RAYMOND MOYO

Versus

SIBONOKUHLE KHUMALO

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 12 & 15 OCTOBER 2015

Opposed Application

T. Masiye-Moyo, for the applicant
Respondent in person

BERE J: On the 6th day of March 2015 this court granted a provisional order in favour of the applicant couched as follows:

> "Interim Relief Granted
>
> The respondent be and is hereby ordered to forthwith take all the necessary steps to present the child to the authorities at Dombodema High School for her commencement of Lower 6 education."

The applicant now seeks confirmation of this order whilst the respondent has sought the discharge of same.

The Background

It will be necessary to give a brief background of this case in order to put the issues in their proper perspective.

The applicant is the biological father of the child at the centre of the controversy and the respondent is her biological mother. From the limited information on record it is clear that the two never got married but had this child out of wedlock.

Prior to this case now before me the respondent had taken the applicant to a maintenance court where she sought an upward adjustment of an order for maintenance which was in force. In that application the lower court found in favour of the now applicant and declined to grant the desired variation as the court felt the application before it was unwarranted.

Long after the abortive maintenance application the applicant lodged the instant matter wherein he sought to take it upon himself to decide on which school was appropriate for the child as she pursued her lower 6 studies. This was despite the fact that in terms of the Guardianship of Minors Act[1] the respondent was *de jure* the custodian parent, more so given the circumstances surrounding how the child was born. It is common cause that the child was born out of wedlock.

It terms of our law as currently framed, it is clear that the mother of a child born out of wedlock has the sole rights of custody and guardianship over such a minor. See the following cases cited by MAWADZE J in *Jennifer Nyamakura* v *Agrippa Muzengi*[2] ; (*D* v *M*[3]); *Cruth* v *Manuel*[4] and *Katedza* v *Chunga*[5] .

I am however aware that this position of our law can be changed in terms of section 5 (3) (b) of the Guardianship of Minors Act (*supra*) in the event of the father of a child born out of wedlock successfully applying for custody. This is however not the situation with this case before me. There was no application made by the applicant to give him the custody of the minor child.

It is the undisputed position of our law that it is the custodian parent who enjoys the prerogative of choosing a school for the child. This is precisely what the respondent has done in this case and this position could not have been unlawfully altered by some unclear determination made without regard being had to the provisions of the Guardianship of Minors Act (*supra*).

1. Chapter 5:08

2. HH-181-12
3. 1986 (1) ZLR 188 (H)
4. 1999 (1) ZLR 7 (S)
5. 2003 (1) ZLR 470 (H)

The respondent chose Eastview High School for the child and she explained in greater detail in her opposing affidavit as well as here in court why she felt that comparatively that school was better than Dombodema High School preferred by the applicant. Ever since the schools opened, the minor child has been pursuing her academic studies at Eastview High School and is almost nearing completion of her lower 6 studies. The respondent advised the court that the minor child who incidentally is approaching the age of majority is happy to be in this school. This averment was not controverted by the applicant

I come now to deal with the final order desired by the applicant. The applicant wants this court to make an order that the child abandons her schooling at Eastview High School and forcibly deposit or relocate her to Dombodema High School.

The request by the applicant, whichever way one looks at it cannot be in the best interest of the minor child. It is simply ludicrous.

The applicant projects himself as someone who is determined to subvert the minor child's education. It would be a traversity to justice if this court were to accede to his request given the fact that this court prides itself as the upper guardian of minor children in this country.

Costs

The applicant has sought to focus on his ego at the expense of the best interest of his minor child. Such adventurous litigation must be discouraged and it is only natural that he be ordered to pay costs.

Consequently, the provisional order granted by this court is hereby discharged with costs.

Masiye-Moyo & Associates, applicant's legal practitioners