

A CRITIC OF THE LAW OF ADOPTION IN UGANDA

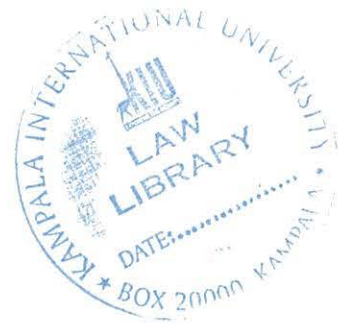
BY

ALIBANKOHA NOBERT

LLB/10029/81/DU

SUPERVISED BY

Esq. MR. WALABYEKI JIMMY



A DESERTATION SUBMITTED TO THE

FACULTY OF LAW

**AS A REQUIREMENT FOR THE PARTIAL FULFILLMENT FOR THE AWARD
OF BACHELORS DEGREE IN LAW OF**

KAMPALA INTERNATIONAL UNIVERSITY

JUNE, 2012

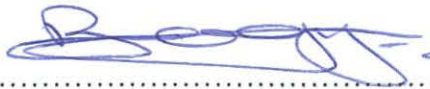
DEDICATION

Dedicated to my parents Mr. Alibankoha Zuwa Fredrick, Mbabazi Margret and Nyangoma Dalison.

DECLARATION

I declare that this thesis is the original work of ALIBANKOHA NOBERT alone except where due acknowledgement is made in the text. It does not include materials for which any other university degree or diploma has been awarded.

Sign



:

Date:

20th - 06 - 2012.

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of Bachelor of Law of Kampala International University

Mr. JIMMY WALABYEKI

Signed:



Date

26th June 2012

ACKNOWLEDGEMENT

I would like to thank my supervisor Esq. Mr. WALABYEKI JIMMY who agreed to supervise my work especially his guidance and directions which enabled me to produce this Work. "May god bless you"

Grateful acknowledgements also go to family members ALINAITWE MELAN, KUSEMERERWA BRIDGET, JOSEPH CHONRAD, ARNOLD ALIBANKOHA REBECCA and BASEMERA PHIONA

Am grateful to my fellow friends especially AKUGIZIBWE RICHARD, TIBAIJUKA ZULAIKA, KITARA TONNY, DOT NGUENY and TUMWESIIGE DANNIEL for the support they gave me while in Kampala International University.

However the errors in this paper are entirely mine. The blame can't be shifted on any of the afore acknowledged people above.

ABSTRACT.

The research is majorly set to critically examine the law relating to adoption of children in Uganda. Adoption refers to the vesting of parental rights and duties related to a child in the adopters on their application to the court vested with jurisdiction to grant an adoption order.

The topic is examining whether the law confirms to the social, economic needs of Uganda today, whether the law is not an obstacle to the adoption practice. The discussion will inter alia cover the jurisdiction of adoption applications, pre requisites, conditions , consent, inter country adoption, effects of adoption, procedure for adoption, wills by adopter and adoptive parents and revocation of property.

The Children Act Cap 59 has got un necessary technicalities, unreasonable conditions and requirements, a lot of inadequacies, a complicated procedure and effects which defeat the interests of legislation.

The major aim is to analyze the law relating to adoption of children under the Children Act Cap59

As earlier on noted ,the law is silent on whether the adopted child can voluntarily end the adoption, its very strict and the Act does not protect the child after the adoption order is granted.

The law should be amended to provide for voluntary ending of adoption by the child, the strictness of the law perse is not bad, it should be relaxed to encourage adoption, the law should provide for mechanisms of monitoring and ensuring that the adopted children are safe and are adequately catered for, the law should not only look at children in foster care homes but also others such as the street children.

It is my submission in conclusion that the law presupposes a complete and a total separation of a child from his or her natural parents to that of the adopter through the effect of the law. However, the law as it stands under the Children Act leaves much to be desired, various provisions were omitted and even those are not perfect in nature. Thus the law has to a large extent failed to conform to the social economic needs of majority Ugandans. Therefore it is highly doubtable whether the law relating to adoption will leave to the expectations of parliament if no immediate reforms are not made and effected.

LIST OF CASES.

1. Corventry Corporation vs. servey country council (1995) AC.199
AT 25
2. George Kagula, Rebecca Nabimera and Ronald ssekolya misc.
app.no.43/44/45of 1980
3. Grace Tumwebaze Namata Misc.app.No.59/98
4. Hewer vs. Brayant 8 (1970)1 ANDb p.373
5. Humphry vs. polak(1901)2 KB 388
6. In the matter of Elizabeth Ayee(an infant) adop.cause.no.130 of
2010 (2010)UGHC 66 2(2 November2010)
7. In the matter of Stella Miriam Nanyenqa Nankya Lwanga
8. In the matter of Laura.misc.(adoption)cause.
9. Juliet Jane Nakazibwe misc. app.adop.No.93/97
10. Kenneth Otto Lengmoi adop.cause.No.3/ 1990
11. Rep (1954)1 ALLER
12. Skinner vs. Carter (1948)ch 39

LIST OF STATUTES.

1. The 1995 constitution of the republic of Uganda
2. The children Act cap 59
3. The United Nations Convention On The Rights Of Children 1959

TABLE OF CONTENTS

DEDICATION.....	i
DECLARATION	ii
ACKNOWLEDGEMENT.....	iii
ABSTRACT.....	iv
LIST OF CASES.....	v
LIST OF STATUTES.....	vi
 CHAPTER ONE.....	 1
1.1 INTRODUCTION	1
1.2 STATEMENT OF THE PROBLEM	4
1.3 RATIONALE.....	5
1.4 HYPOTHESIS.....	5
1.5. METHODOLOGY	5
1.6. LITERATURE REVIEW	6
 CHAPTER TWO.....	 15
2.1.THE HISTORICAL BACKGROUND OF ADOPTION	15
CHAPTER THREE.....	19
3.1.THE PERIOD BEFORE THE PASSING OF THE ADOPTION ACT 1943.....	19
3.2.THE BAGANDA	20
3.3.THE BASOGA	20
3.4.THE BACHIGA OF WESTERN UGANDA.....	21
3.5.THE BANYANKOLE OF WESTERN UGANDA.....	22

CHAPTER FOUR.....	23
4.1.ORIGIN OF ADOPTION LAWS IN UGANDA	23
4.2.RECEPTION OF ENGLISH LAW IN UGANDA.....	23
4.3.THE BEGINNING OF LEGAL ADOPTION IN UGANDA	26
4.4.WHY PEOPLE ADOPT CHILDREN.....	27
4.5.CAUSES OF ADOPTION.....	28
5.1.CRITICAL ANALYSIS OF THE LAW RELATING TO ADOPTION	30
5.2.THE UNITED NATIONS DECLARATION ON THE RIGHTS OF CHILDREN, THE UNITED NATIONS CONVENTION OF THE RIGHTS OF CHILDREN AND THE LAW OF ADOPTION IN UGANDA.....	42
5. 3 INADEQUANCIES OF ADOPTION LAW	44
 CHAPTER SIX	 45
6.1.RECOMMENDATIONS.....	45
6.2 CONCLUSION.....	47

CHAPTER ONE

1.1 INTRODUCTION

Adoption refers to the vesting of parental rights and duties related to a child in the adopters on their application by an authorized court.

The adoptive parents like guardians and custodians stand in law parents to the child to whom they are not necessarily related in blood.

Historically, before the enactment of the law relating to adoption there was the child care system for deprived children in Uganda. As several developments in the country took place, these traditional means went on dying out and parents began deserting their children and the children lives were at stake. However this led to the enactment of the Adoption of Children Act by government which was to make provisions for the adoption of children so I can say that the aim of adoption of children is to look after the deprived children thus those who have lost their parents or deprived of their homes and are lacking parental care and custodial care.

Traditionally most societies in Uganda had their own method of providing for their own children whether motherless, completely orphaned or illegitimate however its important to note that the law relating to adoption of children in the Adoption of children Act was based on the law of England and therefore this law was designed to suit circumstances of the British Adoption of children Act.

In England adoption is associated with the desire to nature a child as a natural child of the adopters; this is also the case in Uganda though adoption has important effects on citizenship succession and other legal rights. Their rights must be evidential to the factual relationship of dependence between the parent and a child in contrast .In some

jurisdictions adoption may be used primarily to confer succession rights on the adopted person.

It is the aim of this paper to analyze the inadequacy or the lacunae in the law relating to adoption of children in Uganda under the Children Act Cap 59.

Further more to provide solutions to curb down the lacunae as far as the law relating to adoption of children is concerned indicating areas which require further inquiry.

To stimulate interest in the public such that they can embrace the notion of adoption of children.

The western concept of adoption which requires that the natural parents irrevocably terminate their parental rights and obligations and responsibilities ¹to the adoptive parents is still a puzzling thing to Uganda and most African states because it doesn't conform to the accepted way of integrating children into the family.

