THE STATE
versus
SEKAI NDORO

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 17 June 2010

Civil Review.

UCHENA J: The applicant Sekai Ndoro is the natural mother of Samatha Ruhukwa. She applied to the Mutare Juvenile Court for an order granting her guardianship, and custody of Samatha. The application cites her as the applicant. No respondent was cited though Samatha's father's identity is revealed in the applicant's founding affidavit.

In her affidavit the applicant says, she stays with Samatha, because her father has remarried. There was therefore a respondent who should have been given notice of the application. The application was heard in spite of the applicant's failure to give notice to the child's father. According to Chipo Ndoro's supporting affidavit, Samatha's father left the country. That does not justify his not being given notice of an application which affects his guardianship of Samatha.

The juvenile court granted the application. The record of proceedings was forwarded to this court for automatic review in terms of s 9(6) of the Guardianship of Minors Act, [*Cap 5;08*], herein after referred to as the Act. Section 9(6) of the Act provides 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."

The record landed on my desk. I asked the Magistrate to comment on why the minor child's father was not given notice of the application. The magistrate conceded the error.

The minor's father was entitled to notice because after his separation with the applicant, he in terms of s 3 of the Act, retained guardianship of Samatha. Section 3 of the Act provides as follows;

"Where the parents of a minor—

(*a*) are living together lawfully as husband and wife; or
(*b*) are divorced or are living apart and the sole guardianship of the minor has not been granted to either of them by order of the High Court or a judge; the rights

> of guardianship of the father shall be exercised in consultation with the mother, and if a decision of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the life," health or morals of the minor to his detriment, the mother may apply to a judge in chambers, who may make such order in the matter as he thinks proper."

This means during the subsistence of the marriage, and after divorce or separation but before the High Court or a judge, has granted the sole guardianship to either of them, the father remains the minor's guardian. The applicant's application sought to take that guardianship from him. Doing so without notifying him offends against the *audi alteram partem* rule.

The Juvenile Court made a more serious error, when it heard the applicant's application, when it had no jurisdiction to hear such an application. In terms of s 9(1) and (2) of the Act, the children's court can only hear applications, for guardianship by relatives, other persons having care and custody of the minor, or a probation officer. It can only hear such an application if the minor has no natural guardian or tutor testamentary. Subss 9(1) and (2) provides as follows;

> "(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 s 74 of the Administration of Estates 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.
>
> (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."

This means the juvenile court can only exercise jurisdiction and appoint a guardian for a minor child if that child has no natural guardian. In this case the applicant is the minor child's natural mother and therefore the child's natural guardian. Applications to the juvenile court, in terms of s 9(2) (a) and (b), can only be made by a relative or person having the care and custody of the minor, or by a probation officer. It can not be made by the minor's natural guardian, because what qualifies such an application is the absence of a natural guardian or tutor testamentary. This is confirmed by s 3 of the Act which provides that;

"Where the parents of a minor—

(*a*) are living together lawfully as husband and wife; or
(*b*) are divorced or are living apart and the sole guardianship of the minor has not been granted to either of them **by order of the High Court or a judge;" (emphasis added)**

This means guardianship disputes between the minor's natural parents are determined by the High Court or a judge of the High Court. The juvenile court did not therefore have jurisdiction to hear the applicant's application.

The applicant should have applied for guardianship to the High Court in terms of s 4(1) of the Act. Section 4 (1) provides as follows;

"(1) The High Court or a judge thereof may—
(*a*) on the application of either parent of a minor in proceedings for divorce or judicial separation in which an order for divorce or judicial separation is granted; or

(*b*) 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."

This means no other court has jurisdiction to determine the issue of guardianship where one of the minor's natural parents is alive. The juvenile court's jurisdiction is limited to circumstances where the minor has no natural guardian or tutor testamentary.

The juvenile court's decision is therefore null and void. It is set aside.

UCHENA J: ……