**THE REPUBLIC OF UGANDA**

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

**FAMILY DIVISION**

**FAMILY CAUSE 273 OF 2013**

**IN THE MATTER OF NANYONGA ROSEMARY (CHILD)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR APPOINTMENT AS THE LEGAL GUARDIANS OF NANYONGA ROSEMARY (AGED 3 YEARS) BY JENNIFFER NICOLE WOODROW AND JOSHUA MARK WOODROW.**

**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; sections 3, 4 and 5 of the Children Act. The applicants are seeking the following orders:-

1. Jenniffer Nicole Woodrow and Joshua Mark Woodrow be appointed legal guardians of Nanyonga Rosemary.
2. The child be allowed to immigrate to the United States of America to live with Jenniffer Nicole Woodrow and Joshua Mark Woodrow.
3. Costs of the application be provided for.

The grounds of the application are that:-

1. The child is needy having lost her biological mother and having been deserted by her biological father.
2. The surviving relatives could not look after the child, they subsequently surrendered her into the custody of a children’s home.
3. The applicants wish to provide the child with a home, medical treatment, parental love and care.
4. This application is for the welfare and benefit of the child.

The application is supported by the statutory declarations of the applicantsas well as the affidavits of Barbra Ndibalekera administrator of M/S Abato Journeys of the Heart, Mutesasira John the child’s biological father, Nakibuuka Lamla the child’s previous caretaker, Nantumbwe Benaleta the child’s maternal grandmother, Nsubuga Samuel the child’s maternal grandfather, Nasimbwa Esereni Yiga chairperson Ssebbobbo local council 1, and Nazimbwe Rosemary the senior probation and welfare officer Mityana district.

The applicants were in court when the application came up for hearing. The infant, Nanyonga Rosemary, the subject of the application, was also in court.

The background is that Nanyonga Rosemary, aged three years, was born on 14th June 2010 to the late Namutebi Robina and Mutesasira John. After the death of Namutebi, Mutesasira John deserted the child at the home of Nakibuuka Lamla. Nakibuuka Lamla, who has eight children of her own, failed to look after the child who is HIV positive. She requested M/S Abato Journeys of the Heart for assistance. The child was eventually admitted at M/S Abato Journeys of the Heart on the recommendation of the local council authorities and the probation and social welfare officer.

The applicants got to know about Nanyonga Rosemary through Journeys of the Heart located in Portland Oregon in USA. They seek this court to grant them legal guardianship of the child. They intend to live with her and adopt her.

Learned Counsel Charles Majoli for the applicants filed written submissions along the following issues:-

1. Whether the application is for the welfare and benefit of the child.
2. Whether the applicants are suitable guardians for the child.

I will address the issues in the order in which they were framed and submitted on by the applicant’s counsel.

***Issue 1: Whether the application is for the welfare and benefit of the child.***

The applicant’s counsel highlighted the background of the child’s plight and submitted that the guardianship order would be in the best interests of the child.

The Children Act does not specifically provide for guardianship orders. However, the constitutional and other statutory provisions empower this court to award guardianship orders. 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 section 3 of 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.

I have carefully analyzed and evaluated the affidavit evidence on the court record. During the hearing, I observed the applicants, the infant and all those who supported this application. Bearing in mind the welfare principle, or the best interests of the infant, and all applicable laws highlighted above, I find as follows:-

It is evident that the child’s father abandoned the child to Nakibuuka Lamla when the child’s mother died. Nakibuuka Lamla who had her own eight children could not afford to look after the child who is HIV positive. The child’s father, in addition to his affidavit evidence testified on oath before this court that he is not able to look after the child. In his affidavit he stated that he is a casual labourer with no reliable source of income to look after the child. The child’s maternal grandmother and grandfather also state in their affidavits that they are unemployed and have no other source of income to look after the child. The father and grandparents of the child state in their affidavits that they have no objection to the applicants being granted legal guardianship of the child.