As already said traditionally each society in Uganda had its own method of providing for its own children whether motherless, completely orphaned or illegitimate.

Although many of these methods approximate to adoption in the western sense in that the child is completely brought up by another family, it doesn't involve total surrender of a child to a new family and loss of right to reclaim. For a child to be a full member of any family in the traditional societies there must be some blood relationship which can be found through the kinship system. So the idea of owning a child through the legal adoption practice is not quite easily understood in the eyes and minds of society. This means that the western concept of adoption which requires that natural parents irrevocably terminate

¹ Children statute 1996

their parental rights and obligations and responsibilities still remains up to date a stumbling block to Ugandans because its not in conformity to the accepted way of integrating children into the family.

It's important to note that the Children Statute of 1996 repealed the Adoption of Children Act, Cap 216 laws of Uganda which is now the main authority which I will critically analyze.

The Act² provides under S.44 (1) that an application for an adoption order may be made.

a) To a Chief Magistrates Court within the jurisdiction of which the applicant or the child resides where both the child and the applicant are citizens of Uganda.

b) To the High Court where the child or the applicant isn't a citizen of Uganda and the court may subject to the provisions of this Act grant the application.

A legal adoption is effected by an adoption order made by the court on an application by opinion called the adopter wishing to adopt an infant.

A child is defined in section 2 of the Act³ as a person below the age of 18 years.

According to the statute an application can only be considered when the applicant has fostered the child for a period of not less than thirty six months under the supervision of a probation and social welfare officer. The major difference between foster care and adoption is that through foster care a child can be found a temporary home or parent substitute while in adoption a permanent home or parent substitute.

² Children Act cap 59

³ Supra

Adoption proceedings are not limited to the High Court at the same time according to S.44 (2) ⁴a child need not be a Ugandan to be adopted the restrictions to and conditions of adoptions under the Children Act are basically the same as the provisions under the Adoption of Children Act of 1943 there is however a significant difference in that it is now possible for a sole applicant who is not a mother or father of the child to be granted an adoption order. The applicant or in the case of joint applicants at least one of the applicants should have attained the age of 25 years and be at least 21 years older than the child.

The court before making an adoption order must be satisfied that all reports required have been dispensed with and that the person especially the parent granting such consent understands the nature and consequences of the adoption court must be satisfied that the order if made will be for the welfare of the child and must give due consideration to the wishes of the child having regard to the age and understanding of the child pursuant to section 3 of the children Act.

Thus an adoption order can only be granted by a court of competent jurisdiction and requirements as provided for by the law and the procedural practice.

1.2 STATEMENT OF THE PROBLEM

My topic relies on adoption and the criticism of the law of Adoption. I will be assessing whether the law conforms to the social economic needs of Uganda today, whether the law itself is an obstacle to adoption practice. So what will be looked at hereunder include the jurisdiction of adoption applications, prerequisites, conditions, consent, inter country adoption, effects of adoption, procedure for

⁴ Supra

adoption, wills by adopter and natural parents and revolution of property.

1.3 RATIONALE

It's indeed true that our streets are flooded with children because they have no one to care for them. These children are entitled to a right to normal life however due to wars, AIDS scourge, have led to many orphans and abandonment of children. Even there are parents who also are financially bankrupt and can't adequately cater for their children so that's why we see streets flooded with kids.

So in a bid to solve these problems, adoption is one mechanism which addresses the issue and the law relating to adoption should not instead be an impediment and obstacle to the practice. So by analysing the law relating to adoption as under the Children Act we shall be able to find a solution to the problems of the unfortunate and deprived children of Uganda.

1.4 HYPOTHESIS

The Law relating to adoption as under the children Act CAP 53 has got unnecessary technicalities, unreasonable conditions and requirements, a complicated procedure and effects which defeat the intention of parliament.

The law also frustrates intending adoptive parents. It also doesn't address all the adoption problems hence there is need for a review and this law also doesn't conform to the economic social needs of Uganda, so there should be an integration of the whole problem of adopted children and the law into the social sphere.

1.5. METHODOLOGY

I have obtained most of my materials from the library thus from News papers, case reports, Text books , various legislation, case law has

been relevant for my research by ascertaining the role of law and the courts as far as legal Adoption of children is concerned.

This is intended to give the real situation on the ground especially after the enactment of the children Act. However due to the limited time given to me, I have majorly concentrated on the children Act as regards my research topic.

1.6. LITERATURE REVIEW

There is little existing literature, which relates to the topic in Uganda. However there is some information from a few sources. The significance of custody is based on the protection and welfare of a child. Welfare has been defined by Benard Passingham to include access and custody, education or training and financial provisions.⁵ He puts emphasis on the fact that the importance of custody is to cater for the welfare of the children including adoption of illegitimate and legitimate children. These matters in all cases can rightly be left to the discretion of the parents, for instance when a marriage has broken down the issue of children may just be neglected a situation which calls for protection of the law. The court is empowered to ensure that satisfactory arrangements are made and justice is administered.⁶

However Passingham doesn't define the concept of custody instead he emphasizes the importance of custody. From his literature the definition still remains uncertain. Perlman⁷ has observed that children are left with their mothers to the age of 10 or 12 among the Batoro. This is because it is considered natural that a woman will take better care of her own children than those of another woman regardless of the fact that they are also children of her husband⁸ . She further

⁵ B Passingham (law and practice in matrimonial cause.op.cit.p.173)

⁶ B Passingham (London Butterworth's) op.cit. p. 173

⁷ M Perlman Toro Marriage op.cit.p.192

⁸ M Perlman Toro Marriage op.cit.p.192

emphasizes that children born out of wedlock are entitled to inherit from their father's estate. They belong to the father in actual fact since the Toro society is purely patrilineal.

Perlman gives the position of the children under the customary law of custody, she clearly points out the rights of custody, but she only addresses her self to one community. So one can not rely on her literature to represent various tribes of Uganda where each has its own customary law. She fails to address her self to the concept of custody in the traditional society of Toro in detail. This would at least give a clear picture of traditional position in the society.

Kayongo Male⁹ addresses himself to circumstances that give rise to custody but doesn't actually define it. The circumstances as laid by 'Male' are divorce, separation, and death of parents and pregnancies out side wedlock. From his analysis there are fewer cases in African communities of custody decisions involving parents who are still living together but are accused of neglect or physical or mental abuse of a child. Where such an instance arises though rare in Africa, the children could be given to the other relatives. He also analyses the position of such deprived children under customary law. The children being in custody of the extended family unit in cases of illness or death of the parents simply entailed a relative taking over responsibility of the child.

Male's analysis doesn't define the concept of custody. He defines the rights but doesn't point out the factors that are taken into consideration while awarding custody, which is bride price in the African context.

⁹ Kayongo Male op.cit.p.54

From the analysis of Poulter¹⁰ the right to custody of legitimate children doesn't in here exclusively vest in the husband as the head of the family, but he addresses him self specifically to Sotho community where customary law vests the rights exclusively in the father.

However his views relate to the customary position as he says that if the marriage has broken down, the husband must call the family meeting first and attempt a reconciliation with his wife before applying to court to divest his wife of the children in the divorce proceedings. He emphasizes the welfare principle exercised by courts that a child who has been removed from its guardian's custody should be returned immediately following a court order.

Since this paper is purely geared at achieving academic goals, poulter's analysis is relevant for purposes of comparing the traditional position in Uganda with Sotho traditional society. **Bevan** ¹¹defines custody by giving it a primary and wider meaning "primarily it means "right to physical care and control, it's the correlative of the duty to protect" he gives the wider meaning from care law.

Bevan gives the detailed definition of custody, but he doesn't specifically show the rights to custody in his definition. So he uses law as laid down in HEWER VS BRAYANT¹² .

According to **Lucy Mair**¹³ custody of children or child is dependent on the institution of bride price under custody law; the rights of custody are vested in the man until bride price has been returned. This is regardless of whether the children belong to another man or not.

¹⁰ S.Poulter Family Law and Litigation in Bosocho Society(London Oxford)1976.p.183

¹¹ 7 the law relating to children (London Butterworth 1973 .p.256)

¹² HEWER VS BRAYANT (1970)1ANDb p.373

¹³ Lucy Mair op. cit 94

Lucy Mair only lays down the rights to custody but gives no definition. The actual meaning of custody in the traditional sense still remains unclear.

According to **Allen George**¹⁴ adoption exists in various forms throughout the world and dates back to antiquity childlessness, the wish for a heir and compassion have all played their part in establishing it as an important social institution. Formally, it was often regarded as a means of furthering the interests of the adopters. More recently the concept and the purpose have changed; attention now focuses primarily on the child. In principle his need, his right to love, security and normal family upbringing are more clearly recognized. This has resulted from the greater awareness that children who have suffered the loss of their parents care must be adequately compensated if their proper development is not to be jeopardized and has in turn led to more concern about how homeless and deprived children are cared for.

