

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

**FAMILY CAUSE NO. 002 OF 2018
IN THE MATTER OF HASSAN KAAYA (CHILD)**

**IN THE MATTER OF A PETITION BY CLARE MAUREEN BYRNE FOR THE
ADOPTION OF HASSAN KAAYA (CHILD)**

**RULING
BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA**

Introduction:

CLARE MAUREEN BYRNE (herein after the petitioner), a national of the United States of America (USA), resident at plot 8 Kaduyu Road, Masese Jinja District and Berkeley Heights in New Jersey USA has moved this Court in an *ex parte* application under the Judicature and Children (Amendment) Acts and Children (Adoption of Children) Rules, seeking an order for the adoption of **HASSAN KAAYA** (hereinafter referred to as the child). She undertakes to meet the costs of the petition.

The petitioner deposed an affidavit in support of the petition. Additional affidavits were deposed by Kabugo Ronald of Missionaries of the Poor (hereinafter referred to as MOP) dated 11/10/17 and Aisha Sasira of Lubiri Village in Lubaga Division, Kampala District dated 11/10/17. However, Ms. Sasira's affidavit is not reliable because she did not strike me as one who was conversant with the English language and no certificate of translation was inserted to confirm that the contents of her affidavit were read back to her. I will instead rely on the statement she made to Mr. Akkiki Mugisa Henry, the private investigator on 20/7/2017.

The grounds advanced for the application are briefly that the child Hassan Kaaya is;

1. A child of the male sex
2. Is a citizen of Uganda
3. His birthdate is unknown but the age given on the date he was found abandoned, is about three months. A professional dentist at the Hope Smiles Dental Centre in Jinja basing on his tooth development, gave an approximate age of nine or ten days old on 3/10/2017.

4. The child was for a period in his early infancy cared for by Aisha Sasira who during 2012 gave him up for enrollment into the orphanage managed by the MOP, Kisenyi Branch
5. His parents are unknown and no relatives are willing or have offered to contribute towards his support
6. The child was through the Probation and Social Welfare Officer (hereinafter probation officer) of Jinja placed under the care and custody of the petitioner
7. The petitioner has from 7/12/2016 to date fostered the child and she now wishes to formerly adopt him as her child
8. The petitioner has not received or agreed to receive any reward, payment or consideration in order to obtain the adoption order
9. The adoption if awarded will be for the benefit and welfare for the child who will receive a home, parental love and care.

The petitioner, the child, Aisha Sasira, Kabugo Ronald a social worker Teophin Lourbert administrator at MOP and Henry Akiki Kiiza, a private investigator were present at the hearing of 7/5/2018. Ms. Rebecca Mugabi, counsel for the petitioner made brief oral submissions that she followed up with written submissions filed on the same day. Court interacted with some of the parties above and that record together with the pleadings and counsel's submissions shall form the basis of my ruling in this matter.

1. The Law:

According to Section 4 of the Children Amendment Act 2016 (hereinafter referred to as the Act), every child has the right to stay with their parents or guardians. However, the same Act allows for substitute care when the circumstances require; such substitute care would include adoption. See for example, **Hon. Chigamoy Owiny Dollo In the matter of David Twesigye (an infant) and in the matter of an Application by Dawn Pittman and Dustin Pittman HCMA No. 0004 of 2008(Fort Portal).**

In her submissions, counsel did relate quite well, the current law on adoption. Power is vested in the High Court to make an order for adoption if the welfare of that child will be met.

It is provided in Section 3 of the 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.

There is no universal definition of welfare. However the definition given by the court in **J V C (1970) AC 668** best captures the provisions of our current legislation.

“when all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child...”

It follows therefore that the unique situation of every child who is a subject of an adoption application should be considered on the facts as presented bearing in mind their best interests.

