STINY MACHIKA
versus
JOSHUA MAKONI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 18 November 2022 & 4 May 2023

Opposed Application

L Mundieta, for the applicant
R T Benza, for the respondent

TSANGA J: A point *in limine* raised in this matter is that of *locus standi,* more specifically being that a grandparent has no standing in our law to seek shared access with the biological parent who has custody of the children. The application before me is made under the rubric of the "best interests of the child" under common law and as provided for in our Constitution of Zimbabwe Amendment (No 20) Act of 2013. The trigger to the application arises from events following the death of applicant's daughter who died on the 15th of January 2022. She left behind two minor children aged five years and two years six months at the time of the application filed in August 2022. The respondent, the father of these children who assumed full custody as a surviving parent, is said to have refused to allow her to see the children and continues to do so. There is animosity between applicant and the respondent pre-dating the death of applicant's daughter.

The minor children were living with their mother prior to her death and the applicant says they would at least spend two nights at her house. Applicant's daughter and the respondent had lived together between 2016 and 2021.They separated in June of 2021. Applicant says she has a relationship with them which is desirous of maintaining in the best interests of the children so they retain an intact family fabric with their mother's side of the family. Moreover, the children are still young and she considers herself more attuned to addressing their interests compared to their father whom she says is unmarried. They were removed from her at the end

of January 2022. She says in February 2022 she had tried to communicate with the children's father to have them attend their mother's memorial service. He refused. She has been denied access ever since. The order she seeks is that she be granted access to the two minor children on every alternate weekend from Friday 17:00 hours to Sunday 17:000 and every alternate school holiday. In the event of failure to comply with the order, she seeks the intervention of the Sherriff or any member of the police force.

Respondent, on his part, relies on the definition of access order in s 6 of the Guardianship of Minors Act [*Chapter 5:08*] to argue that applicant is not a parent and has no direct interest in the matter. It defines access order as follows:

> "Access order" means an order of any court, including the High Court, which confers, expressly or impliedly, rights of access to a minor **upon a parent** who does not have the custody of that minor."

On the basis of this definition, he argues that she has neither right, nor direct or substantive interest as she is not a parent. He avers that he was not even approached for access to the children only to be landed with court papers seeking the same. He had not been able to attend the memorial with the children as he had learnt that the grandmother intended to make noise. In any event, he is opposed on the basis that she lacks a legal basis for bringing this application in her capacity as a grandparent as the law governing access dos not entitle grandparents to seek any recourse of this nature. He also avers that she has no cause of action and that the application is in fact one for custody as it is manifest that she wants control of the children based on her averments that she is better placed to look mother them since he is unmarried.

As persuasive authority on *locus standi*, applicant draws attention to *Kleingeld* v *Heunis & Another* 2007 (5) SA 559 (T) in which the court held that a grandparent does have *locus standi* to apply for access to a minor grandchild. On *locus standi*, the court reasoned thus on p 563E of the judgment:

> "In this matter it is a fact that the applicant is the grandparent of the minor children of the respondents. All he needs to allege to establish *locus standi* is the very fact that he is the grandparent of the relevant children. So the contention that he does not have *locus standi*, is in my view unfounded".

However, it also emphasised that a grandparent does not have inherent right of access to a grandchild although a court, as upper guardian, may intervene to grant access where special grounds indicate that it is in a child's best interests to do so. The court equally emphasised that

it is slow to substitute itself as parents of child where nothing indicates that parents not exercising parental rights in the child's best interests. Also highlighted was that grounds for intervention include realities such as danger to the child's life, health or morals, but equally, that these are not the only grounds on which the Court will interfere.

I am indeed persuaded by this case authority on the issue of *locus standi*. Even though a grandparent does not have an inherent right of access, the approach must not be to shut the door to a grandparent without any assessment whatsoever of the triggers to the application and whether an application is in a child's best interests. The point *in limine* on locus standi is accordingly dismissed.

A second point *in limine* relates to the order sought. Respondent's argument is that what is sought is custody. That is not the case. Full custody is with the respondent. What the court is asked to consider are access and visitation rights. Their extent can be altered by the court on the basis of the totality of the facts in the event that the court finds that this is a special case where it ought to intervene and grant visitation rights in the best interests of the children. This point *in limine* therefore also lacks merit.

Turning to the merits of the matter, Mr Mundieta emphasized the strong relationship that the children had with the applicant before the death of their mother. The respondent was said to have since banned all maternal relatives from having access to the minor children. He emphasized that every child has a right to a family which encompasses interaction with maternal and paternal relatives. He also argued that there is nothing herein that indicates that it is not in the best interest of the children to maintain that relationship. He relied on the case of *Frank Buyanga Sadiqi* v *Chantelle Tatenda Muteswa* HH *249/20* to emphasise that it is not the rights of parents but those of the child that must be paramount.

Mr. Benza on behalf of respondent submitted that the alleged barring had not been demonstrated. Whilst agreeing that there should be bond, he emphasized that his client's main objection was with approaching the issue as a legal right. Still, efforts on my part to get the parties to agree on access arrangements failed leaving me no option but to proceed by way of a written judgment.