Adoption is often seen as most desirable provision if the child cannot be reunited with his or her family. Indeed the **Hurst committee**¹⁵ which reported in **1954** went so far as to claim that there can be no doubt that adoption is generally a much more satisfactory solution than any form of institutional care or foster care.

The aims of English practices are adequately summarized in the following definition of adoption. "It is the method provided by law of establishing relationship of parent and child between persons not so related by birth with same mutual rights and obligations that exists between children and their natural parents".¹⁶

¹⁴ Adoption Policy and practice

¹⁵ Report of the department committee on adoption 1954

¹⁶ Adoption Policy and practice

Ideally care taken, to protect the three parties concerned, children, natural parents and adopters from risk, may lead to unhappiness. Children for example must be protected from adoption by parents who are unsuited to the responsibility of bringing them up or want children for their wrong motives. Similarly, the natural parents must be protected from hurried or panic decisions to give up their children and from being persuaded to place them unsuitably. In turn adopters must be protected from under taking responsibility for which they are not fitted or which they have not appreciated. In Georges study the selection criteria of the applicant were Age, Religion or the Size of the struggle of their existing family.¹⁷

With regard to adoption **J.F Josling**¹⁸ submitted that it is the vesting in another person of the parent's rights and liabilities with regard to a child.

A legal adoption is affected by an adoption order made by court on an application by the person wishing to adopt an infant. The solemnity and importance of adoption have been emphasized by **Lord Greene Mr. in the case of SKINNER V CARTER**¹⁹ when he said that the importance of court is not to approve mere accommodation adoption. Adoption normally presupposes a complete and formal separation between the child and its natural parent. The child looks hence forth to the adopter as its parent and natural parent relinquishing all their parental rights and duties, step, as it were for ever out of the picture of the child's life.²⁰

In many African Societies deprived children used to be cared for through the extended family system. In Uganda each family had a definite way of caring for such children for example the orphaned and

¹⁷ Ibid pg2

¹⁸ Adoption of children pg1

¹⁹ SKINNER V CARTER (1948) ch 391

²⁰ In quest of foster parents Dorothy Hutchinson pg 10

illegitimate. In Uganda the study done by **Wandera Nabaho** (**substitute child care page 4-6**) has confirmed this. He studied several tribes among which were the Baganda, Bachiga, Banyankole and Acholi. This study however and some other have pointed out that traditional ways of care have become inadequate especially due to urbanization and industrialization. In his study **Nabaho** attributed the inadequacy to three factors namely introduction of western education, religion and introduction of a market economy and industrialization.

In her book, Dorothy **Hutchinson**²¹ submitted that the incentive of prospective adoptive parents is of greatest importance in home finding not so much because it is an end in itself as that the incentive may be a vital indication of people these are and what kind of adoptive parents they will become. There are many things one could say about prospective adoptive parents but their wish for parenthood always revolve around the psychological question of getting a baby.

Foster care is a pre-requisite for adoption; **KADUSHINI**²² submits that foster care involves substituting another family for the child's own family. Such drastic change is necessary when the child's own home presents serious deficiencies that it can't provide the child with minimally adequate social, emotional and physical care. In effect the child's own parents are incapable or unwilling to implement the essential aspects of their parental role so that the parents surrogates needs to be assigned the status of the parent to this child and enact the role for him. It involves for a child not only temporally separation except for visits, for his own family and adjustments for a new family but also change of location school and a change of peer and sibling group.

²¹ Supra

²² Child Welfare Service

In his book **GLICKMAN**²³ submits that the empty nests often will be the source of motivation for rearing foster children. When a couple still vigorous and in the prime of life find their children grown and gone from their home, they may have a need to sub climate. Their wish might be a use, their capacity to be parents on account of challenges and creativity that exist in rearing children while at the same time they crave the companionship and response children give, the natural rewards of parenthood.

Children coming into care are broadly categorized as the deprived but since they are, and can be various types of deprivation more clarification is needed.

Boss study in England revealed that those children, who had been admitted into care, fell under such categories as orphaned, deserted and whose parents were physically or mentally ill or for other reason were unable to look after them.

Mass Eugler, study also indicated that most children needed substitute childcare mainly as a result of neglect and abandonment. Eugler submitted that situations requiring foster care includes: -

When there is marital disorder so severe that care of the child suffers and the child might be damaged by prolonged exposure to such conflict. The presence of the child makes resolution of the marital conflict more difficult. To reduce pressure on both the child and marriage , the child is temporarily placed.²⁴

Also as a result of divorce, separation or desertion the family has been broken and the remaining parent feels that he or she can't continue to care for the child while she re-organizes herself in the way that may

²³ Ibid

²⁴ Problems and Practices of Child adoption pg 8 . 364

permit the ultimate return of the child. Abuse and neglect by the child's own family represents danger to him.

The nature of foster family care suggests that it's a feasible resource for a child who has the capacity to participate in, contribute to, normal family living. Such case would be in appropriate in the following cases:

-

If the child is undisciplined in a family or community and his behaviors are intolerable. In case of a child whose handicap requires the same special care and or training beyond that which can not be afforded by the family or community.

Also in cases of special situations that might suggest the use of substitute care facility other than foster.

Reasons why people want to adopt children are explained by **Rowe Jane**²⁵ who submitted that they do so because of a variety of reasons, some of which find it hard to explain. Most couples want a family because they enjoy children and feel that life is not quite complete without them.

Other reasons include failure to get children, companion for an only child, replacement of a lost child to mention but a few.

Sources of children for adoption include the illegitimate children, abandoned and neglected children, orphans; legitimate children voluntarily surrendered for adoption by their parent, foreign born children.²⁶

On application and during the selection of suitable adoptive and foster parents, various adoption policies are put into consideration, motive of the parent is one of important facts considered when accessing

²⁵ Yours by choice

²⁶ Ibid

adoptive parents. Different foster and adoptive parent have different motivation and therefore different processes to fulfill in fostering or adoption assessment is aimed at getting some one who is interested in the child.

According to **Wandera Nabaho**²⁷ he clarified that age is another factor to consider that there was a clear cut policy concerning the age at which would be foster parent are determined.

Parker, in his study pointed out that there is a tendency to collect older foster parents. As per assessment of adoptive parent the available studies indicate that some of the factors on which assessment of adoptive parents is based, is the same as those in assessing foster parents.

All in all the analysis of the concept of custody has been by sociologists this is a weakness because it lacks the current legal principles of law considering the date when these sociologists carried out their study. Their information is nearly outdated because it excludes the recent changes and developments. However, considering the literature and information from various authorities adoption does exist in various societies and are almost similar causes of adoption and various policy consideration are followed in selection of either foster or adoptive parents.

²⁷ Child Substitute care

CHAPTER TWO

2.1.THE HISTORICAL BACKGROUND OF ADOPTION

Adoption dates back in late centuries and even the bible clarifies it. Pharaoh's daughter adopted Moses and Medicaï Adopted Esther. The code of Hamurabi mentions adoption and the protection that should be given in the adoptive parent.²⁸

A number of adoptions have occurred throughout the world which inter alia include but not limited to that of Moses, and its piece of splendid dramatic irony that the Decalogue, the foundation of social conduct was given to us through the medium of an adopted child, abandoned infancy who later became the great Hero not only to the Jewish race but to the entire Man kind²⁹.

It is important to acknowledge that in ancient Greece and Rome, child adoption was bound up with the whole pattern of family religion, inheritance and organization. The ancestral graves had to be tended and appropriate rights performed either by legitimate or an adopted son, even before solon in 594 BC Aristotle knew the practice and did here-dotes.³⁰

In early Rome, the people who had more children were preferred compared to people who had few children and this was seen as a sign of prestige.³¹

Among the Hindus the adoptive father declared to the adoptive son, "I accept thee for the fulfillment of religion, I take thee for the continuance of lineage" like the Chinese among the Hindus the need

²⁸ Child welfare services kadushin pg 1

²⁹ The Adopted Child pg2

³⁰ Child welfare services kadushin pg 1

³¹ Ibid.

for adoption was specifically for a Male child because "Heaven awaits not one who has no male issue".³²

According to the book entitled "The Adopted child" there was a little body of common law regarding adoption³³, consequently there was little precedent for adoption procedure in colonial America. Abbot³⁴ notes, "Provision for care of dependent children by means of adoption was probably delayed by the development of the relationship between master and apprentice" so that orphans and children and indigent parents could be bound out to obtain care in this way. Prior to the passage of general adoption laws, state legislatures followed the practice of passing special Acts providing for the adoption of particular children by particular adults. By 1929 every state had passed some kind of adoption legislation.³⁵

Josling submits³⁶ that until the Adoption of Children Act 1926 English law did not recognize adoption as such at common law such liabilities and risks were not transferable as this was observed in the case of **HUMPHRY V POLAK**³⁷ per Sterling that a contract between the mother of an illegitimate child and another person for the transfer to that person of the rights of the mother in respect of the child was unenforceable. De war³⁸ submits that the movement to legalize adoption in England was an oblique result of the 1914 to 1918 war which robbed thousands of families of their sons and caused illegitimate birth to reach a new peak. World War II with its horrors, stimulated acceptance of new ideas and sympathisers. This new search for more liberal and compassionate attitude cytolysed between the war in the

³² Ibid.

