

X
versus
Y
and
THE MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE
and
CHITUNGWIZA DEPARTMENT OF SOCIAL WELFARE

HIGH COURT OF ZIMBAWE
TSANGA J
HARARE, 11 September & 8 October 2020

Urgent chamber application

T Mushangwe, for applicant
No appearance for 1st respondent
N Muchinguri, for 2nd and 3rd Respondents

TSANGA J: On the 11th of September 2020, I dismissed an urgent chamber for interim custody and gave oral reasons for so doing. I indicated to the parties that I would put the reasons given in writing for the guidance of others who may find themselves under similar fact circumstances.

An urgent chamber application was filed by X in which she sought that the second and third respondents hand into her custody, five minor children belonging to Y. She is the sister to Y. The children were removed from Y's custody by the Chitungwiza Department of Social Welfare for fear for their safety. He is their father and faces allegations of having raped a 15 year old minor who was under his guardianship.

A court enquiry was also in progress at the time on whether any of the other children, who vary in age from three to thirteen years old, may have been affected. It emerged from the papers that their mother is separated from Y and lives in Dubai.

According to X, this urgent application for interim relief was said to have been necessitated by the coming to her knowledge, through unspecified means, that since their removal, the children were not being looked after properly by second respondent, that is the Department of Social Welfare. She did not state how or from whom she had obtained this knowledge. Apart from their being moved from pillar to post, she also alleged that they were not being properly fed. The facilities for their accommodation were said to be dilapidated and

not suitable for minor children who were said to be more accustomed to a homely environment. More significantly, X averred that she had already made an application for custody of the five minor children which was scheduled for hearing the 17th of September 2020. In other words, the hearing for custody was only a few days away at the time of this application on the 11th of September 2020. She averred that it would be detrimental for the children have to wait for the custody hearing on the stipulated date.

In light of these averments involving the children, albeit hearsay in the nature, I still found it prudent to set the matter down for urgent hearing and instructed that applicant notify all relevant parties. Indeed X the applicant and her lawyer availed herself as did the lawyer from the AG's office who represented the second and third respondents. A representative from the welfare also availed herself. Y was a no show.

At the hearing, the above assertions were reiterated. The main point by X's lawyer was that this court, as upper guardian of all children, should intervene by giving the interim custody on the basis of this being in the best interests of the children.

Counsel for the represented respondents was opposed. Investigations were still in progress on the court enquiry, and, as for the custody application, he asserted that it would be prejudicial at this point to give custody to X who is Y's sister. This was on the basis that it might jeopardise the enquiry that was still being done as the children could be easily influenced.

As for the allegations of neglect, according to the representative from Social Welfare who was present, the children were staying at SOS Children's home in Waterfalls. She had not heard anything about the inadequacy of facilities at that centre. It was not government run. She also challenged the assertion that the children had not been brought to court as mandated within the requisite time frame after being taken by the Department of Social Welfare. She stressed that investigations were in progress.

In dealing with the application on whether to grant interim custody, I acknowledged the starting point that the High Court is the upper guardian of all children. Indeed our constitution could not be clearer in s 81(3):

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

Being that as it may, the role of the High Court in particular must not be understood as that of usurper of the judicial functions of lower courts. It must be understood as that of

upper guardian in the sense of doing at all times, that which is in the best of the children. This would also include the best administrative action towards that goal. Therefore upon hearing the parties, in dismissing the application, the reason I gave was that although the High Court is the upper guardian of all children and even more so for children in care, it still remains important for lower courts to be permitted to play their role unfettered. In this instance were the provisional order for temporary custody to have been given placing by the children in X's care before the custody hearing, this would likely compromise those proceedings. There would be nothing to stop X from asserting her suitability on the strength of an interim order of this court. This would cloud issues and would be undesirable.

What needs to be understood in such contexts, is that the High Court will not flex its muscles as upper guardian simply because it is the higher court. I can do no more than highlight herein what was stated in *Kunz v Pretorius* 1982 (2) ZLR 24 (HC) that the question is not one of which court is senior but which course is more conducive to stability of administration. This does not mean non-intervention in ongoing proceedings before lower courts that involve children at all times. It does, however, mean that the High Court must be able to assess and balance all considerations in protecting children effectively in every case before doing so. In other, words, if need be it will do so very sparingly given that the avenue of review or appeal remain. Furthermore, in the case of children being place in care the order would need to be confirmed by this court.

In this instance, there was no tangible evidence placed before me to support the allegations of hardship. As the custody hearing was only a few days away, the best course of action in the interests of the children was to allow the matter to be fully ventilated at the Children's Court.

It was for these reasons that I dismissed the urgent application that was before me with no order as to costs.

Masawi & Partners: Applicant's Legal Practitioners
Civil Division of the Attorney General's Office: 2nd and 3rd Respondent's Legal Practitioners