THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA.
HON. JUSTICE C.N.B KITUMBA, JA.
HON. JUSTICE C.K. BYAMUGISHA, JA.

CIVIL APPLICATION No.142 OF 2009

RWABUHEMBA TIM MUSINGUZI :::::::::::::::::: APPLICANT

VERSUS

HARRIET KAMAKUME :::::::::::::::::: RESPONDENT

[Arising from the judgment of the High Court of Uganda in HCT-00-FD-003 of 2008 (Egonda-Ntende J) dated 28/11/2008)

RULING OF THE COURT

This application is brought by notice of motion under sections 73 of the Civil Procedure Act, 10 of the Judicature Act and rule 40 (1) (b) of the Judicature (Court of Appeal Rules). It seeks orders that; -

a) **That a Certificate of Importance/leave to Appeal be granted to the applicant to appeal to this Court against the decision of the High Court of Uganda at Kampala given on the 28th November, 2008 (Egonda-Ntende, J) IN Family Division Civil Appeal No. 003 of 2008.**

b) **Costs of this application be provided for.**

The grounds for the application are;-

a) "*The High Court of Uganda has declined to grant leave to appeal or a certificate as required by the rules of this Court.*

b) The intended appeal raises questions of great public and general importance on matters of law touching the custody of children in the Family Court as shown by the draft Memorandum of Appeal to wit; -

i) Whether an appellate Court can decide an appeal on matters of law which were not included in the Memorandum of nor addressed by any of the parties.

ii) Whether a Court can grant custody of a child/minor to a person who made no application to the Family Court as required by law.

iii) Whether a person, other than a biological parent in either declaration of parentage, divorce or maintenance proceedings cannot apply for custody of a child.

iv) Whether a person, other than a biological parent cannot bring an application for custody of a child/minor under the Children's Act and Rules.

v) Whether custody can only be granted in total disregard of the welfare principle as set out in section 3 of the Children's Act as being a paramount consideration in custody cases and without the Court talking to or seeing the child.

c) That the Applicant has already lodged a Notice of Appeal and requested for the Record of proceedings as the record was being recorded electronically and it is still in the process being transcribed.

d) That the Applicant's oral application was rejected by the learned judge, immediately after delivery of judgment on 28th November 2008.

e) *It is fair, just and equitable that the certificate of importance that the matter concerns a matter or matters of law of great public importance be granted to the Applicant to appeal to this Honorable Court against the said decision".*

The application is supported by affidavit of Joy Ntabirweki, sworn on 11th December 2008. The background of the application is as per agreed facts in a joint conferencing before the Registrar of this Court is as follows; -

1. ***The respondent is the natural mother of one Ashley Kijumba, a minor.***
2. ***While the child was 2 years old the respondent went to London leaving the child with its father in the year 2002.***
3. ***After the respondent had gone to London the applicant who is a paternal uncle took custody of the infant.***
4. ***in the year 2006 the applicant applied for legal custody in the Family Court at Nakawa and he got custody of the child.***
5. ***The Respondent appealed to Chief Magistrate's Court at Nakawa but the Chief declined to hear it upon which the matter was allocated to Chief Magistrate Buganda Road who dismissed the appeal.***
6. ***The respondent appealed to the High Court which allowed the appeal.***

The agreed issue for determination before this court is; -

> **"Whether the intended appeal raises questions of public and general importance on matters of law touching custody of children".**

During the hearing of the application, learned counsel Mr. Kandeebe-Ntambirweki appeared for the applicant, and learned counsel Mr. Ladislous Kizza-Rwakafuuzi represented the respondent.

Counsel for the applicant contended that the issue raised question of public and general importance. He reasoned that the learned appellate judge found that there was no basis for the applicant to make the application in the Children and Family Court. Counsel submitted that he intended to show that section 80 (2) of the Children Act allowed the applicant to apply for custody. He argued that during the hearing of this matter in the Family and Children Court, the application was amended to include that it was also being made under s. 80 (2) of the Children Act. Counsel submitted that in interpreting the provisions of the section, each section and sub-section, stands on its own unless there is a cross-reference.

Counsel for the applicant urged this court to find that a person who is not a biological parent while having custody of the child may apply for legal custody without seeking for maintenance from the parents. In support of his submissions, he relied on the case of **Namuddu vs Uganda [2004] Z EA 2007**.

