

In re LEO MASHIZHA NHERERA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 6 February 2015

Civil review

MUREMBA J: This matter was dealt with by a magistrate on 16 January 2015. It involves the application for guardianship of a minor child aged 14 years.

The applicant is the minor's paternal uncle. The father of the minor child who was a brother of the applicant is deceased. However, the minor child's mother is still alive.

On 16 January 2015 the applicant made an application for guardianship of the minor child before the children's court at Harare Magistrates Court. The mother of the child deposed to an affidavit consenting to the application. This application was made in terms of s 9 (1) of the Guardianship of Minors Act [*Chapter 5:08*]. The magistrate granted the application.

However, upon sending the record for review in terms of s 9 (6) of the said Act, the magistrate attached a note to the effect that she had erroneously granted the application without realising that one of the biological parents of the minor child was still alive. She was seeking guidance on how to proceed.

In terms of s 9 (1) and (2) of the Guardianship of Minors Act [*Chapter 5:08*] the children's court may only appoint a person to be a guardian of a minor child who has no natural guardian or a tutor testamentary. It reads,

“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.

(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.”

So the Magistrate was quite correct in her observation that she had no jurisdiction to entertain the application. The unfortunate part is that she made this realisation after she had

already granted the application. The children's court's jurisdiction is limited to circumstances or situations where the minor has no natural guardian or tutor testamentary. The magistrates court being a creature of statute cannot exercise jurisdiction which is not conferred upon it by statute. So as long as the minor's natural parents or one of the natural parents is still alive or maybe alive, an application for guardianship cannot be made to the children's court.

For parents who are both alive, but are divorced or living apart, the parent who wishes to have sole guardianship of the minor child can make an application to this court in terms of s 4 (1) (b) of the Guardianship of Minors Act [*Chapter 5:08*]. The provision reads:

“On the application of either parent of a minor whose parents are divorced or are living apart; if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship, which shall include the power to consent to a marriage, or sole custody of the minor, or order that on the predecease of the parent named in the order, a person other than the survivor shall be the guardian of the minor, to the exclusion of the survivor or otherwise.”

However, the Guardianship of Minors Act does not cover a scenario like the present scenario where the natural guardian is alive and a relative wants guardianship. Since the magistrates court has no jurisdiction in such a scenario, the application must be made to the High Court on the basis that it is the upper guardian of minor children. Section 81 (3) of the Constitution of Zimbabwe Amendment Act (Number 20) states that,

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

The High Court also exercises jurisdiction on the ground that it has inherent jurisdiction based on s 171 (1) (a) of the Constitution which states that, “the High Court has jurisdiction over all civil and criminal matters throughout Zimbabwe.” Section 13 of the High Court Act also states that, “subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.”

This therefore means that the applicant ought to have made his application to this court instead of making it at the magistrates court.

The children's court's decision is therefore null and void. It is hereby set aside in terms of s 9 (7) (a) of the Guardianship of Minors Act [*Chapter 5:08*]. The learned magistrate is directed to instruct the clerk of court to notify the applicant accordingly and to advise him to apply to this court for guardianship if he still wishes to pursue the matter.

MAWADZE J agrees _____