³³ The Adopted Child pg4

³⁴ The Child and The State Volume 11 Chicago(1938)

³⁵ Ibid.

³⁶ Adoption of children.

³⁷ HUMPHRY V POLAK (1901) 2 KB 388.

³⁸ Orphans of the living pg 31.

Adoption of Children's Act 1926 which legalized adoption but left room for abuses the way it was carried out. Better safeguards for both children and adoptors' were achieved by the later regulation which has now been consolidated in the 1959 Adoption Act.

It is important to acknowledge that the whole subject of the various customs, both historical and modern, bound up with adoption in different parts of the world is the most fascinating and rewarding one. It's known for instance that it was customary for slaves to place an infant on the lap of a Hebrew wife who was barren. Such a child would be brought up as a free adopted member of the family but it is doubtful whether he could inherit land from his adoptive parents.³⁹ One of the most thorny problem attendants on the whole subject of child adoption has always been in the future of the child born out of legal wedlock. In countries where concubinage age was accepted the child born out of such relations very naturally had his own defined status.

After the First World War every national conscience was particularly sensitive about its children after the devastation of war. The Adoption of Children Act of 1926 followed the First World War and it was no ancient that the great Curtis report appeared in 1946 a year after the cessation of the second international conflict.

³⁹ The Adopted Child pg33.

So adoption can clearly be seen from above information that it is not a recent practice. It did exist right from ancient times though it wasn't so much wide spread. It was basically an individual basis and generally not recognized by law in different states. Adoption in many countries only took legal cognizance after the devastating catastrophes of the first and the second world wars which left behind an enormous number of deprived and needy children.

CHAPTER THREE

3.1. THE PERIOD BEFORE THE PASSING OF THE ADOPTION ACT 1943.

In this chapter discussion is going to be based on the traditional care for the deprived children in Uganda.

The 1995 constitution of the republic of Uganda recognizes 56⁴⁰ tribes and available evidence from anthropological and other studies indicate that in all these tribal societies there was provision for all the deprived children. By deprived children it means that those children who from loss of their parents or any other cause what so ever could not get such needs as adequate food, clothing, shelter, protection or emotional health. Although the arrangement and quality of care for these children deferred from one society to another, what was so common in all these societies was the fact that they all met needs of the deprived children through the extended family systems. This is illustrated by the description of the traditional child care system for the deprived children in five societies.

The selection of these societies is based on 3 criteria's:

First, they were among the earliest to come into contact with and be studied by the colonial anthropologists, missionaries and historians. Therefore there is wealth material on their traditional customs and practices.

Second, it is felt necessary to discuss these tribes because they are well known in the country.

Thirdly, for historical and other reasons each of the societies selected has had some influence on its neighbouring societies such that the

⁴⁰ The 1995 constitution of the republic of Uganda.

language, customs and practices of these societies are much more like those of the tribes not included in the description.

3.2.THE BAGANDA

Among the Baganda, the death of the parents did not deprive children of the basic and other needs available for other children with-in the society. When the head of the family died, the widow together with the children stayed in the home of the deceased to keep the land and property of the deceased until his sons grew to adulthood. The sons of the deceased were true heirs and could therefore take over all the property formally owned by the deceased father. As regards children born out of wed lock, they were provided for by either the extended family of their mothers or that of their fathers. If a man who made a girl pregnant chose to marry her, if on the other hand the marriage didn't take place the parents of the girl would look after the child. The needy children among the Baganda were provided for by the extended family systems and this was without regard to the marital status of their parents. There is evidence that children born out of wedlock, as it will be seen later were easily within the extended family system unlike the Bachiga who didn't.

3.3.THE BASOGA

The responsibility of caring for deprived children among the Basoga fell on extended family members, unlike the Bachiga and Banyankole and like Baganda and Acholi, children born out of wedlock were provided for just as any deprived children regardless of the circumstances leading to their birth. Premarital pregnancies usually ended up by the parent concerned, where marriage didn't take place, the child could only join the family of the putative father on payment of a cow or a bull as a fine. Failure of the putative father to pay the fine, the maternal parents or her maternal relatives would shoulder the full responsibility of providing for the needs of such a child until adulthood.

If the putative father neither married the mother of the child nor paid the fine the child would remain with the parents or relatives of the mother forever. On attaining adulthood, the grandparents or close relatives of the mother would give him land on which to settle and would also be responsible for paying bride price paid on her marriage. From the afore said, it can be said that all the orphans or half orphans, that is children whose one of the parents was dead were provided for through extended families.

3.4.THE BACHIGA OF WESTERN UGANDA

The Bachiga are found in Kabaale district the provision for the deprived children was available for only the children who were born through recognized customary marriages. Thus, if a child lost his father, the extended family provided for his needs just as it did for any other children in the society. The wife of the deceased was married through the extended widow inheritance system and it is the heir, the man who remarried on whom direct responsibilities of the caring for the child fell, like in all societies children belonged to the whole clan and so the heir took responsibilities on behalf of the clan.

Unlike the Acholi, the Bachiga didn't tolerate the children who were born out of wedlock. It was considered a very serious disgrace to the family. If their daughter became pregnant out side marriage and if it happened the girl was regarded as un fit to live in their families and clan as a whole and were in most cases thrown over the cliff to die⁴¹ . The fore going account suggests that among the Bachiga, the provision of substitute care was made available for the deprived children of recognized marriages through extended family system, which have acquired good reputation. It can also be implied that there was high

⁴¹ M.M. Edel, The Chiga of Western Uganda London, Oxford University Press pg68

degree of value attached to the children who were born in traditionally constituted families only.

3.5.THE BANYANKOLE OF WESTERN UGANDA

Provision for the deprived children among the Banyankole was collective through extended family systems. As in the cases of Bachiga the provision for the deprived children among the Banyankole was only meant for children born of the recognizable marriages. The extended family was not expected to care for the children who were born out of dubious circumstances.

Given such a background it is apt to conclude that adoption which is currently realized didn't exist in traditional African societies but there was well established system of caring for children who would otherwise have been adopted.

As per the causes of adoption on either side of the deprived children on the adoptive parent there existed other alternative, which didn't give the adoption chance to be practiced e.g. failure of married couples to produce a child they always resorted to polygamy. Kitembo submits that polygamy in traditional Africa was certainly not merely and it certainly helped to stabilize the institution of marriage and to integrate the family with society. He goes further to submit that polygamy also catered for childless union so childlessness could not be a cause of adoption.

CHAPTER FOUR

4.1.ORIGIN OF ADOPTION LAWS IN UGANDA

Though there was no adoption in African Traditional Societies, today in Uganda it exists and it's backed by Law so we are going to see how Ugandan Law came to recognize adoption.

4.2.RECEPTION OF ENGLISH LAW IN UGANDA

Josling⁴² submits that until the Adoption Act 1926, English Law didn't recognize adoption as such. Though it did exist in England, adoption was basically a common law practice. By definition common law is the law of England that was not a creation of the law legislature but originated from customs and culture of the British which were followed by judges in courts when entertaining cases.⁴³

In Uganda before colonisation and intervention of the Europeans, society was governed on customary principles. Strict rules of behaviour were necessary for keeping social order as well as sanctions for those who defaulted. This gave no chance to children lacking care thus leaving no room for adoption practice.⁴⁴

It's important to note that Africa was partitioned into Colonial powers and this led to tremendous change.

Britain governed Uganda through indirect rule in a bid to fulfill the goals of finance capital, Britain had to export her ideologies and this explains why British law was transplanted to Uganda.

By the 1911 order in council, the common law was imported wholesale from England. This order in council which amended the 1902 order in council provided that in so far as the Indian Codes named in the 1902 order in council didn't apply. The jurisdiction of the High Court was to

⁴² The Adoption Children pg11

⁴³ Introduction to law

⁴⁴ Custody of children

be exercised, in conformity with the substance of the common law. The doctrines of equity and statutes of general application in force in England in the 11th day of August 1902 and with powers rested in an according to the procedure and practice observed by and before the courts of justice of the peace of England.⁴⁵

Common Law was to apply subject to local circumstances. This qualification was attributed to the fact that the English Common Law evolved under different social economic conditions. Therefore direct application would not have been fair to a different kind of people whose ways and culture were designed in a different fashion.

It's important to note that there existed customary laws as a body of unwritten rules recognized by communities which was to be applied subject to the repugnancy clause in order to discourage customs which were not acceptable in English culture and this led to erosion of customary law.

