Jill Marie Smith are granted an order of adoption in respect of the children **APIO SARAH and ACHEN CLAIRE**
2. The petitioners may travel with the children to the United States of America or any other country they may choose as residence in order to fulfill their obligations as adoptive parents.
3. I direct that the Registrar of Births and Deaths makes an entry recording this adoption order in the Adopted Children Register.
4. It is further directed that this adoption order be furnished to the consular department in the Ministry of Foreign Affairs at Kampala and at the Ministry of Gender, Labour and Social Development in Kampala.
5. The petitioners shall meet the costs of this application.

I so order.

Signed

EVA K. LUSWATA

JUDGE

27/05/2019