Two crucial points stand out in our current law on adoption. Firstly, under all circumstances, the welfare of the child shall be paramount before any consideration is made by this court to allow an adoption. 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 a Ugandan child only in exceptional circumstances. For the purposes of this petition, the petitioner need to fulfill the conditions under Sections 45 and 46 of the Act. Specifically,

- (a) She has attained the age of 25 years and is at least 21 years older than the child.*
- (b) Has stayed in Uganda for at least one year.*
- (c) Has fostered the child for at least one year under the supervision of a probation officer.*
- (d) Does not have a criminal record.*
- (e) 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*

- (f) *Has satisfied the court that his or her country of origin will respect and recognize the adoption order.*

A new addition to the law appears in Section 46 (5) 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. I believe that list is not exhaustive and the court may depending on the circumstances presented, invite information from other sources.

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

2. Is this Child a suitable candidate for an adoption Order?

The evidence presented by the petitioner and Ms Sasira is that the child's parents are unknown. According to Sasira, during 2008 while digging in a banana plantation at the King's palace in Lubiri, her grandson Musa Mutebi found the child abandoned by an unknown person or persons near her house. The child was severely malnourished and in dire need of care. That when Sasira reported the matter to the LCI Chairperson of Nannozi Village, Lubaga Road in Lubaga Division, she was advised to keep the child which she did, and gave him the name HASSAN KAAYA (herein after shortened to Kaaya). When he was of age, she enrolled Kaaya into the Lubiri Nabagereka School and educated him for some years.

With time, Sasira who had six other children to look after, became financially constrained. Upon advise of her neighbours, she approached Br. Prem one of the founders of MOP who agreed to take over Kaaya's care and education and had him enrolled with MOP. After several years, Sasira was approached by an officer from MOP with news that the petitioner intended to take over the care of Kaaya as her son, and her permission, as the only known contact was being sought. She readily agreed for in her opinion, that offer would be good for the child as he would be able to grow p with a mother who loves and cares for him. During October 2017 she was

given the full details and long term implications of the petitioner's intentions which she fully understood. She then gave her formal consent to the adoption of Kaaya.

On her part, the petitioner who lives and works in Uganda as an occupational therapist, first learnt of the plight of Kaaya while working for MOP in Kampala District. She confirmed that all efforts to trace Kaaya's parents and relatives had been futile. She then volunteered to support and take care of Kaaya and is now prepared to become his formal parent. During 2016, she moved to Jinja to work with Imprint Hope Ltd and took Kaaya with him. She obtained a foster care order in respect of Kaaya from the Probation officer on 7/12/2016 and Kaaya is now part of her household.

I am persuaded by what was provided on record that Kaaya was abandoned while an infant. According to a police report issued by the Criminal Investigations Department, Natete Police Station dated 23/10/17, after Kaaya was rescued at three months, Sasira named him Kaaya Hassan and took care of him before reporting the matter to police in September, 2009. Inquiries were opened under SD 43/20/09/2009 and consequently CRB 651/2017. Efforts were put in place to establish the biological parents or relatives of Kaaya but in vain. That the scanty information available, Kaaya's mother who was believed to be of Rwandese origin returned to Rwanda after abandoning him and the father, a Somali national also relocated. Kaaya's relatives have never been established to date. There was no response to an advert placed in the Bukedde Newspaper of 5/10/2017 of a public notice of the petitioner's intentions to apply for Kaaya's adoption in the High Court of Uganda.

Petitioner's counsel commissioned Scorpion Investigations Security a private investigator to try and locate Kaaya's biological parents and relatives. In their report dated 25/7/2017, they confirmed Sasira's account of how she found and brought up Kaaya up to the age of four years. The fact that in 2012, she requested and then handed over Kaaya to Brother Prem of MOP, Kisenyi Branch. In that report, one Brother Lubert Teophim, a director of Homes in MOP, confirmed that Kaaya who had no known parents or relatives had been in the custody of MOP since 2012. That the petitioner worked with MOP as a therapist between 2013-2014 and it was during that period that she took interest in Kaaya and took up his custody in 2016 which she formalized with a foster care placement.

Thus the evidence is strong that Kaaya has no known biological parent or relative and none has come forward to claim him despite notifications of his existence and abandonment. He is thus a child unable to enjoy the rights to which he is guaranteed under the Constitution and the Act. Being a minor, he needs alternative placement to ensure his survival. I accordingly find that the child Kaaya is a suitable candidate for adoption.