Akatwongyera⁴⁶ submits that it's because of industrialization and urbanization that the traditional ways of child care have weakened and this has led to the beginning of legal adoption in Uganda thus the need for-clothing, education to mention but a few, and this leads to parents deserting their homes. Nakiyingi⁴⁷ submits that it was a result of collective nature that people automatically took up the spirits themselves to look after the motherless children, destitutes as a result of poverty and war this came from the spirit of African Traditional Society where children were looked upon by society as an achievement to the whole society.

⁴⁵ The 1911 order in counsel

⁴⁶ Legal Adoption of children in Uganda pg 21

⁴⁷ Violation of rights of children pg 21

Nakiyingi put several reasons as already discussed that led to the emergency of children who need substitute child care according to her they include, abandonment of children, parents being unable to care for many children, industrialization and urbanization, so all these conditions and factors necessitated the enactment of laws that would protect children she submits that the state came up with such Acts like the affiliation Act and Adoption of Children Act.

International community strived so much to ensure that all nations had laws which adequately provided for rights of their respective children. This can be illustrated by a look at the United Nations convention on the rights of children.⁴⁸ Whose origin can be traced back to the basic principles for child welfare and protection set out in the declaration of Geneva promulgated in 1924 by save the children. This was the first attempt to codify into one text the fundamental conditions to which children had a right. The United Nations convention on the rights of children in its provisions there in provides for adoption.

Due to introduction of cash economy traditional ways of caring for deprived children were done away with and Colonialism came with foreign law which law recognized adoption. So as per the 1911 order in Council common-law which is the root of adoption was to be applied in Uganda. The United Nations also agitated for protection of children rights and provided for the same among which was adoption Laws. So it was not by accident that Uganda came up with the Adoption of children's Act in 1943 which Act has been repealed by the Children Statute of 1996 which is the current main governing law of children in Uganda.

⁴⁸ The United Nations Convention on the rights of children

4.3.THE BEGINNING OF LEGAL ADOPTION IN UGANDA

Due to urbanization and industrialization traditional ways of childcare have weakened, thus children have been clothed, they need education, health services to mention but a few. Many cases have arisen due to the increased large families, where a parent deserts a home because he or she can't cater for big number thus the children are left deserted. The parliament therefore passed Acts like the Adoption of Children Act to cater for the needs of such deprived children. This marked the beginning of legal adoption of children in Uganda.

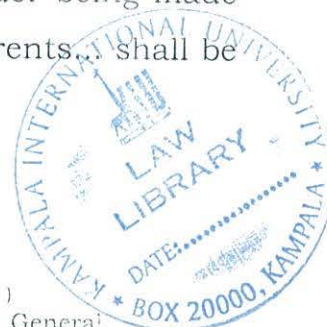
The Adoption of Children Act marks the beginning of legal adoption in Uganda. The Adoption Brown⁴⁹ in a book entitled "Introduction to social administration", the most important need so far a child is to receive personal attention and genuine affection and according to Andry Preharch in a book "Delinquency and parental pathology"⁵⁰ child needs a warm feeling that derives from his relationship with his mother, if this is lacking, anxiety feelings are present and a state of maternal deprivation developes... complete deprivation entirely cripples the character development".⁵¹ This is why adoption aims at offering a permanent substitute family or parents for a child and Moore in his report on adoptive services in Kenya refers to adoption as the total and irrevocable termination of the natural parents' right and responsibilities to the adoptive parent." This is in line with the law of adoption as provided by the Adoption of Children Act.

According to section 7 of the Act upon an adoptive order being made all duties, obligations and liabilities of the parent or parents... shall be

⁴⁹ MURIEL BROWN. Introduction to Social administration(London Hetehuson and co ltd 1969)

⁵⁰ ANDRY RICHARD. Delinquency and parental pathology/ health organization General

⁵¹ Supra.



extinguished and all such rights, duties, obligations and liabilities shall rest in be exercisable by and enforceable against the adopter.⁵²

In Uganda however, since the passing of the adoption of children Act few African children have been adopted under the Act. The reasons as to why there are so few children Adoption being a new practice in Uganda aren't well understood. The other reason might be that although they have been undermined. There are still strong Kinship systems and extended family obligations towards the orphans. The illegitimate and other categories of children could probably be considered to be some of the main reasons why there are few legal adoptions so far. Besides these possible reasons, other reasons are based on the Act itself.

4.4.WHY PEOPLE ADOPT CHILDREN

People adopt children because of many reasons, others adopt because they have none, others because they want a balance in their children. Thus if they have produced boys only they may decide to adopt a girl thus this will lead to sex balance among children.

Some people adopt because of sentimental reasons for example if one witnesses the killing of birth parents of the child or see an abandoned child. The best examples, from HOIMA Buhinba, 7 kms Hoima Fort-Portal road or from Luwero triangle who are orphans.

In the matter of Grace Tumwebaze Namata⁵³ the applicants were granted guardianship instead of adoption because they could not qualify to adopt as they were nationals of Belgium. However in granting guardianship, the court stated that this child had been picked from Luwero where she had survived war, and the applicants didn't appear to have any other motive a part from charity.

⁵² Adoption of Children Act 1943 cap 216

⁵³ In the matter of Grace Tumwebaze Namata Misc. APP. No. 6 of 1989

4.5.CAUSES OF ADOPTION

These causes include liability, failure and absence or unwillingness of the natural parents to provide sufficiently for the needs of children.

As far as absence of natural parents or one of the natural parents is concerned it's illustrated by, **in matter of Laura**⁵⁴ (allias Lora Weir, the petitioners were step-father and Natural Mother respectively of the said Laura. The child's father was Peter Weir but his where abouts were known and an adoption order was granted.

In "child's care needs and Numbers"⁵⁵ other reasons are due to incomplete families where one or both parents are missing through death, abandonment, desertion, divorce or some unclassifiable emergency connected with their health or were never or are not a complete unit as in the case of an illegitimate child whose mother is unable to provide for or wants him placed for adoption .Many of the children who are adopted are those whose parents are or one of their parents is dead for example in **George Kagula, Rebecca Nabimera and Ronald ssekolya**.⁵⁶The father of the children was dead and order for adoption was granted to their paternal uncle. Similarly in **Elena Nansubucia Kaggwa**.⁵⁷The natural father of the infant was dead and the order of adoption was given to her step father and natural mother.

In a matter of adoption of Raymond Moses Tugume⁵⁸ the child's mother was dead and an order for adoption was given to his maternal Aunt.

As far as where parents were never or are not a complete unit is concerned. It's illustrated **in the matter of Stella Miriam Nanyenqa Nankya Lwanga** .Both parents of the child were a live but staying in

⁵⁴ Laura miscellaneous(Adoption)

⁵⁵ J. Packman. Children Care Needs and Numbers London. George Allen and Unwin 1968

⁵⁶George Kagula, Rebecca Nabimera and Ronald ssekolya Miscellaneous app. No. 43/44/45 of 1988.

⁵⁷ Supra.

⁵⁸In a matter of adoption of Raymond Moses Tugume Misc.(Adoption)cause No.76/1988

different places. An adoption order was granted to the paternal uncle of the children and his wife. Due to political instability most parents had gone into exile without making provisions for their children leaving many children deprived, for example Amin's Era (1971-79).

We can also see a big number of deprived children in the north due to the KONY Invasion. Many orphans have been registered, in Luwero triangle children were made deprived by civil war (1981-1986).

Problematic families. This is a family structure which remain in some form but the family can not function effectively this may be because of mental or physical illness of one or both parents making the existence of the family precarious in extreme.

According to Wimperis in a book "The unmarried mother and her child" a high proportion of unmarried mothers are psychologically disturbed women quite often from broken homes, who may be unfit to give a child the emotional stability it needs, to leave them to struggle alone with the child's upbringing or the Mother's own emotional difficulties may perpetuate a vicious circle.

A part from these reasons most Ugandans are poor; most parents can't afford to pay for education proper clothing and medical care for their children. For these reasons many children find themselves in a position of being adopted and the Adoption of Children Act's aim was to provide necessary adoption measures streamlining the law relating to adoption of children.

CHAPTER FIVE

5.1.CRITICAL ANALYSIS OF THE LAW RELATING TO ADOPTION

This chapter seeks to critically assess or examine the law relating to Adoption as per the children statute⁵⁹. These aspects include provision for inter- country adoption, consent, appeals, jurisdiction of adoption proceedings, prerequisites for adoption, procedure of adoption, functions of court, wills, adopted children register and disclosure of adoption, provision for inter- country adoption, devolution of property and effect of adoption.

In this chapter 1 will assess whether adoption Laws conform to the social economic needs of Uganda today. Does the law of adoption cater adequately for Uganda children needs today?

