

NAOMI MUKUNDU
versus
LAWRENCE KUDZAYI CHIGUMADZI
and
TAKUNDA E GUMBO
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 29 July and 15 September 2015

Urgent Application

Miss *N S Ndlovu*, for the applicant
S Chabuka, for the respondent

UCHENA J: The applicant is the maternal grand- mother of the two minor children Laura Edna Chigumadzi born on 4 August 1999 and Lawrence Takudzwa Chigumadzi born on 28 September 2000, for whom she sought an order granting her their custody and guardianship. The first respondent is the biological father of the minor children. He however has not been involved in their life since his separation from their late mother in 2005. He lives in the United Kingdom with his wife and child from a subsequent marriage.

The applicant filed an urgent application on 27 July 2015. The urgency was based on her urgent need to have authority to apply for a passport for Laura who has to urgently travel to Ghana to take up a scholarship at SOS- HERMANN GMEINER INTERNATIONAL COLLEGE. I heard the application on 29 July 2015 and granted it on the following terms;

1. The applicant Naomi Mukundu be and is hereby appointed the legal guardian and custodian of the minor children, Laura Edna Chigumadzi (born 4th August 1999) and Lawrence Takudzwa Chigumadzi (born 28 September 2000).
2. There shall be no order as to costs.

I indicated that my reasons for judgment would follow. These are they.

The Facts

The applicant is the two minor children's maternal grandmother. She is the mother of the minors' late mother Elizabeth Lorraine Mukundu who died on 13 July 2010. Elizabeth Lorraine Mukundu was initially married to the respondent in terms of an unregistered customary law union which they upgraded into a civil marriage in 2005. Shortly thereafter the respondent left her and the children presumably for the UK where he now stays. Sometime in 2005 Elizabeth and her children were brought to the applicant by her husband's relatives after she had had a miscarriage. Elizabeth and her children later went to stay at the first respondent's homestead in Murehwa. The first respondent neglected them and gave them no support till the children stopped going to school. Towards the end of 2008 Elizabeth who was now sick and unable to look after the children came back to stay with the applicant. The applicant looked after her and the children till she died in 2010. The first respondent did not come back to attend his wife's funeral, nor did he render any assistance towards her funeral's expenses. The applicant continued to look after the children to this date. She arranged for the children to go back to school. She sought and obtained SOS's assistance in the payment of their fees.

In para 8 of her founding affidavit the applicant described the first respondent's only contact with the children as follows,

"The 1st respondent would call the children once a year and promise to send them clothes or toys and they would never come. 1st respondent sent Laura an amount of US42-00 twice on her birthday after the death of her mother and has send nothing to Lawrence. He also send a bag of clothes. In 2013 or thereabouts he sent a runner to buy second hand bicycles for the children but the bicycles were rusty and old so we could only take one."

The above while establishing that the first respondent has not completely forgotten his children, does not show that he has their best interest at heart.

Miss *Ndlovu* for the applicant submitted that the applicant has always been there for the children, and is suitable for appointment as their custodian and guardian. She further submitted that the applicant has demonstrated that she has the minor children's best interests at heart, as demonstrated by her caring for their welfare and putting them back in school. Her submissions are supported by common cause evidence. The applicant stays with the two minor children and has for years been taking care of them. In-spite of her limited means she put them back in school and sought on their behalf SOS's help in paying their school fees. This shows genuine love and care for her daughter's children.

The first respondent's counsel Mr *Chabuka* orally submitted that his client is opposed to Laura going to Ghana to pursue her education under the scholarship she has been awarded. He submitted that the first respondent wants her to continue with her education in Zimbabwe and is able to fund her education. The disposition of a litigant is judged from his conduct as demonstrated by what he has done or not done and not by what he promises to do in the future. The first respondent has in the past neglected his children to the extent of their having to drop out of school until the applicant had to seek SOS's intervention. He neglected them and their mother to the extent of denying them education, health care services, nutrition and shelter. He left them in that condition until the applicant came to their rescue. He therefore has demonstrated his attitude towards his children. He has contrary to the provisions of s 81 (1) (f), exposed them to lack of education, shelter and nutrition. When they came back from his homestead in Murehwa they were not going to school and had been starving, as their mother was sick and could no-longer fend for them as the first respondent had abandoned them. The first respondent now opposes his daughter's chance to get sound education. He clearly does not have her best interest at heart. The court as the upper guardian of all minors cannot be swayed by the whims of a parent who has for years displayed that he does not care about the welfare of his children.

Off record submissions

During his submissions Mr *Chabuka* for the first respondent said he would off the record not oppose the applicant's application as he had been touched by the curator's detailed report on what the children had gone through as a result of the neglect at the hands of their father. I unfortunately for him recorded that submission as a court of record cannot go off record. This demonstrates that the first respondent's neglect of his children is apparent and cannot be disputed. A legal practitioner has a duty to the court and to his client. If he says something against his client to the court, the court is entitled to take it seriously as he knows his client's case, better than anybody else in the proceedings. The request to make off the record submissions is unlawful and un-procedural. It however cannot prevent the court from using what the legal practitioner said. When I pointed out that I could not go off record Mr *Chabuka* to his credit maintained that he could personally not oppose the order sought as it is in the minor children's best interest. His view confirms the curators view, and my finding that the order sought is in the children's best interest.