Analysis

The general legal position is indeed to give a surviving parent full custodial rights which the court can only interfere with in exceptional circumstances in the interests of the children. There is indeed currently no specific legislation giving or establishing independent visitation for grandparents in our law. Generally, grandparent involvement is a matter of private

arrangement or resolution in most families. What is there in our law is, however, a constitutional mandate to prioritise the best interests of the child in all matters involving children. Herein the father objects to giving the applicant as the maternal grandmother access. His reasons which I had to ascertain have to do with a past feud in which applicant ended up assaulting his mother following his own dispute involving domestic violence with the late when they were still together. These reasons have nothing to do with the children but rather unhealed adult egos.

Our Constitution is clear in s 81 that in matters involving children their best interests are paramount, not those of the parent. Sections 81(2) and (3) of our Constitution are pertinent. They provide as follows:

> (2) A child's best interests are paramount in every matter concerning the child.
> (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

It is therefore necessary to analyse the factual matrix of all parties involved in order to arrive at a conclusion of what is in the children's best interests, since ultimately it is the children's needs which should be prioritised. Since the death of a parent has triggered this application this case can be said to be immediately distinguishable from those such as *Kleingeld* where such a dispute arises in a context where both parents are alive but are perhaps divorced or separated, thus impacting on a grandparent's access in some manner.

Since the mother or the children is dead, it is clearly in the children's interest to keep in touch with the maternal side of their family absent any indication that it is not in their interests to do so. To deny them any contact is severely cruel to the children as they can never get back that they will have lost from the absence of such connection. It is also vital to look at the best interests of the children from the perspective of the vital link between grandparents and grandchildren. As it is said "where a child is born, so is a grandparent". Both stand to benefit. The grandmother is more than willing to continue fostering her natural bond with her grandchildren. Children learn how to develop and maintain important social relations within the family.

The applicant, as grandparent, has alluded to the circumstances that make the application justifiable. She has alluded to emotional ties with her children. She has also attested to her ability and willingness to give them love and support. She has equally attested to having had prior contact with the children. She is also physically fit from what I observed of her in the endeavour to get the parties to settle. All these are important considerations in assessing the

best interest of the child which are a paramount. Even if the common law obligation to visit grandparents is a moral as opposed to a legal one suffice it to emphasise that the best interest of the child principle makes it is possible to address present scenario even in the absence of such specific legislation. This requires balancing all the interests of those involved against that principle.

The respondent as father of those children relies on parental rights as enshrined in the Guardianship of Minors Act to assert his full rights as a surviving parent. Indeed as stated in the *Kleingeld* case, grandparents do not have an inherent right of access but the court may intervene in special circumstances. A total denial of access as in this case is itself an indicator that the respondent is not acting in children's best interest. He is fronting his own vendetta.
In my view, this is a special case where the court ought to intervene in the best interests of the children whose mother is no more and where the children do need to grow up knowing their mother's side of the family. Reasonable visitation rights would therefore be within this context.

Suffice it to say that in so far as parties may find it necessary to approach the courts, the advantage of legislation would be to make it clear under what circumstances under which grandparents can seek the court's intervention so as to avoid an influx of applications. Such legislative intervention would also significantly be in keeping with giving contextual meaning to the family as a fundamental unit of society in line with article 16 of the Universal Declaration of Human rights and article 23 of the International Covenant on Civil and Political Rights. Both provide the basis of family as a fundamental human right. The African Charter on Human and People's Rights, an important regional instrument, equally awards family protection in article 18.

In circumstances where the children have lost a parent it is in the children's best interests to have some contact with the deceased parent's family in the absence of any adverse reasons why they should not. It has not been shown here how it would endanger their physical, mental, or emotional health to maintain those links. The respondent is clearly acting in his own interests to fix her. "A child is what you put into them" so says a Nigerian proverb. The Rwandese add to this: "When you bear a grudge, your child will also bear a grudge." Great wisdom. That cycle needs to be nipped in the bud as it has zero to do with the children's best interests. It is necessary in this case for the court to intervening order to protect their interests.

However, visitation should not conflict with a child's education. Since in this case the parties live in different towns, visitation ought to be curtailed and measured so that it is not

disruption of respondent's parenting duties. They cannot be going back and forth between towns every weekend. Visitation will be confined to a defined period during school holidays.

On costs, the applicant has sought that the respondent pays these on a higher scale for his resistance. There being no inherent right of access, and this case having been analysed on its merits to ascertain the best interests of the children, I do not think such an order would be justified. Each party can take care of their own costs.

In the circumstances, it is ordered as follows:

1. The applicant is granted visitation rights in her own home to two minor children namely Joshua Tendai Makoni and Michael Tafadzwa Makoni for a continuous period of two weeks of every school holiday.
2. There shall be no order as to costs

Mundieta & Wagoneka –Madzivanyika Law Chambers, applicant's legal practitioners
Masawi & Partners, respondent's legal practitioners