

IN RE WASHINGTON FUNGISAI MUDIMBU

**HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 14 NOVEMBER 2018.**

Civil Review

MAWADZE J: This matter was brought to me in terms of s 9(6) of the Guardianship of Minors Act [*Cap 5:08*] by the Magistrate sitting as the children's Court at Masvingo.

After I had ploughed through the papers submitted by the Magistrate I raised a number of issues with the presiding Magistrate. It may be prudent to quote the query I raised. It reads as follows;

- “1. In terms of what provision of the Guardianship of Minors Act [*Cap 5:08*] was this order granted.
2. If it is s 9(1) of the said Act, did the trial Magistrate have jurisdiction to grant such an order where one of the parents is alive.
3. Why is the affidavit of one Delight Chikohomero written in ink where additional information is added? Is that proper for court records. Who added that information as the handwriting is patently different from the deponent's signature.”

The response by the learned Magistrate makes various concessions.

This matter is an application for guardianship in terms of the Guardianship of Minors Act [*Cap 5:08*]. The background facts are as follows;

The record of proceedings consists of an affidavit by the applicant one Washington Fungisai Mudimbu; an affidavit purportedly by the minor's mother one Delight Chikohomero, a copy of applicant's passport which is hardly legible, a copy of the minor's birth certificate, certificate of death of the father of the minor and an illegible copy of the passport of the minor's mother Delight Chikohomero.

The applicant regards the minor as a nephew as he is a son to his late brother who passed on on 23 November 2004. The applicant's founding affidavit is not of much help. According to the applicant the minor's mother is married to another man and is now resident in Botswana. The applicant avers that on an unspecified date the minor was left in the custody of the applicant. The applicant alleges that on that basis he has become what he calls "*a de facto guardian.*" The applicant wrongly avers that since the father of the minor is late and its mother is domiciled in Botswana the minor has no natural guardian. Lastly the applicant states without any further elaboration that it is in the best interests of the minor for him to be awarded guardianship. The main reason proffered by the applicant is that he is the closest available relative of the minor and that he is currently meeting the material needs of the minor who is in his custody. The applicant does not give any other detail about himself or why he is a fit and proper person to be awarded guardianship.

The affidavit purportedly by the minor's biological mother raises serious ethical questions and puts into doubt as to who authored it. Its authenticity is clearly in doubt. Some important information is written in ink as additional information and is not countersigned. The handwriting is manifestly different from the deponent's signature or handwriting. The Magistrate was unhelpful in explaining all this. In order to illustrate this point, I shall reproduce this affidavit and put the additional information written in ink in italics. It reads as follows;

"I Delight Chikohomero do hereby make oath and stat that: -

1. I am the biological mother of the minor child Tadiwanashe Blessing Linnel Mudimbu (born 18 August 2004). I attach a copy of my identity document as Annexure "D".
2. The minor child's father Blessing Taremeredzwa Mudimbu died on 23rd November, 2004.
3. Since the death of the minor child's father, I have relocated to Botswana, where I am married to another man *and have started another family.*
4. I left the minor child under the care of his uncle, Washington Fungisai Mudimbu who is still in charge of the child's affairs to date. *The child had no natural guardian nor tutor testamentary since his father is deceased and I have relocated to another country.*
5. I have no objection to the court formally awarding *guardianship* to the minor child to Washington Fungisai Mudimbu as I consider it to be in the best interests of the child. *The child lives with Washington Fungisai Mudimbu who cares for him as though it was his own child. Washington Fungisai Mudimbu enrolled the child in*

boarding school at Mutambara High School where he takes care of all the child's need.

Wherefore I pray for an order in terms of the Draft Order.”

As already said all what is in italics is additional information written in ink and not countersigned. The handwriting is clearly different from that of the deponent as appears on her signature. The question which lingers in the mind is who made this additional information and some cancellations in ink. Why was this not counter signed or a proper affidavit redone? Does this not put into doubt the authenticity of this affidavit? A magistrates court is a court of record and all documents filed should be clear and unaltered. I do not wish to cast any aspersions on anyone but I am alive that our courts are not immune to fraudulent practices. Fake documents and or orders have been generated in our jurisdiction. There is no plausible reason why such a poorly drafted affidavit was deemed acceptable by the magistrate who handled this matter. It would be a dereliction of duty if I am to also endorse such an anomaly especially where the interests of a minor child are involved and the rights of the biological mother are at stake.

Another anomaly I noted is that the proceedings were held in a very perfunctory manner. The record of proceedings does not inspire any confidence at all. Indeed, advertisements were placed in both the Government Gazette and the Mirror newspaper but no meaningful inquiry was held by the Magistrate. All what is recorded is as follows;

“Mr Hwacha – I have filed in the necessary papers. I have checked the record and there is no objection to the application. I therefore pray for the confirmation of the Draft Order.

Ruling

Draft order confirmation as final.”

These are the proceedings I am obliged to review!

In terms of s 9(4) of the Guardianship of Minors Act [*Cap 5:08*] the court should hold an inquiry.

In the case of re *Chikombingo & Ors* 2014 (1) ZLR 65) (H) at 656 C – E I had this to say;

“In terms of s 27 of the Children's Act after holding of the inquiry and granting the order, the Children's Court is enjoined with seven days to submit the record of proceedings to the High Court for review. Such a review can only be meaningful where a proper record of proceedings has been kept.

In re Gonyora 2001 (2) ZLR 573 (H) it was pointed out that the record of proceedings of a Children's Court which is submitted for review (whether in terms of the

Guardianship of Minors Act [Cap 5:08] or the Act [Cap 5:06] must include reasons for the court's decision. The reason for this is clear. This court cannot carry out its review powers to determine whether the proceedings were in accordance with real and substantial justice where there is no record of proceedings and no written reasons for the decision made. In the absence of a proper inquiry, the record of proceedings and the reasons for the order made, this court is hamstrung in deciding whether the Children's Court has taken into consideration the principles that bear on the child's best interests."

In casu I am equally hamstrung to assess the propriety of the decision taken by the Magistrate.

The most glaring misdirection in this matter is that the Magistrate had no jurisdiction to grant the order in issue. The powers of the Magistrate are clearly spelt out in s 9(1) of the Guardianship Act [Cap 5:08] which provide as follows;

“9. *Appointment of Guardian by Children's Court*

(1) *Without prejudice to the rights, powers and privileges of the High Court as the upper guardian of the minor children, and the Master in terms of Section 74 of the Administration of Estate Act [Cap 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.*” (emphasis is my own)

The minor child in this matter has a biological mother who in the absence of the late father is the natural guardian. Secondly, the Magistrate has not explained at all why the applicant is deemed to be a fit and proper person. The applicant's affidavit does not deal with this issue at all and no inquiry was held to satisfy this requirement. This court as the upper guardian of minor children cannot say with certainty whether the applicant's appointment as the minor's guardian is in the interest of the said minor child and whether the applicant is a fit and proper person.

In the result, I am inclined to invoke the powers bestowed upon me in terms of s 28 of the High Court Act [Cap 7:06] as read together with s 9(7) of the Guardianship of Minors Act [Cap 5:08]. I shall proceed to set aside the order made by the Magistrate as it is *ultra vires* the powers of the Magistrate. The applicant is at liberty to seek a similar order in an appropriate court taking into account the concerns I have raised.

It is ordered that, the order by the Magistrate be and is hereby set aside.