PATRICK CHAURAYA

In Re for his appointment as guardian to a minor child P.M.C born on the 1st of September 2009.

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 20 & 21 May 2020

Review of appointment of a guardian by the Children's Court in terms of s9(6) of the Guardianship of Minors Act [Chapter 5:08

CHIRAWU- MUGOMBA J: -This matter was placed before me in terms of the Guardianship of Minor's Act [*Chapter 5:08*] specifically section 9(6) that reads as follows:-

> *(6) Whenever the children's court appoints a person as guardian in terms of subsection (4), the clerk of the children's court shall, within seven days thereof, submit the record of the proceedings in the matter to the registrar of the High Court, who shall lay the record before a judge in chambers.*

BACKGROUND

On the 5th of September 2019, the applicant through his legal practitioners filed what is headed, "Court application for the adoption of a child in terms of section 51 of Child Act". The application was allocated the number JV 08/19 at the Bindura Magistrates Court. In that application there is no affidavit of the applicant. The affidavit that is there is that of one Nigel Chauraya who states that he is the elder brother of the minor child. In addition that their parents are deceased and that he has been bestowed with the responsibility of looking after the minor plus his young sister Michelle Chauraya who is studying at University. He relies on farming and due to the economic hardships, he cannot look after both. He claims to have read the affidavit of the applicant (despite no affidavit of the applicant having been attached). The relationship between him and the applicant is that the latter is the brother to his late father, thus making them uncle and nephew. He claims that since their father's death in 2014, the applicant has been the one looking after him and his siblings. Their mother passed away on the 29th of April 2019 leaving him as the eldest in the family. He states that he is in full support of the application for 'guardianship'. The draft order seeks the appointment of the applicant as guardian not only of the minor child but of Michelle Tinodiwanashe Chauraya

born on the 1st of October 1999 (meaning that at the time of the application she was close to 20 years of age). Curiously the draft order seeks an order of costs in the event that the 'respondent' opposes it. There is no respondent cited.

On the 6th of September 2019, the record indicates that a Mr *Kajokoto* appeared for the applicant and requested for a postponement to the following week since there were some documents missing. The court acceded to the request and the matter was postponed to the 13th of September 2019.

The record does not indicate what happened if anything on the 13th of September 2019. In a strange twist, another court application was filed on the 16th day of September 2019 this time headed as follows, " The application of Patrick Chauraya for an order that he be appointted(*sic*) the gurdianship *(sic)* of P.M.C and Michelle Tinodiwanashe Chauraya in terms of section 9 of the Guardianship of Minor (*sic*) Act (Charpter (*sic*). The new application was allocated the same case number as the 'old' one. In the application, the applicant makes the following averments. He is seeking to be appointed guardian of the minor child and of Michelle. Although the latter is not a minor, she is not yet self-sufficient to fund her university education. The minor child is a biological son to the applicant's late brother one Nesbert Chauraya and Florence Dambudzo Chauraya. Both are deceased. In support of his contention, he attached copies of their death certificates. In a sign of further shoddiness on the part of the applicant's legal practitioners, they attached two different pages of page one of the applicants' founding affidavit. Applicant claimed that it is in the best interests of the minor child that he be appointed legal guardian so that he can easily provide for him since he stays in the United Kingdom. He cannot provide for him since he has no legal documents to that effect. He claims that he is a fit and proper person to be so appointed. He desires to see the minor child enjoying life just like his own biological children. It is disturbing to note that the applicant's affidavit is said to have been 'done and sworn to at Bindura' on the 13th day of September 2019. However, the stamp of the commissioner indicates that this was done in the United Kingdom.

In another twist, Nigel Chauraya deposed to a 'supporting' affidavit. This is the same affidavit filed in the earlier case. What is disturbing is that the applicant's affidavit as noted was 'purportedly' signed on the 13th of September 2019. The supporting affidavit was sworn to at Bindura on the 10th of June 2019. This means that Nigel was supporting an application for which the affidavit had not yet been sworn to. Curiously also, this affidavit though purportedly sworn to on the 10th of June 2019, the commissioner's stamp bears the

date of the 23rd of August 2019. Michelle also deposed to a 'supporting' affidavit. It suffers the same fate as that of Nigel. It was purportedly sworn to on the 10th of June 2019 at Bindura but the date stamp of the commissioner of oaths is the 16th of September 2019.

The record indicates that a hearing was held on the 2nd of October 2019 and the matter was postponed to the 25th of October 2019 on the basis that a notice had not yet been published in the gazette and that there was need for an affidavit from a relative of the deceased's mother of the minor child. On the 9th day of October 2019, one Ethel Davidzo Shirihuru who stated that she is a cousin to the mother of the minor child deposed to a supporting affidavit.

The record indicates that on the 25th of October 2019, there was a 'ruling' by the court. There is no record of a notice published in the government gazette. The ruling was to the effect that the applicant had complied with the legal requirements. The court noted that Michelle was a major and therefore could not be subject to an order for guardianship. The court granted the application in respect of the minor child only.

THE LAW

An application for guardianship in terms of the Guardianship of Minors Act can be made in respect of a child whose parents are both deceased or in instances in which one parent is alive. It is trite that in instances in which both parents are deceased as in *casu,* such application is made in the Magistrates court sitting as a Children's Court –see *In Re Nherera* –HH-117-15.

