

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL MISCELLANEOUS APPLICATION No. 0001 OF 2009

**IN THE MATTER OF ARTICLES 34 (1) AND 139 (1) OF THE 1995 CONSTITUTION;
SECTIONS 14 AND 33 OF THE JUDICATURE ACT; SECTION 4 OF THE CHILDREN
ACT; AND SECTION 98 OF THE CIVIL PROCEDURE ACT.**

AND

IN THE MATTER OF BASEMERA ROSE AN INFANT CHILD

AND

**IN THE MATTER OF AN APPLICATION FOR GUARDIANSHIP BY JOHN
HARRISON KINTON III AND DONNAS BURNETTE KINTON.**

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

RULING

John Harrison Kinton III and Donnas Burnette Kinton, (herein after the Applicants), a married couple, and nationals of the United States of America (USA), and residents of **4905 Highland Park Court Raleigh North Carolina, 27613, USA**, moved this Court for an order vesting in them, jointly, legal guardianship of one **Basemera Rose**; a Ugandan infant of Nyarubingo, Kaihura, Butiiti, Mwenge, Kyenjojo District, Uganda; and so as to enable the said **Basemera Rose** become a member of the Applicants' family and live with them in the United States of America.

The grounds for this application, which were further set out in the affidavits sworn respectively by the 2nd Applicant, Katusabe Teopista, and Faith Philo, in support of the application, are namely that:-

1. The said **Basemera Rose** lost both her parents and is an orphan.
2. The Applicants are ready and willing to provide for the child with a view to eventually adopting her.

In support of the application is attached other supportive documents, such as a report by The Community Development Officer – Butiiti Sub – County, Kyenjojo District, recommending the

legal guardianship sought; and as well, letters from Talia Kinton Jernigan, and Lydia Danette Kinton – daughters of the Applicants – who have both expressed their enthusiasm at the prospect of having the infant **Basemera Rose** becoming part of their family.

The affidavit of Katusabe Teopista, at present the customary guardian of the infant in issue, expresses her consent to the vesting of legal guardianship of Basemera **Rose** to the Applicants. The affidavit of Faith Philo Kunihiro, Executive Director Bringing Hope to the Family, a community based organisation, was also in support of the grant of the order vesting legal guardian guardianship to the Applicants. The two affidavits, and the letters from the children of the Applicants, taken together, expand on the grounds stated for this application; and which were argued by Mr. Johnson Musana, legal counsel for the Applicants. The gist of the affidavits and the supporting documents were that:-

- (a) The infant is in dire need of proper care and upbringing; and that the customary guardian lacks the capacity to do so.
- (b) The Applicants are a solid Christian family who have shown keen interest in the infant and desire to legally look after her; and it is believed the infant will have an opportunity for a better future in life.
- (c) The Applicants and their children have emotionally prepared themselves as a family to receive the infant into their family.
- (d) The maternal aunt of the infant who is the customary guardian, has given her consent and blessing to the vesting of the legal guardianship of the **Basemera Rose** in the Applicants. This then means there is no adverse claim against the grant of legal guardianship sought, and for the child to relocate, and live with the Applicants in the USA.

In Court, at the hearing of the application, were: both Applicants, the infant **Basemera Rose**, the aforesaid customary guardian of the infant, Katusabe Teopista, and Faith Philo Kunihiro – the Executive Director of Bringing Hope to the Family, who linked the Applicants and the family of the child. I took the opportunity to establish from the Applicants, and the said customary guardian of the infant, the matters deposed to in their respective affidavits in support of this application. The infant **Basemera Rose** was evidently enthusiastic, and looked forward to the realisation of the process being pursued something which she evidently understood and appreciated.