It is evident that Rosemary Nanyonga is in need of a family to grow in and be cared for. M/S Abato Journeys of the Heart which is currently caring for the child is an institution which cannot provide a permanent home for her. The child is HIV positive, which makes her very vulnerable in need of special care and attention to ensure she lives a qualitative life with loving and caring people. The applicants are aware of the child’s HIV status and are willing to take her on as their child and give her love and a home.

I find that where the child’s parents or relatives are unable to care for the child, or where neither her parents nor other relatives are showing interest in her, the applicants are the next best suited persons to look after her. It is a godsend that the applicants are willing to look after the child in her current plight where the mother died, the biological father abandoned her, and the grandparents are not in position to care for her. Denying the applicants to look after the child would deprive the child of the available opportunity of being in a home where she 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 for her nurturing and development in life which she is currently enjoying temporarily at M/S Abato Journeys of the Heart. It will be in her best interests to allow this application if she is to enjoy the said basic needs permanently in the course of her growing up.

***Issue 2: Whether the applicants are suitable guardians for the children.***

The applicant’s counsel submitted that the applicants are suitable to be guardians of the child because they are financially able, free from communicable diseases, among other things highlighted in their credentials.

The applicant’s counsel submitted that the applicant’s credentials and financial status makes them suitable to be appointed legal guardians of the child. He cited ***Evelyn Atukwase Brianne Gamelin (Infant) FC 118/2010; Bernie Hansen & Patricia Hansden fg 78/2009;*** and ***Re M an Infant SCCA 22/1994*** to support the application.

The Court of Appeal in ***Civil Appeal Nos. 70 & 81/2011*** noted that non citizenship *per se* is not a bar to obtaining guardianship orders. The court observed that it is possible for non Ugandans to obtain guardianship orders in respect of Ugandan minors, unlike in adoption matters where conditions are imposed by section 46 of the Children Act. The discretion is left to court to impose conditions it deems appropriate in the best interests of the child.

The affidavit evidence on record reveals that the applicants intend to live with the child in USA where they can provide her with a home, parental love and care, and eventually adopt her. Their home has been recommended as being fit for adoptive purposes, as stated in the international home study report annexed to the 1st applicant’s affidavit as **D**. The 1st applicant is a stay at home mother and online instructor employed by Orange Lutheran Online of 2222 N. Santiago Blvd. Orange, CA 92867, as revealed in annexture **C** to her affidavit. The 2nd applicant is employed by Orange Lutheran Online of 2222 N. Santiago Blvd. Orange, CA 92867, and as a Reverand at First Lutheran Church of 2800 McCallie Ave. Chattanooga, TN 37404, as shown by annexture **B** to his statutory declaration. The applicants have no criminal or child abuse record as revealed by annextures **E** and **C** to their respective statutory declarations. They are financially stable. The health reports annexed to their respective statutory declarations as **F** and **D** reveal them to be in good and healthy condition. On basis of the adduced evidence, and the law applicable, the applicants meet the requirements of legal guardianship.

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.

The applicants also pray that Nanyonga Rosemary is allowed to travel with them to the USA to live with them. 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. In ***Civil Application No. 38/*2012**, which arose from the same appeals, the same court stated that the intention of their judgment could not be fully implemented unless they deleted the condition requiring legal guardians to come back and file adoption applications in Uganda.

In my opinion, based on the foregoing authorities, a guardian can only be enabled to fulfill his/her obligations effectively if he/she is enabled to live with the child to whom he/she has been granted legal guardianship.

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

1. Jenniffer Nicole Woodrow and Joshua Mark Woodrow are appointed legal guardians of Nanyonga Rosemary.
2. The child is allowed to immigrate to the United States of America to live with Jenniffer Nicole Woodrow and Joshua Mark Woodrow.
3. The legal guardians are directed to obtain a Ugandan passport for the child using her current names.
4. The legal guardians 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 she attains 18 (eighteen) years of age or until directed otherwise.
5. 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; the Ministry of Justice and Constitutional Affairs of Uganda.
6. The legal guardians shall immediately communicate any changes of addresses to the authorities mentioned above.
7. Costs of this application will be met by the applicants.

**Dated at Kampala this 20th day of January 2014.**

**Percy Night Tuhaise**

**Judge.**