Mr. Rwakafuuzi, for the respondent, opposed the application on two grounds. Firstly, that the applicant informally applied for leave in the High Court to appeal to this court, he should have applied to the same court formally. He argued that this instant application before court was, therefore, incompetent. He submitted that the learned appellate judge based his judgment on Article 31 of the Constitution. According to counsel, the applicant who is an uncle had no legal provision under the Children Act by which he applied for custody of the child. He argued that counsel for the applicant had not made out a case for certificate of public and general importance to be given.

We have perused the proceedings and the submissions of counsel for both parties. On 28/11/2008, counsel for the applicant made an informal application to the High Court for a certificate to appeal to this court and it was refused. He was right to apply to this court. That is what is provided by Rules 40 (1) (2) of the Judicature (Court of Appeal Rules) Directions. In the premise the present application before us is competent.

In his judgment, the appellate judge quoted at length sections in the Children Act which deal with application for child maintenance orders and held that the application in the lower court was brought using a wrong section 76 of the Children Act. He further quoted section 73 of the Children Act and stated that in order to seek custody under that section one would be proceedings in relation to parentage and the custody of the child arises there from. He also stated that custody would be sought under section 80 of the Act of the child in maintenance proceedings. This is correct Section 80 of the Children Act provides; -

> **80. Appointment of custodian.**
>
> **(1)…….**
>
> **(2) The appointment of a custodian may be made on the application of a probation and social welfare officer or of the person having custody of the child or of the person against whom the maintenance order is made.**

He further considered the constitutional rights of the respondent regarding custody of the child in the instant application visa vie that of the uncle, the applicant. He stated thus; -

> ***'18. The applicant (in the trial court and now respondent) was in custody of the child as a result of the father of the child who had custody of the child giving the applicant custody. The father stated that he was unable to look after the child after it was left with him by the mother,***

(now the appellant) in these proceedings. In her affidavits in opposing the original application the appellant stated that she wants custody of the child, and that she is able to look after the child. It is not contested that the appellant purchased a flat (Block 17 C.4) on mortgage at Bugolobi, a middle class neighborhood in Kampala. She is the holder of Bachelor of Arts in Degree in Banking with Economic and Law of Leicester University. I have no doubt that she is able to look after her daughter, now that she has completed her studies.

19. Article 31 of the Constitution states in part,

> **'(4) It is the right and duty of parents to care for and bring up their children.**
>
> **(5) 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.'**

20. Parents have a fundamental right to care and bring up their children. This is a constitutional right. Of course it is not considered in isolation. The welfare of the child is a consideration to be taken into account, and at times may be the paramount consideration. A parent can only be denied the right to care for and raise her children when it is clear and has been determined by a competent authority, in accordance with law, that it is the best interest of the child that the child be separated from the parent. No such proceedings, under Part V of the Children Act, or any other provisions of the Children Act or other law, took place in the instant case.

21. Both parents have similar and equal rights with regard to their child. The father of the child elected not to look after the child. The mother wants to care for and raise her child. She is entitled to do so in law. The mother's right to raise her child cannot be ousted by a wealthy relative on the basis that the relative is well off and competent to look after the child. Or that the child having initially joined the wealthy relative by consent of one of the parents of the child and the blessing of the clan the

other parent is to be denied custody because the wealthy relative's children have gotten used to the company of the child. In effect that was the case put forward by the respondent.

22. The appellant is, as of constitutional right, entitled to custody of Ashley Kijumba, and I so order'.

The appellate judge was right in our view.

Section 73 of the Civil Procedure Act under which this application is made provides; -

"Where an appeal emanates from a judgment of a magistrate grade II but not an interlocutory matter, a party aggrieved may lodge a third and a final appeal to the Court of Appeal on the certificate of the High Court that the appeal concerns a matter of law of great or general importance, or if the Court of Appeal in its overall duty to see that justice is made considers that the appeal should be heard".

We have perused the authority of **Namuddu vs Uganda** (supra). From that case it is clear that the court will grant a certificate where the court from which the appeal is being made has not properly settled some aspect of the law or where it is considered that justice requires that the appeal should be heard.

On our part we find that the provisions of the Children Act are clear. They were rightly interpreted by the appellate judge. The memorandum of appeal raises no special grounds. The Constitution is the supreme law in this country and the judge properly applied Article 31 thereof on parental rights.

It is our considered opinion that no justice will be done by allowing a third appeal to this court. There is no question of public and general importance warranting the granting of a certificate to allow a third appeal.

In the result, this application is dismissed with costs to the respondent.

Dated this……25th ……day of……August…….2009.

S.G. ENGWAU

JUSTICE OF APPEAL

C.N.B. KITUMBA

JUSTICE OF APPEAL

C.K. BYAMUGISHA

JUSTICE OF APPEAL.