JURISDICTION

Before the enactment of the Children Statute of 1996, an application for adoption order was to be made to the High Court.⁶⁰ The new legislation now allows applications for adoption to be made to a chief magistrate's court within the jurisdiction of which the applicant or the child resides where both the child and the applicant are citizens of Uganda.⁶¹

However, where the child or the applicant is not a citizen of Uganda the application is to be made in the High Court. The loophole which has been filed by the new legislation is that formerly all applications had to be made in the High Court with costs, remoteness and greater technicalities involved where a Ugandan applicant was living in a district far from Kampala, it was a problem because up to now very few towns have resident judges and the visits to other districts by judges

⁵⁹ The 1996 children statute

⁶⁰ S. 2 of theChildren Act

⁶¹ S.44 of the children statute1996.

are infrequent and short. It therefore made adoption more difficult to apply for.

Sub section (2) of section 44 of the statute⁶² provides that a child need not be a Ugandan to be adopted. Before the enactment of the Children Statute that is when the Adoption of Children Act of 1943 was still followed; an adoption order could only be granted if the child in respect of who the application was made was a Ugandan. This can be illustrated by the case of **Juliet Jane Nakazibwe**⁶³ where the applicant sought an adoption order to be granted to him in respect of a child who had been in his care. The child had been abandoned in 1961 but the British certificate showed that the child's nationality was not known. Court held that the child was not eligible for adoption and merely it was found in Uganda didn't mean that it was a Ugandan so the adoption order wasn't granted. Currently S.44 (2) of the statute⁶⁴ has avoided repeating such absurdities like the one in the above case. Thus this is a suitable provision so long as it can be established that it is in the best interest of the child that an adoption order is sought and that the child's welfare will be promoted. This provision suits Ugandans circumstances given the fact that there are many deprived children who are not Ugandans, (refugees) but need substitute childcare most especially adoption.

PRE-REQUISITE OF ADOPTION

Section 45 (1) of the Act provides that an adoption order may be granted to a sole applicant or jointly to spouses where the applicant is twenty five years old and at least twenty one years older than the child this means that a person below twenty five years is not a good parent and can't protect the child. People above twenty-five years are

⁶² Ibid

⁶³ Juliet Jane Nakazibwe Misc.Adoption cause No.93/73

⁶⁴ Children statute 1996

competent and are believed to be able promote the welfare of a child as it's the main aim of adoption. **In the Matter Of Elizabeth Ayee (an infant)** ⁶⁵ HON. Lady Justice Margaret C. Oguli Oumo granted an Adoption order to the applicants as they had fulfilled the requirement of age

This raises an issue of the statute not being specific about the maximum age. See a person of one hundred and two years; can he really adopt a child? Here the law isn't clear. However the laws' aim is to effect the effectiveness of looking after the child which can only be seen in older people (25 years and above).

Kadushin⁶⁶ submits that the maximum age of parents for adoption should lie between 35-45 years. The reasons he gives for this is that it increases the probability that the parent will be alive throughout the 16-18 years of the adoptive child's dependency. Having lost one set of parents, the adopted child in case he was an orphan, would be doubly deprived if the adoptive parents died before he was ready to assume independence.

Section 45 (1) (b)⁶⁷ provides for the consent of one spouse after the other has made an application for adoption. The reason behind obtaining consent of the other spouse, who has not jointly applied for adoption, is to protect the adopted child from ill-treatment and fortune by a spouse who may not have liked an adopted child to be brought into the family. So it is anticipated by the legislature that once such spouse consents to the adoption then such spouse is unlikely to subject the adopted child to ill treatment and torture.

Given the number of the deprived children who need substitute child-care in Uganda, There should be dispensing with the consent required

⁶⁵ Adoption Cause No.130 Of 2010 [2010] UGHC 66 (2 November 2010)

⁶⁶ Child welfare service pg 439

⁶⁷ Children statute 1996

under section 45 (1) (b)⁶⁸ in such circumstances so long as it has been established by the court that the adoption will be to protect the interests of the child, then an adoption order should be granted.

Section 45 (3) of the Children Statute⁶⁹ intends to protect children adopted from being turned into husbands or wives as the case may be, by an adopter at a later stage. The section restricts the granting of an adoption order to a sole male applicant in respect of a female child or vice-versa.

In **George Kagulu, Rebecca Nakimera and Ronald Ssekolya**⁷⁰ it was clearly stated in this case that on the issue of Rebecca being a girl, the applicant was an uncle. The law intended to stop a male from adopting a girl whom he could later seduce or marry but Nakimera was a daughter of the applicant's brother. Therefore there was nothing wrong in granting the adoption of Rebecca to her natural paternal uncle.

Section 45 (4)⁷¹ provides that an application shall not be considered unless the applicant has fostered the child for a period of not less than thirty-six months under the supervision of a probation and social welfare officer. It is a requirement of the law that a person intending to adopt a child must have fostered that child for thirty six months or else no adoption order can be granted in respect of that particular child intended to be adopted. However, this period is consequently a threat to the adoptive parents and quite often frustrates the chance of those children who would have been adopted. For instance in the united stat of America, the period considered is six months only. The laws presuppose that the earlier the child is in the hands of the adoptive parents the better.

⁶⁸ ibid

⁶⁹ ibid

⁷⁰ MISC. APP. No.44 of 1998

⁷¹ Children statute 1996.

INTER-COUNTRY ADOPTION

Section 46 (1) of the Statute⁷² provides that, a person who is not a citizen may in exceptional circumstances adopt a Ugandan child if he or she,

- a) Has stayed in Uganda for at least three years.
- b) Has fostered the child for at least thirty-six months under the supervision of a probation and social welfare officer.
- c) Does not have a criminal record.
- d) Has a recommendation concerning his suitability to adopt a child from his country's probation and welfare officer or other competent authority and
- e) Has satisfied the court that his or her country of origin will respect and recognize the adoption.

This is a new provision. Initially non-citizens who were not British subjects could not adopt. This law provided that an adoption order shall not be made if the application is not a British subject or citizen of Uganda and is resident in Uganda. This provision was absurdly followed in the case of **Grace Tumwebaze Narnata**⁷³ where the applicants being nationals of Belgium could not adopt the infant because they were bared by the Act.

Currently a non-Ugandan who is not a British subject can adopt. This provision suits the circumstances in Uganda because the number of children who need substitute childcare has increased. Considering the fact that the infant in **Namata's case**⁷⁴ was picked from Luwero where he had survived war and none of his relatives could be traced, one

⁷² *ibid*

⁷³ MISC. App. No. 59/1988

⁷⁴ *ibid*

wonders why the court should put such conditions on some one who has kindly volunteered to look after such a homeless child. So such unfair decisions are guarded against by the statute⁷⁵ by providing for a chance to non-Ugandans to adopt.

In as much as the law has tried to provide for inter-country adoption which of course is a provision which tries to encourage adoption, the law is strict as per the provision. Fulfilling the conditions given in the paragraphs there above is not easy. So one wonders how many people can pass this test, bearing in mind the number of deprived children in Uganda need substitute child care.

Section 46 (2) provides: "For the purposes of an application to which this section applies, the probation and social welfare officer referred to in paragraph (b) of subsection (1) of this section shall be required to submit a report to assist the court in considering the application and the court may, in addition, require some other person or authority to make a report in respect of the application. It should be noted that all these conditions and requirements are intended to protect the adopted child, in that, court has to ensure that the child is placed, in the hands of a right person. So Section 46 (2) adds another condition before an inter-country adoption takes place.

It is my submission that the strictness of this provision should be relaxed if adoption cases are to increase in Uganda because there are many children who need to be adopted.

CONSENT

S 47 (1)¹⁷ provides that the consent of the parents of the child if known, is necessary for the adoption order to be made but the consent may be revoked any time before the pronouncement of the adoption

⁷⁵ *ibid*

order. This provision is similar to the provision in section 19 of the Adoption of Children Act and was followed in the case of **Kenneth Anthony Otto Lengmoi**⁷⁶ where the applicant who was a grandmother of the children got a written consent from the father of the children who was staying in Sweden.

Sub section (2) of the statute defines a parent as a biological mother or father or adoptive mother or father of the child⁷⁷.

Josling⁷⁸ submits that the husband of the infant mother, if married to her at the time when the child was born is presumed to be a parent but evidence in rebuttal of this presumption may in no doubt be led to show that this consent is unnecessary.

Section 47 (2) provides that the court may dispense with the consent if parents are incapable of giving it. A person is incapable of giving consent if say that person is insane or of an unsound mind, if he can't be found; his / her consent may be dispensed with as in **Laura Alias case**⁷⁹ The consent of the father was dispensed with because his whereabouts were unknown.

The above tends to bend the strictness of section 47(1) and really fits Ugandan circumstances. Since adoption is to help the child most, and prospective adoptive parent has come up dispensing with the consent in such circumstances is not bad if Ugandan children who are deprived of parental care are to get the same through other alternatives.