Courts in Uganda have the powers to grant an order for legal guardianship as provided for in the Constitution of the Republic of Uganda 1995, as amended; the Judicature Act (Cap 13); and the Children Act (Cap 59). The guiding principles in all these aforesaid provisions of the law are principally the promotion and protection of the interests or welfare of the child; and it is rightly under the provisions of these laws that this application has been brought before this Court. The Children Act (Cap. 59) provides, in **PART II**, for the rights and welfare of the child as follows:-

Section 3. Guiding principles.

The welfare principles and the children's rights set out in the First schedule to this Act shall be the guiding principles in making any decision based on this Act.

Section 4. Child's rights to stay with parents.

- (1) A child is entitled to live with his or her parents or guardians.*
- (2) Subject to sub section (1), where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interest of the child to separate him or her from his or her parents or parent, the best substitute care available shall be provided for the child.*

What these provisions mean is that while the primary right of the child is to be brought up by his or her parents, or parent, if it is shown to the satisfaction of a competent authority, such as a Court of law, that by vesting legal guardianship of the child in the Applicants, it would serve the best interest of the child, then it is the proper thing for this Court to do. In the instant case the parents are both dead. The infant child is under the care of the customary guardian who with her family of five children cannot afford the burden of bringing her decently; hence the intervention of the community based organisation which has given support since.

Section 5. Duty to maintain a child.

(1) It shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and, in particular, that duty gives a child the right to –

- (a) education and guidance;*

- (b) *immunisation;*
- (c) *adequate diet;*
- (d) *clothing;*
- (e) *shelter; and*
- (f) *medical attention.*

This provision of the law recognises and reiterates the natural responsibility of the parent of a child, to that child; its other importance is that it places the guardian in the same position as the parent of the child; with the duties and responsibility to promote and protect the interests of the child. Therefore in determining whether or not to vest legal guardianship in the Applicants herein as sought, the issue of education and guidance, health care and medical attention, and shelter which the child would benefit from, vis-à-vis the situation of the child before the grant of the guardianship, are principal factors for considering such grant.

Sub section (2) of the said section 5 provides that:

(2). Any person having the custody of a child shall protect the child from discrimination, violence, abuse and neglect.

I am aware that an order vesting legal guardianship of the child herein to the Applicants means they can relocate the child to the US; and this has cultural and other implications. Therefore I needed satisfaction that the child herein will not suffer victimisation from of any form of prejudice from the society she will become part of on account of the order of guardianship. I am satisfied that the Applicant family have manifested their strong moral and religious basis for guaranteeing a proper upkeep and allaying any fears Court may have had in that regard.

The First Schedule to the Children Act reiterates and elaborates on the ***‘Guiding principles in the implementation of the Act’*** and provides for the interests of the child as follows:-

1. Welfare principle.

“Whenever the State, a court, a local authority or any person determines any question with respect to:-

- (a) *the upbringing of a child*

(b) *the administration of any child's property or the application of any income arising from it,*
the child's welfare shall be of the paramount consideration."

Since the application before this Court is about the upbringing of the child, there can be no greater protection of the interest of the child than to be allowed or afforded, through good upbringing, to grow up and become a responsible person in society; in whom is cultivated rich moral values, and therefore a useful member not only serving himself or family, but society as a whole.

2. Criteria for decisions.

"In determining any question relating to circumstances set out in paragraph 1(a) and (b), the court or any other person shall have regard in particular to –

- (a) *the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;*
- (b) *the child's physical, emotional and educational needs;*
- (c) *the likely effect in any changes in the child's circumstances;*
- (d) *the child's age, sex, background and any other circumstances relevant in the matter;*
- (e) *any harm that the child has suffered or is at the risk of suffering;*
- (f) *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."*

In the instant case before me what emerges, from the evidence on record, is namely that the infant who is 14 years of age, fully appreciates that this order is about opportunities and her best interest in life.

The word '**guardian**' is defined in the Children Act as follows:-

- (k) *'guardian' means a person having a parental responsibility for a child;*

The phrase '**Parental responsibility**' is defined in the said Act as follows:-

(o) 'parental responsibility' means all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child;

The law places the guardian in the same position as the parent of the child; and so, this provision of the law on parental responsibility must be given effect to. The Applicants herein are a Christian family. They will certainly inculcate Christian teachings in the child, and prepare her to be a commendable part of human society.