3. Does the petitioner qualify to be an adoptive parent under the Act?

I have enumerated the conditions for an adoption by non-Ugandans under Sections 45 and 46 of the Act which I deem the petitioner substantially fulfills.

It is stated in her passport that she was born on 15/7/1987 (thus aged 31 years. Kaaya who was found abandoned in 2008 at the approximate age of three months, should be about or just over ten years now. The petitioner is thus about 21 years older than Kaaya. Under Section 45(3) of the Act, a sole female applicant is permitted to adopt a male child only where special circumstances justify. I note that Kaaya was placed under the care of the petitioner way back in December 2016 vide a foster care order of the probation officer. She has thereby completed the required fostering period of one year prior to this application. Since then, the fostering has been under the keen supervision of the probation officer. There has been no report of negative behavior or compromise by the petitioner and it is confirmed by the Uganda Police Force, that she has never been convicted of any criminal offence or adverse activity. To date, she is the only available adult willing to give Kaaya a home. I would under such circumstances waive that restriction.

It was the petitioner's testimony that she has been resident in Uganda since 2013 while working and supporting orphans and vulnerable children. That fact was confirmed by her entry visa into Uganda dated 11/12/2013. She first worked for MOP and is now an occupational therapist with Imprint Hope, an NGO registered to operate country wide to provide medical, educational and rehabilitation care to children with disabilities. The NGO is centered in Masese but plans are underway to move to Kangulumira Kayunga. The petitioner has no immediate plans to return to her home country.

Save for a sweeping statement in paragraph 26 of her affidavit, I have noted that nothing was put forward by the petitioner or her advocate to show that the petitioner's home country confirms her suitability to adopt or that the USA will respect an adoption order of this Court. Much emphasis was infact to address the fact that the petitioner had fostered the child for the statutory period, received positive recommendations from the probation officer and been cleared of any criminal record by Interpol.

That above evidence may be strong indication of the petitioner's suitability but it must have been the intention of our Parliament that in addition to reports from Uganda where the fostering takes place, any foreign applicant for an adoption order should present a suitable recommendation from their home country and assurance that the home country would respect an adoption order of this Court and also be prepared receive the child concerned. Nothing has been shown that the applicant suffered any hindrance to obtain such clearance from the USA Government or is exempted from doing so. None the less, I am conscious of my discretion to waive any of the requirements under section 46 of the Act, which discretion must of course be exercised judiciously and with the interests of the concerned child in mind.

I have been faced with a similar situation in the earlier case of **Ekisa Alice and Bizigo Jamil (Family Cause No. 053/2016)**. Similar to this petitioner, a home study from the Federal State in the USA of the applicant then, was missing and attempts to secure confirmation from the USA Government were not properly brought into evidence. My decision to waive this requirement in that case was strongly influenced by the fact that the applicants there presented positively strong recommendations from the Government of Uganda and other civilian and neutral sources supporting their candidature. I did stress then and I repeat here that an assessment from the petitioner's home country is very important and only under very specific circumstances should it be over looked.

The petitioner has shown that she has been resident in Uganda since 2013, a long period of nearly five years. I imagine she may have visited her home country during that period but only as a visitor. In my view, her visits to the USA over this long period would not be sufficient to

enable the concerned authority to make a comprehensive assessment of her suitability to adopt in Uganda. I believe the next, but probably best assessment in the circumstances, by an officer or institution that has visited, and with a professional eye, observed the capabilities of this petitioner and assessed her relationship with Kaaya. Such person would be the probation officer of Jinja who as I will show later gave a favourable account of the foster period and recommended the petitioner to adopt Kaaya. In addition, the petitioner has been very well recommended by MOP, the institution in which she worked for some time and from which she came to know and then received him.

I will accordingly waive the requirement for a recommendation from the USA Government in favour of recommendations done here in Uganda and attached to this petition.