Section 47 (3) provides that while an application for an adoption order is pending in Court, a parent who has given his or her consent to the adoption is not entitled, except with leave of court, to remove the child

⁷⁶ Adoption cause no.3/1990

⁷⁷ Children statute 1996.

⁷⁸ Problems and practice of child adoption.

⁷⁹ Misc.App.No.1of 1990

from the care and custody of the applicant. This section is intended to protect the adopter from any unjust removal of the child from him or her by the parent of the child. So once a parent consents to an adoption he or she is there and then estopped, unless with leave of court, to remove the child from the custody of the adopter. However if the parent can prove to court that he/she has got reasonable grounds to remove the child from custody of the adopter then leave of court may be granted to him and he or she does so.

Under Section 47 (4)²² signifies that it is at the discretion of the court to decide whether to grant leave to remove the child from care and custody of the adopter depending on the circumstances and facts of each case. This will automatically depend on the ground put forward by the parent when seeking for leave of court to remove the child from custody of the adopter.

If the reason unsatisfactory mostly if it is harmful to the child's welfare then it can refuse to grant adoption and by doing so the child is protected.

Sub section 5 of Section 47⁸⁰ provides for the respect of the child's view if he understands the adoption proceedings. There can arise a problem if his views are not considered this is mostly if he is adopted by a person he naturally doesn't like, a child can kill himself or causes havoc even him or herself can be uncomfortable. In such case the child will be doubly deprived.

S.47 (6)⁸¹ provides that if a child is at least 14 years of age, his or her consent to the adoption must be obtained unless it is impossible for him or her to express his or her wishes thus if he is insane or of unsound mind. This is intended to protect the child from being put

⁸⁰ The 1996 children statute.

⁸¹ The 1996 children statute.

into care and custody of a person whom that child does not like which might lead to problems as the child will feel uncomfortable in such a home.

Section 47 (7)⁸² provides that where it appears to court that any person who is not the parent of the child has any rights or obligations in respect of the child under any order of the court or agreement or under customary law or otherwise, the court may require the consent of that person before the adoption order is made. This provision protects both the adopted and the adopter. The adopted is protected in such a way that before these people who are supposed to consent do so, they have to ensure first that the child is going to be placed in the hands of a suitable person. On the other hand the adopter is protected in that once these people who are responsible for child consent, they are estopped from unjustifiable and illegal removal of the child from the care and custody of the adopter.

Section 47 (8)⁸³ provides for probation and social welfare officer to prepare a report to assist it to determine whether any person who is not a parent of the child has any rights or obligation in respect of the child and whether that person's consent need to be obtained before the making of the adoption order . this is aimed at avoiding jeopardizing the legitimate interests of the parent in the child.

Section 48 (1) of the statute means that consent to adoption from who ever is supposed to be obtained, must be freely given by that person. The person must not have been corrupted, bribed, must not have been induced, under duress or undue influence. The consent must not have been obtained fraudulently and the person when giving such consent must have been of sound mind; sober and must be sane in the case of

⁸² Ibid

⁸³ ibid

Rep.⁸⁴ where, however an inducement mentioned to the mother by the children's officer was held to be though unjustifiably and regrettable, insufficient to show the consent has been made under pressure and S. 48 (2). The court has to see that the interests of the child prevail over the interests of the adopter.

APPEALS

Section 50⁸⁵ provides for appeals in case a person is aggrieved by a decision of chief magistrate court or the High Court. These provisions serve as protective remedies to unfairness, unjust or erogenous decisions of lower courts, in deciding adoption proceedings. Thus a right to appeal as provided for and guaranteed by the constitution⁸⁶ is also embodied in the adoption Laws of Uganda.

EFFECTS OF ADOPTION

Section 51⁸⁷ provides that upon an adoption order being made all rights duties obligations and liabilities of the parents and guardians in relation to the future custody maintenance and education of the child including all the rights to appoint a guardian and to consent or give notice of consent to marriage are extinguished and rested in and enforceable against the adopter. Maintenance includes education and guidance, immunization, adequate diet, clothing, shelter and medical attention and these are rights (automatic) that accrue to an adopted child.

Article 34 (1) of the constitution⁸⁸ provides that subject to laws enacted in their best interests, children shall have the right to know and to be cared for by their parents or those entitled by law to bring them up.

⁸⁴ (1954) 1 ALLIER

⁸⁵ *ibid*

⁸⁶ Article 50 (3) of the 1995 of the republic of Uganda.

⁸⁷ *ibid*

⁸⁸ The 1995 constitution of the republic of Uganda.

Article 34 clauses (2) ⁸⁹ provides that a child is entitled to basic education which shall be the responsibility of the state and the parents of the child.

All the above duties and responsibilities above are vested in the adopter once the adoption order has been made.

In **Coventry Corporation V Survey Country Council**⁹⁰ Lord Atkin said that once an adoption order has been granted, it does in the plainest language transfer from the natural parents to the adopter the whole of the rights and obligations that flow from parenthood.

However this section might in anyway discourage adoption. This is especially on the part of the natural parents of the child whose duties, liabilities and responsibilities towards the child are extinguished. For fear of this, some parents might become reluctant to give away their children. This is disadvantageous in a way that some parents will not look into the best interest of the child.

THE RIGHTS OF THE CHILD IN ADOPTION

Section 52 (1) deals with rights of an adopted child in event of adopter parents dying intestate. In such a case, the property of adopter dying intestate would devolve in all respects as if the adopted child was a natural child of the adopter.

If unfair devotion of property is occasioned, a claim can be lodged in the High Court and may order such provision as it deems profitable to the child out of the property devolving in the intestacy in accordance with the law.

⁸⁹ supra

⁹⁰ 1995(AC) 199at2.5

According to Section 53⁹¹ if an adoption order is made after the adopter makes a testamentary disposition of property, whether oral or in writing, any reference, whether express or implied to the child or children of the adopter shall be construed as making a reference to an adopted child.

If in any disposition made by the adopter prior to the adoption order, no provision is made for the adopted child, the adopted child may apply to court to vary the disposition by ordering such a disposition as the court thinks equitable to be made for him.

These provisions of the law are very vital for the adopted child since the child gets a share which helps him to proceed with life normally. Besides since the natural parents irrevocably relinquish their parental rights and obligations it's just and fitting for these adopted children to benefit from the estate of their adoptive parents to double loss. However these provisions of the law might scare away the would be adoptive parents as they might only want to adopt the children but without devolving their property in case of their demise.

DISCLOSURE OF ADOPTION

S.55 (1)⁹² provides for informing the adopted child about his Natural parents after attaining age of maturity. This is intended to inform the adopted child that the parent with whom he or she stays with is not his or her Natural parents.

It is important to acknowledge the fact that s.55 (2) clarifies on the above by putting a duty to adopter to inform the child. Unless it's not on child's best interests to do so.

⁹¹ S.53(2)children statute 1996.

⁹² *ibid*

5.2.THE UNITED NATIONS DECLARATION ON THE RIGHTS OF CHILDREN, THE UNITED NATIONS CONVENTION OF THE RIGHTS OF CHILDREN AND THE LAW OF ADOPTION IN UGANDA

Under this, I am assessing the extent to which the law relating to adoption in Uganda tries to encompass the rights, which are provided by the U.N declaration on rights of children and the U.N convention of the rights of children as Uganda is a party to this convention.

Among the rights to a child provided by the United Nations declaration on the rights of children are:

- a) The right to affection, love and understanding and the right to maternal security,
- b) The right to adequate nutrition, housing and medical services.
- c) The right to be protected against all sorts of neglect, cruelty and exploitation

Section 52 of the statute⁹³ tries to ensure that all these rights are guaranteed when an adoption order is being made. It provides that upon an application order being made all rights, duties, obligations and liabilities of parents and guardians in relation to the future custody, maintenance and education of the child, shall rest in, and be exercised and enforceable against the adopter. In **The Matter of Elizabeth Ayee (an infant)**⁹⁴ the applicants were appointed adoptive parents of Elizabeth were appointed adoptive parents with full parental rights and responsibilities.

⁹³ Ibid

⁹⁴ The Matter of Elizabeth Ayee (an infant) (Adoption Cause No.130 Of 2010) [2010] UGHC 66 (2 November 2010)

In determining the best adopter love for the child is a paramount consideration, thus in **Rebeccas'Case**⁹⁵ it was held that the paramount interest of the children would be served by the uncle.

The United Nations convention on the rights of children also outlines some of the rights of a child as far as adoption is concerned. These are found in article 21 of the convention.⁹⁶ It estates that state shall ensure that the best interest of the child shall be the paramount consideration and they shall;

- a) Ensure that the adoption of a child is authorized only by competent authorities who determine in accordance with applicable law and procedure and on the basis of all pertinent and reliable information, that the adoption is permitted in view of the child's status conserved to the adoption on the basis of such counseling as may be necessary.
- b) Recognize that inter-country adoption may be considered as an alternative means of child care if the child can't be placed in a foster or an adoptive family or can not in any suitable manner be cared for in the child's country of origin and
- c) Ensure that the child conserved by inter-country adoption enjoys safe guards and standards equivalent to those existing in the case of National adoption.