Sections 9 of the Act deals extensively with the appointment of a guardian by a Children's Court. Section 9(1) deals with the application and 9(2) with who can make the application as follows:-

> "9 (1) Without prejudice to the rights, powers and privileges of the High Court as upper guardian of minor children, and the Master in terms of section 74 of the Administration of Estates Act [*Chapter 6:01*], the children's court may, on application in terms of this section, appoint a fit and proper person to be the guardian of a minor who has no natural guardian or tutor testamentary.
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> (2) Where a minor has no natural guardian or tutor testamentary—
> (*a*) a relative or person having the care and custody of the minor; or
> (*b*) a probation officer;
> may apply to the children's court by way of an application lodged with the clerk of that court for the appointment of a person as guardian of the minor, and such application may propose the appointment of a specified person as the guardian."

The application must be advertised in the gazette and in a newspaper circulating in an area where the minor child resides – see s9 (3). This is meant to give an opportunity to any person

who has an interest in the matter to appear before the court and make representations. The notice must specify the name of the person who is proposed to be appointed. On the named date the court conducts an inquiry and if satisfied that it is in the interests of the child's welfare appoint the applicant to be the guardian with all such privileges of guardianship or such conditions as may be specified – see s9(4) (5).

APPLICATION OF THE LAW TO THE FACTS

In *casu* the court notes that there was no indication that the initial application for adoption was withdrawn. The hearing of the 6th of September 2019 indicated that there was need to file supplementary documents and publication of the notice of the application and not a completely new application altogether. It is difficult to understand how the Magistrate went on to hear the new matter without the earlier one not having been disposed of.

In the application for guardianship, as indicated in the background the supporting affidavits of Nigel and Michelle were fraudulent and there was therefore no supporting affidavits to speak of. Worse still, the founding affidavit itself was fraudulent having purportedly been sworn to at Bindura but having been purpotedly signed before a notary public in the United Kingdom. The affidavit of Ethel was only filed at the court's insistence. The Magistrate ought therefore to have scrutinised the whole application with a fine tooth comb because there was no proper application in the first place.

Even if assuming that there was a proper application, the record has no proof of publication of the application in the government gazette which is a critical legal requirement. Even the notice of publication in a newspaper bears no proof as to which newspaper it was published in. The requirement in s9 (3) is that the notice must be published in a newspaper circulating in the area where the minor child resides. The Magistrate overlooked this very critical aspect. Publication is meant to give interested persons notice so that they can make representations if any regarding the application. More worrisome is the fact that even on the 2nd of October 2019, no notice had been published in a newspaper and yet the Magistrate only mentioned the gazette. The notice published in an unidentified newspaper shows the date of the 25th of October 2019 which is as a matter of fact the date to which the hearing was postponed to.

The applicant cannot be heard to claim that he is a fit and proper person on his own. This requires independent proof. His circumstances in the United Kingdom are scanty. The court ought to have conducted an inquiry as per s 9(4). Although the Magistrate correctly concluded that Michelle was a major and could not be the subject of an order for

guardianship, the proceedings cannot by any stretch of imagination be called an inquiry. There is no record of what transpired except a 'ruling'. Courts must not be seen to be playing Russian Roulette with the lives of minor children especially in a world characterised by unimaginable abuse of children including sexual and gender based violence including child trafficking – see *Saungweme* v *The Master of the High Court NO,* 2016(2) ZLR 639; *In Re Maposa,* 2007 (2) ZLR 333 and *Kutsanzira* v *The Master of the High Court,* 2012 (2) ZLR 91(H). It is therefore concerning that the court treated this matter in a cursory manner.

I noted with concern that despite the law requiring that applications must be placed before a judge within seven days of appointment of a person as guardian – see s9(6), this matter was only placed before me on the 19th of May 2020 despite the appointment having been made on the 25th of October 2019. There is no explanation on this state of affairs.

I also noted that ironically the applicant's legal practitioners in the draft order sought costs against any 'respondent' despite none being cited should they oppose the application. It is the conduct of the applicant's legal practitioner Mr *Kajokoto* that deserves censure and had the application been opposed, he would have had to convince this court not to make an order of costs against him personally. It is inexplicably how a legal practitioner would file an application for adoption then not go through with it or withdraw it. He proceeds to file another application and place fraudulent affidavits before the court. He does not comply with the law on advertising and yet he expects costs if the matter is opposed.

Section 9(7) of the Act gives this honourable court options as follows:-

> "(7) A judge before whom a record of proceedings has been laid in terms of subsection (6) may—
> (*a*) confirm, vary or set aside the decision of the children's court; or
> (*b*) remit the matter to the children's court with such instructions as to the further proceedings to be had in such matter as he thinks fit; or
> (*c*) give such other order or make such other direction, including an order for the production of further evidence before him, as he thinks fit."

It is not clear from the record whether or not the applicant's legal practitioners have already uplifted a copy of the order for guardianship before this court would have made a determination. If so, it is likely that the applicant will innocently use the order to apply for a visa for the minor child. It is trite that this court is the upper guardian of all minor children and there is need to protect them. The Registrar of this court is therefore directed to bring this order to the attention of the Embassy of the United Kingdom in Zimbabwe.

Disposition

Accordingly it is ordered as follows:-

The decision of the Children's Court sitting at Bindura in case number JV 08/19 appointing the applicant as guardian of a minor child Passion Mukudzeyi Chauraya born on the 1st of September 2009 be and is hereby set aside.

Kajokoto and Company, applicant's legal practitioners