It is also a requirement of our law that the consent of the biological parents is necessary where they are known, but in the same vein can be dispensed with if the parents are incapable of giving it. The strong evidence presented is that Kaaya's biological parents are unknown. No response was made to media reports of his existence in that regard. There were unconfirmed reports that Kaaya's parents were both foreigners and relocated back to their countries. Since he was found in Uganda before attaining the age of five years, he is deemed to be a Ugandan child with full rights under our Constitution and the Act. Parental consent to this adoption is accordingly waived.

In conclusion, I do agree with counsel's submission that the petitioner qualifies to be appointed the adoptive parent of Hassan Kaaya.

4. Is the application in the best interests of the child?

I have previously in my ruling, emphasized the significance of the welfare principle in matters concerning the adoption of children. According to Section 3 (3), of the 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.*

Bromley's advice at page 338 is very pertinent.

"...in applying the welfare principle the Court must act in the child's best interests...it should be appreciated that the Judge is not dealing with what is ideal for the child but simply what is the best that can be done in the circumstances..." **See Bromley's Family Law, 8th Edition**

The facts of this case are that Kaaya is an abandoned child and with no known family. Save for institutional care, it is only the petitioner who is willing to take care of him and has been doing so for the last two years. She has undertaken to love him as his very own and meet all his needs. I was able to see the unmistakable strong bond between Kaaya and the petitioner. They were free with each other and he appeared to adore her and hold her in high esteem. Kaaya is now too old for institutional care from where he was taken several years ago. It would be detrimental to his wellbeing and future expectations to be returned there.

The applicant has demonstrated capability to bring up Kaaya. Her previous and continuing work with children should give her the necessary skills of an adoptive parent. She has indicated desire to reside and work in Uganda for a long time and has taken the trouble to keep in touch with Sasira, who was the first parental figure in Kaaya's life. This demonstrates that the petitioner should be able to understand Kaaya's background and culture very well. She has a confirmed address in Jinja, has placed Kaaya in a good school and should be a good influence on him.

The petitioner confirmed that she earns an income the equivalent of USD 3000 per month. She is unmarried and indicated no other dependants. That income should be sufficient to meet Kaaya's constitutional needs of food, shelter, healthcare, clothing and education. She has in addition offered love, care and companionship to Kaaya. There has been strong recommendations from MOP that she has the qualities of a good mother. Kaaya himself testified that he has lived with the petitioner for two years and is the only mother he knows and wishes to continue living with her.

The probation officer confirmed in his report made in December 2017 that Kaaya is currently attending Kira Junior Prep School and is thriving in his educational environment. He is healthy and emotionally stable in the safe, secure and loving environment that the petitioner has provided. That the petitioner holds Kaaya's education in high esteem and has in addition executed all financial, social and spiritual responsibilities towards Kaaya satisfactorily. She was instructed and understood the conditions and circumstances arising from taking up legal adoption and the need to maintain a good balance to prevent Kaaya from feeling stigmatized as a result of his adoptive status. The probation officer recommended that the petitioner be appointed the legal adoptive parent of Kaaya.

In conclusion, I am persuaded that the facts of this case present exceptional circumstances to permit a non-citizen to adopt the child concerned. By her own proven competencies, her demonstrated commitment to bringing up the child as well as reliable and positive references, the petitioner qualifies to be appointed the adoptive parent of the child Hassan Kaaya. I accordingly allow the application and order as follows: -

1. The petitioner **CLARE MAUREEN BYRNE** is granted an order of adoption in respect of the child **HASSAN KAAYA**.

2. The petitioner shall have exclusive care, custody and control of the child Hassan Kaaya, free from the claims, or hinderances of all others, and shall be held responsible for his maintenance, education and support.
3. I direct that the petitioner may travel with the child to the United States of America or any other country of her choice, in the event that she has to return there to fulfill her obligations as an adoptive parent.
4. I direct that the Registrar of Births and Deaths makes an entry recording this adoption in the Adopted Children Register.
5. It is further directed that this adoption 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.
6. The petitioner shall meet the costs of this application.

I so order.

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EVA K. LUSWATA

JUDGE

16/10/2018