In the Children Statute ⁹⁷ consents are provided for in section 47 and inter- country adoption and its requirements as per the resolution of the convention in section 46, section 44 provides for competent authority for granting an adoption order. So all these requirements of the United Nations convention on the rights of children as per Adoption are contained in the children statute of 1996.

⁹⁵Rebeccas'Case Misc. app. No. 44 of 1988.

⁹⁶ The united Nations Convention on The Rights of children

⁹⁷ ibid

5. 3 INADEQUANCIES OF ADOPTION LAW

The statute⁹⁸ is silent on whether an Adopted child can voluntarily end the Adoption. Look at an instance where the child is mistreated and tortured by the Adoptive parents. He or she should at least have a right to disclaim or voluntarily end the Adoption.

What next if the adopter fails to cater for the adopted child, the statute doesn't provide for that and with this situation of Uganda a person may become economically or financially incapacitated and fail to raise even 1000/= for the family, what happens after?

The strictness of the Law of adoption. Though the statute tends to protect the children it some times makes adoption almost impossible for example the conditions and requirements of inter-country adoption are not easy to fulfill. This strictness may lead to cases of stealing babies by people who need them.

The law doesn't provide for a mechanism of monitoring and ensuring that the child is in safe hands of an adopter. That is to say the law fails to cater for the safety and security of the child after adoption order is granted. There are con men who pretend to be good adopters and after the order is granted they take these children for evil purposes like sacrifice. So there is need for a law for inspection, monitoring and checking on adopted children when under care and custody of adopters.

Lastly though the statute and the constitution provide for handicapped there should be special adoption laws to cater for them. Jane Rowe submits that although most people adopting a child want one that is healthy, bright and less than three years, there are those who have the warmth understanding and patience to open their hearts and homes to a child with some handicap.

⁹⁸ ibid

CHAPTER SIX

6.1.RECOMMENDATIONS

As discussed and analyzed in chapter four that in some provisions the law of adoption is so strict, the law should somehow be relaxed as to encourage adoption. Being strict perse is not bad since it is intended to protect the child adopted, but on the other hand being too strict is also not desirable since it might end up discouraging those who would otherwise have been prospective adoptive parents. Every case should be decided in accordance with circumstances of that particular case in as far as they permit.

The law relating to adoption should also not be general when it comes to treatment of different categories of deprived children. Children who are completely abandoned and the orphaned should be treated differently from those who are illegitimate and those who still have their natural parent but who cannot adequately cater for them. The difference in treatment should be in respect to provisions relating to effects of adoption, devolution of property and matters relating to this. It is really unfair for example to deny an adopted child inheriting property from his/her deceased parent who did not make a will.

Adoption laws should also expressly provide for the measures that have to be taken when in the due course of adoption, the adopter fails to adequately cater for the adopted child. It should provide for the child to be either taken back to a home care unit or to be given to another adopter.

Adoption laws should also have a special provision specifically catering for the doubly unfortunate children. By doubly unfortunate children I mean children who are handicapped and at the same time lack the necessary and adequate family care and protection. It should be noted that among the handicapped children we have both the physically

handicapped and the mentally handicapped. These children require special care and attention.

This will go a long way in helping such children to the extent that parents who may not have had interest in adopting such children since they are "burdensome" as they require special care and treatment, that burden will somehow be relieved since it will now be collective responsibility that is of the adopter and the state to look after the child.

Further still the law should provide for a mechanism of monitoring and ensuring that adopted children are safe, in good condition and are adequately catered for. This is basically for protecting children from "ill intentioned" adopters who may after getting the child turn him or her into say a houseboy or house girl or even into any other bad hidden motive. The law should not only protect the child up to the time of granting of an adoption order but also during the period after an adoption order is made.

The law further looks as if it provides only for adoption of children who have been placed in home care units. What about children who are on the streets. Street children are a serious problem in Uganda today. Thus the law should provide for an easy way of adopting these children and absorbing them into society. If these children are not given a fast and appropriate solution, they are most likely to become a liability to society if they are not yet one.

Further still where the law provides that a child should not be adopted by two people at the same time save for spouses, this provision should not be so absolute like this. It should put circumstances of a case into consideration. If such adoption means collective responsibility and given the circumstances it is in the interest of the child and his or her

welfare is not jeopardized, then such adoption order should be granted.

In as far as the procedure followed when selecting a prospective adoptive parent is concerned, it should also be flexible in order not to discourage adoption. If deemed necessary and considered to be in the best interest of the child and that the welfare of the child will not be jeopardized such factors like religion, tribe may be ignored.

Lastly, though not directly connected to the statute ignorance of the law has greatly contributed to the unpopularity of adoption in Uganda. There is general lack of legal awareness of majority Ugandans and this also partly explains why adoption is not so popular in Uganda. So legal awareness policies especially relating to the matter at hand that is adoption should be undertaken. These may include such measures like seminars, public lecture, press release and any other system that can effectively lead to legal awareness among the majority Ugandans. However, these measures should not be in form of advertising children for adoption.

6.2 CONCLUSION

Adoption presupposes a complete and total separation of a child from his or her natural family to that of the adopter through the effect of the law. Adoption did not exist in the traditional African society because children who were subject to adoption that is most especially the orphaned were easily absorbed in the society because caring for children during that time was a collective responsibility of society. In addition to that such instances like abandoning children were very rare and illegitimate children were something unheard of in many if not all African traditional societies.

However, a different course was taken from the second half of the nineteenth century. This was the period when Africa was interfered

with by outsiders through colonialism. On the eve of colonialism various changes took place in African traditional societies. Among these was the direct importation of foreign law and for Uganda's case British law since Britain was Uganda's colonial master.

Other changes resulting from colonialism were the introduction of a market economy and urbanization. A monetarised economy was introduced and these all led to individualization of society. Every family now minded its own business, as there was total disintegration of society. So this meant that any child who couldn't be looked after by his or her immediate family could not easily be absorbed and taken most especially to the relatives of that child. Worst of all aspects which did not exist in the traditional society like illegitimacy were introduced by the law whose roots are in foreign law. In addition to these, given Uganda's past history it was not an accident that the state came up with the adoption laws through the Adoption Act of 1943. Since then the number of children who needed substitute childcare greatly increased, as many children became orphans others were abandoned especially due to various wars that Uganda has experienced.

Thus to solve the problem of deprived children the legislature came up with the adoption law as provided for in the Children Statute of 1996. It should be noted that if the above problem of deprived children was to be solved, the law relating to adoption ought to be coherent, consistent and should have conformed to the social - economic needs and situation of Uganda today. However, from the analysis of the law relating to adoption as under the Children Statute, what is noted is that the law tries to ensure that the adopted child is protected and that his or her interests are protected and catered for. The law as it stands leaves much to be desired. Various aspects which are so important at the same time were not put into consideration. Various provisions were omitted and even those which were included are not

perfect in nature. Thus the law has to a large extent failed to conform to the social - economic needs of Uganda. So it is highly whether the law relating to adoption will live up to the expectation of the parliament. If no immediate changes are made and effected, Uganda is most likely to have an escalated increase in the number of children in home care units, babies' homes and worst of all many ending on streets. So if the law is to solve the problems of Uganda's deprived children the above measures, amendments and provisions as discussed should be apprehended.

BIBLIOGRAPHY

1. The adopted child: Ellison LondoGollencz1958
2. Violation of Children Rights: Nakiyingi M.U.K Kampala
3. Introduction to Law: Kidd Makubuya EA publishers
4. Adoption of Children: Josling 6th Edit London oyez
Publication 1965
5. The 1995 Constitution of the Republic of Uganda .
6. The United Nations Convention on the Rights of Children 1959
7. Adoption of Children : Josling 6TH Edition London Oyez
Publishing 1965
8. Orphans of the Living: Diana Dewan, Columbia University
Press
9. Problems and Practice of Child Adoption: Nakiwala Annet
10. Substitute Child Care: Wandera Nabaho M.A Thesis
11. Yours by Choice : Dowe Jane London Mub & Born
12. The Baganda : Macmillan and co. Ltd London Press (1911)
13. The Acholi of Uganda: Giving London her majesty station and
press

- ✓ 14. The Bachiga of W. Uganda : M.M Odel London Oxford University Press
- ✓ 15. The Toro Marriage : B. Perlman
- 16. Law and Practice in matrimonial causes : B. Paningham
- 17. Family Law and Litigation in Bosotho Society : S. Paulter
- 18. The Law relating to children : Bevar
- 19. Adoption Policy and Practice : Allen George
- 20. Inquest of Foster Parents : Dorothy Hutchinson
- ✓ 21. Child Welfare Service : Kadnshin
- ✓ 22. Child Placement : Glickman