In the case of *In the Matter of Francis Palmer (An Infant); Civil Appeal No. 32 of 2006*; and *In the Matter of Howard Amani Little (An Infant); Civil Appeal No. 33 of 2006*; Kikonyogo D.C.J; reproduced a section of the findings of the Commissioner for Youth and Children in the Ministry of Gender, Labour, and Social Development of the Government of Uganda; contained in a report on the best interests of the child; which made an observation on Ugandan children who have been afforded the opportunity to live under the guardianship of nationals of the USA in that country; and which is relevant for the instant purpose:-

“...the children are likely to gain than if they remained here. Similar cases have already been handled by the High Court of Uganda and the children are already in the USA doing well from the annual reports on the progress of the children sent back....The American government has very stringent regulations regarding admission of the children into the US. It is possible to follow the children through our embassy in the US.”

The applicants herein are American nationals, domiciled in the USA; and naturally desire that **Basemera Rose** is also domiciled with them. The High Court of Uganda has granted legal guardianship of Ugandans to foreign nationals in several cases; see *Miscellaneous Application No. 78 of 1991 – In the Matter of Sarah Namukasa (Infant)*; *Miscellaneous Application No. 17 of 2003 – In the Matter of Dr Cindy Howard (Applicant)*; *Miscellaneous Application No. 20 of 2003 – In the Matter of Ayla Mayanja (Infant)*. In each of these applications, the Court had to first satisfy itself that the best interests of the child would be realised by the grant of the order sought.

I had the opportunity of observing the infant **Basemera Rose** in Court; seated happily between the two Applicants. I got the impression that she felt she is part of them. On the evidence

therefore, I am satisfied that the grant of the order vesting legal guardianship of **Basemera Rose** to the Applicants; would be in the best interests of the said **Basemera Rose**.

From the consent given by the customary guardian of the infant and the report of the Community Development Officer, as well as that of the Executive Director of Bringing Hope to the Family, I am satisfied that there is no adverse claims with regard to the child which would bar the vesting of legal guardianship of the child in the Applicants; and thereby enable the Applicants take the child to live with them in the U.S.A.

I therefore grant the order vesting in the Applicants, **John Harrison Kinton III and Donnas Burnette Kinton**, jointly, the legal guardianship of **Basemera Rose**; and to exercise the right to live with the said **Basemera Rose**, in the United States of America, or any other place the Applicants may be domiciled in. This grant of legal guardianship is made on the following strict terms and conditions; namely that:-

- (i) The grant of legal guardianship herein shall be in force until the child has attained the age of majority – 18 years.
- (ii) The legal guardians herein shall have the right to live with the child in the United States of America; or any other place of their domicile.
- (iii) The legal guardians herein shall avail their addresses and contact to the Registrar, High Court Fort Portal; the Probation and Welfare Officer for Kyenjojo District; the Ministry of Foreign Affairs Uganda, Kampala; and the Embassy of Uganda at Washington D.C. in the U.S.A.
- (iv) The legal guardians shall submit a report on the child every six months, to the officials mentioned in (iii) immediately herein above.
- (v) Bringing Hope to the Family shall follow up the progress of the child; and make independent periodic reports to the Registrar High Court at Fort Portal, and the District Probation and Welfare Officer Kyenjojo.
- (vi) The District Probation and welfare Officer, Kyenjojo shall make similar periodic reports to the Registrar High court Fort Portal; of his findings and information regarding the progress of the child.
- (vii) The legal guardians shall ensure that the child is accorded the opportunity to come to Uganda at least once before attaining the age of 18 years.

The Applicants shall meet the costs of this application.

Chigamoy Owiny – Dollo

RESIDENT JUDGE, FORT PORTAL

22 – 06 – 2009