Curator Ad Litem's Report

Through a prior application Mr Takunda Emmanuel Gumbo was appointed curator *ad litem* for the minor children. He in that capacity investigated the circumstances of the minor children to establish what would be in their best interest. His report is part of the record. He conducted a thorough investigation by interviewing the applicant, the children, Mrs Nyika of SOS Children's Village Association, the first respondent's sisters, which established the following;

1. That the 1st respondent abandoned the children and their late mother.
2. That the 1st respondent did not pay school fees for his children resulting in the applicant, having to apply to SOS Children's Home Association for assistance with the payment of the minor children's school fees. That organisation pays half of the children's fees while the applicant pays the other half.
3. That the applicant has been the *de facto* parent who has been there for the children since their mother died.
4. That the urgency of this application arose from the need for the applicant to apply urgently for Laura's passport to enable her to travel to Ghana to take up a scholarship awarded to her by SOS-Hermann Gmeiner International College an Organisation associated to SOS which has been paying her fees, for the 2015 academic year starting on 7 July 2015, but had been extended to the end of July 2015, because of her circumstances.
5. That the Scholarship is in the best interest of Laura as it opens doors for an unlimited funding of her education at prestigious Universities, and assures her of a proper grounding towards a prosperous future.

The curator's report is supported by in depth interviews and a dispassionate assessment of the information gathered. It is a good guide towards a determination which takes into consideration the best interest of the minors.

The best Interest of the minor children

It is trite that any determination which affects the rights of a child should be guided by the child's best interests. Our case law states that position clearly. The principle is applied in many nations of the world. Article 3 of the United Nations Convention on the Rights of a child and Article 4 of the African Charter on the Rights of and Welfare of a child, which are identical, provides for the rights of a child as follows;

“In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”.

The position has been reinforced by s 81 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. Section 81(2) provides as follows;

“(2) A child's best interests are paramount in every matter concerning the child.”

I will therefore concentrate on the best interests of the minor children and not be detained by the feelings and protestations of the applicant and the first respondent. I will however consider their suitability in advancing the best interests of the minor children. This Court as upper guardian of all minors has a duty to adequately protect the rights of a child. In appropriate cases the court may have to protect the children from harmful conduct by the child's own biological parent. Section 81 (3) of the Constitution provides as follows;

“(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.” (emphasis added)

This case is therefore not a contest between the applicant's and the first respondent's rights over the minor children. It is about the best interests of the children which, in terms of s 81 (2) of the Constitution are paramount.)

Section 81 (1) spells out the rights of a child which throws light on what the court should consider in upholding the best interests of a child. It provides as follows;

“81 (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—

- (a) to equal treatment before the law, including the right to be heard;
- (b) to be given a name and family name;
- (c) in the case of a child who is—
 - (i) born in Zimbabwe; or
 - (ii) born outside Zimbabwe and is a Zimbabwean citizen by descent; to the prompt provision of a birth certificate;

- (d) to family or parental care, or to appropriate care when removed from the family environment;
- (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;
- (f) to education, health care services, nutrition and shelter;
- (g) not to be recruited into a militia force or take part in armed conflict or hostilities;
- (h) not to be compelled to take part in any political activity; and
 - (i) not to be detained except as a measure of last resort and, if detained—
 - (ii) to be detained for the shortest appropriate period;
 - (iii) to be kept separately from detained persons over the age of eighteen years; and
 - (iv) to be treated in a manner, and kept in conditions, that take account of the child's age.”

Section 81 (1) (d) to (f) entitles every child to family or parental care, or to appropriate care when removed from the family environment to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse; and to education, health care services, nutrition and shelter. These rights should be assessed in order to determine whether it would be appropriate to grant custody and guardianship to the applicant. Ordinarily custody and guardianship should be reserved for a child's biological parents. Section 81 (1) (d) however envisages circumstances which may lead to a child being removed from the family environment. The facts of this case where a father has neglected his children to the extent, of dropping out of school and their being educated by SOS and the applicant justifies the removal of the children from the custody and guardianship of the biological parent to that of the maternal grandmother who has consistently been there for them and took care of their best interests. She is the one who has been providing care, shelter, education and nutrition, since their mother came back to the applicant with them in 2008.

Disposition

It is common cause that half of the minor children's fees is being paid by SOS at the instance of the applicant who sought assistance from them due to the difficulties she was facing in educating them after the death of their mother. The elder child Laura, has now secured a scholarship to study at SOS Hermann Gmeiner International College in Ghana. According to the curator Mr Gumbo who investigated the circumstances of the minor children and filed his report the programme of study is in the best interest of the minor child.

I therefore was satisfied that the applicant should be granted custody and guardianship of the minor children who she has been looking after since their mother brought them to her in 2008. It is in their best interest that their custody and guardianship be granted to the applicant. These therefore are the reasons why I granted the minor children's custody and guardianship to the applicant.

Wintertons, applicant's legal practitioners
Madotsa & Partners, 1st respondent's legal practitioners.