

**A PAPER PRESENTED AT THE 4TH
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**THE ROLE AND RESPONSIBILITIES OF
A JUDICIAL OFFICER IN RESPECT OF
ADOPTION, LEGAL GUARDIANSHIP
AND CUSTODY OF CHILDREN**

1. INTRODUCTION

The population of children in Uganda is relatively high comprising of more than half of the total population. The large numbers of these children are growing up in extremely poor and abusive situations.

The concept of children's rights is relatively new and widely misunderstood by many Ugandans, Judicial Officers inclusive, hence the need to fully appreciate the role of Judicial Officers in respect of cases of adoptions, legal guardianship and custody of children.

Children who go through the above process are in most cases very vulnerable and need protection of their fundamental human rights.

The Judicial Officer being the person vested with the power to grant the order or not, has to consider the case basing on the best interest of the child and not anybody else where best interest of the child is beyond the welfare principle.

2. RIGHTS OF CHILDREN

The Constitution of the Republic of Uganda provides under Article 31 (4) (5): “It is the right and duty of parents to care for and bring up the children. Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons except in accordance with the law.”

Article 34 (1) provides “subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up” and Article 34 (7) provides: “The Law shall accord special protection to orphans and other vulnerable children.

There are provisions on rights of children like education, medication e.t.c. but the right to be taken care of by a parent or other person authorised by law is the basis of this paper.

3. ADOPTION

Adoption is a legal process where a person(s) take into their care a child/children who are not born to them. The child-parent relationship is formalised through the legal process. It is a permanent relationship where the biological parents if known renounce their natural rights over the child.

In case one is a Ugandan, the Chief Magistrate has jurisdiction while High Court has jurisdiction for Applicants who are non citizens.

The Law has prescribed a period of 3 years for fostering before a petition for Adoption can be filed for non citizens.
(S.46 Children's Act.

It should be noted that:

- i) Uganda has not yet ratified, accepted or approved the UN Convention on protection of children and cooperation in respect of inter-country Adoption.
- ii) Uganda has no laws to establish safeguards to ensure that inter country adoption takes place in the best interest of the child.

iii) There is no system of cooperation between Uganda and the countries where the children are taken to ensure that safeguards are established.

iv) In Uganda, no person or body of persons has been designated to be the central or competent Authority to control or coordinate matters of inter country Adoption.

v) Court have placed the welfare principle above all other conditions prescribed by the Children's Act – to be precise, Courts have waived the strict observance of conditions such as residence or fostering for 36 months and granted Adoption Orders.

4. LEGAL GUARDIANSHIP

This is an order granted by the High Court allowing usually non citizens to have custody of Ugandan children and allow them to emigrate with them to their countries for purposes of Adoption in their countries.

There is no provision for legal guardianship under the Children's Act. The Courts invoke the provisions of Articles 139 (1) and 34 (1) and (2) of the 1995 Constitution, Sections 14, 33, 39 of the Judicature Act; Section 98 of the Civil Procedure Act and Orders 52 rules 1, 2, and 3 of the Civil Procedure Rules.

With the unlimited jurisdiction and wide discretion, backed by Court of Appeal decision in MA 38/2012 Arising from Civil Appeals No.70 and 81 of 2011.

In matters of Deborah Joyce Alitubeera and Richard Masaba where the Court of Appeal opened the way for legal guardians to apply for adoption in their countries, a non citizen can get a Ugandan child in one week, take to his/her home country for adoption.

Alitubera's decision was a departure from stringent conditions the same court had set in the case of Civil Appeal No.33 and 32 of 2006 in the matter of Haward Amani little and in the matter of Francis Palmer (an infant) where the Court of Appeal imposed the following condition

“In the event of an application for adoption, the infants, or anyone of the two, it must be filed in Uganda, failure of which, will result in the revocation of the guardianship orders.”

With the current precedent, it is very easy to traffic a Ugandan child using the legal system.

Legal guardianship is also used in situations where parents want to sell or mortgage property which is registered in the names of their minor children alleging, it is in the best interest of the child.

Foster and Care Orders

Applications are also basically for custody of the children who are alleged to be in need of care and protection.

The applications are usually made by directors of institutions such as children's homes and orphanages.

The care order gives them the legal authority to deal with the child which may be abused because they use it to handover children to third parties.

In cases of divorce, separation or broken casual relationships where children have been born, issues of custody and maintenance are very contentious and therefore calls for serious evaluation of the facts before a decision based on the best interest of the child principle is made.

5. THE ROLE AND RESPONSIBILITY OF A JUDICIAL OFFICER

Needless to mention, the cardinal role of the judicial Officer is to protect the fundamental rights of the child during the legal process.

1. Adoption and Legal Guardianship

Each case may present its peculiar facts. Nevertheless, the court should ensure that the decision made is in the best interest of the child.

- The court should strictly study all documents relating to the child and if possible verify them.

- Courts should strictly subject all evidence to scrutiny and evaluation to establish whether the child is adoptable, adoption being the last resort for any child.

- Court should ensure that any consents by parents or guardians was given without any inducement and after being informed of the effects of adoption or now legal guardianship.
(Case of Steward Bukenya)

- Courts to decide whether or not inter country adoption is in the best interest of the child and it is for his benefit and welfare.

- The court should conduct interviews in relation to all the documents submitted. Some documents are forged and some parents pretend to be aunties/uncles.

- Court should get and study evidence about the child's biological parents, the extended family on both paternal and maternal.

- Establish whether the homes are approved by Ministry of Gender, Labour and Social Development.

- Where are they located.
- Get evidence from the local area or police where the child was alleged to have been abandoned.
- Establish the authenticity of death certificates.

- Interview the Probation and Social Welfare offices who copy and paste reports to establish whether they visited the home or not.
- Establish the nature of the adoptive parents and financial ability to provide for the child.

- Be conscious about urgent applications as it is a tale tale sign of trafficking in persons.
- Establish whether the parent is indeed mortgaging the property or selling it in the best interest of the child.
- Involve both parents if they are both alive.

CUSTODY IN F.C.C.

In a situation where parents have serious disagreements, children suffer both physically and emotionally. They are traumatized by the separation of the parents.

The court has to be very careful when handling issues of custody. It should be the best interest of the child that should guide the Judicial Officer, far and above the welfare principle.

- Establish the most suitable parent to take care of the best interest of the child. Remember financial ability is not the basis of grant of custody.

- Where children are old enough, you may consult them but in the absence of the parents (in confidence).

- Consult close family members and friends to make an informed decision.
- Make orders which are enforceable and very clear.

Thank you for listening to me.

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