PRAXEDES MUNGWARI
versus
MASTER OF THE HIGH COURT
and
LAWRENCE MUNGWARI
and
ANTONATTA CHIHOMBORI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; 23 September 2024

(Chamber Application: Reasons for dismissal)

TSANGA J:

On 5 July 2024, I issued the order as captured below in a chamber application for guardianship:

> "The application is dismissed as applicant can continue to support the second respondent financially without a surrender of guardianship as the other reasons given are insufficiently compelling for the surrender of guardian or the appointment of joint guardianship with a non-parent."

The context was as follows:

The applicant and the father of the child Lawrence Mungwari who was the second respondent in the application, are brother and sister. The applicant averred that she has been supporting her brother to look after his child F. T. M. who was born on the 29th of December 2008. Her application was for full guardianship or in the alternative joint guardianship because her brother Lawrence cannot afford to look after the child. The application was also made on account that there are better educational opportunities for the child in the United Kingdom, were applicant to be given guardianship since that is where she resides. This application was made under common law.

The minor, F. T. M is one of four children for whom Lawrence Mungwari obtained sole guardianship of on the 25th of June 2014, on account of the whereabouts of the mother being unknown.

The applicant's averments were in essence that she has been looking after the interests of the minor child in question by paying her school fees and taking care of her financial needs because the father is unemployed. He himself said his income was unstable. According to her, she liaises with the child whenever she comes to visit Zimbabwe and keeps in touch through WhatsApp messages and phone calls.

She also averred that she has a son who is the same age as the minor child and that the two get along. (The curator, however, said in her report applicant's son is 24 years old). Applicant also indicated that she has tried to apply for a visa for the minor child but was advised by Immigration in the United Kingdom that she needs to have full guardianship for the visa to be considered.

In reaching my conclusion that neither the surrender of guardianship nor joint guardianship was appropriate and that the applicant should simply continue to support her brother financially to look after the child if so disposed, I took into account the following.

The surrender of guardianship under common law by a parent is in exceptional circumstances. These were outlined in *Kutsanzira v The Master* 2012 (2) ZLR 91 (H) as follows:

> "Under the common law there are basically three categories which are recognized by law whereby guardianship or parental power may be lawfully transferred. These are adoption, *legimmatio per subsequens matrimonium* (which means that children whose parents marry after their birth become legitimated as a result of the subsequent marriage of their parents) and *venia aetatis* (which means grant by a sovereign or the courts of the status of majority to a minor). It seems to me therefore that guardianship cannot merely be transferred from one person to another if it does not fall under any of these categories. The willingness of the parents to give away their guardianship does not appear to have any significance in the ultimate decision by the court of whether or not to grant the guardianship of the minor child to another."

I was not persuaded that the factual circumstances could be described as exceptional. She lives and works in the United Kingdom and has not had physical custody of the child. It was therefore not as if I was faced with an application that would keep a family together. What she wanted was is in fact custody of the child which custody she was to exercise in England together with guardianship rights.

She also said she has been giving financial support for the child's educational needs and attached school fee receipts from 2021 to 2023. There was nothing in the receipts to show

that the payments were by financed by her. In reality if she has been supporting her brother to look after the child from 2014 because of financial difficulties as alleged, then nothing has changed. My conclusion was applicant could very well continue her model of support without uprooting the minor from her guardian and her family. There are many families using this model of support to cater for economic hardships by family members.

The child is in fact one of four siblings under the day-to-day care of their father Lawrence Mungwari. Courts try to keep children together. I was not convinced that the child's best interests would be served by removing her from the guardian she has always known and the siblings she has grown up with.

In *Chipo Usore & Anor v Samson Chigwada & The Master* HH 483-20 an application made for guardianship by third parties made for purposes of travelling with the child outside the country was denied. In *In Re Maenzanise* HH39/20 where the factual circumstances were similar to the case that was before me, the application was denied.

Equally significant, in dismissing the application, I was persuaded by the fact that the United Kingdom has its own immigration laws concerning bringing in additional dependants by those it has granted citizenship or resident rights. In other words, the child's ability to be with the applicant would be derivative from the latter being allowed by the authorities in the United Kingdom. Whilst applicant said she had tried to apply for a visa and was advised that she needs to have guardianship of the child, no proof of such communication was attached.

It has become too evident that our courts are being asked to make pre-emptive decisions on eligibility to bring in additional dependants to the United Kingdom in circumstances where there is not even proof of an application being made or one that is likely to be granted. It cannot be in the best interests of a child to be thrown into a situation of uncertainty where there is no knowing if an application will in fact be granted. None of the relevant authorities in the United Kingdom had attested to anything in support of the application.

There are also many tensions these days around economic induced migrations in countries whose economies are perceived to be strong, including the United Kingdom. It is not for our courts to make decisions about who can be brought as a dependant to the United Kingdom without proof that there has indeed been an application made to the relevant authorities, which may be in abeyance subject to our court granting guardianship. It is important that proof of such application be made part of the record in an application for guardianship as it is the authorities in the United Kingdom for instance where applicant resides that are in a position to assess whether the applicant can rightfully bring in an additional person.

Although there are indeed cultural variations in the definition of who constitutes family, it is certainly not for the courts or judges to loosely define families or guardianship for immigration purposes for purposes of pursuing greener pastures. This court also needed to have been satisfied that there is schooling for the minor child which would generally be in the context where the relevant immigration authorities have approved an application.

The curator's report was not of much assistance under the circumstances. Assessing an applicant's suitability through a WhatsApp call is insufficient. Applicants simply state what you want to hear. As for the parent, they too will also expectedly speak in support of the application. The Master's report was also standard and tended to be a regurgitation of the factual circumstances.

Courts simply have to be stricter about these applications as guardianship. It cannot be surrendered to third party living in another country who has never had custody of the child in question, merely on their strength of their say so without a single iota of evidence that they have been granted or have even pursued an application for bringing a child that they have financially supported within the wider family, as a dependant into that country.

It was for all these reasons that I dismissed the application.

TSANGA J: …….

TK Hove and Partners, applicant's legal practitioners