IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

ACTION NUMBER:	**14/Ltk/ 0002**
	(13/Ltk/0098)
BETWEEN:	**DAVINA**
	APPELLANT
AND:	**MAAN**
	RESPONDENT

Appearances:	*Mr. S. Sharma (DLAC) and Ms. S. Prakash for the Appellant.*
	Ms. L. Tabuakuro for the Respondent.
Date/Place of Judgment:	*Wednesday 22 April 2015 at Lautoka.*
Coram:	*Hon. Madam Justice Anjala Wati.*
Category:	*All identifying information in this Judgment have been anonymized or removed and pseudonyms have been used for all persons referred to .Any similarities to any person is purely coincidental.*
Anonymised Case Citation:	*Davina v Maan Family Appeal Case 0002 Suv 2014*

JUDGMENT

Catchwords:

FAMILY LAW – APPEAL – STRIKING OUT PARENTING ORDER APPLICATION ON GROUNDS OF MATERIAL NON-DISCLOSURE – PROPER CONSIDERATIONS -INJUNCTION AGAINST CHILD: VALIDITY OF THE ORDER.

Legislation:

1. ***Family Law Act No. 18 of 2003 ("FLA"): ss. 66(2); 118 (1).***

1. The mother appeals against the orders of the Resident Magistrate ***("RM")*** of - 2013 which arose out of her application for residence of the child of - marriage namely -, born -in 2000.

2. The application was brought by Form 9. The application was dismissed on the grounds that the mother had failed to disclose that there was an earlier order of - 2005 for joint custody of the child to the parents. The Court had also ordered that there be a prohibition order against the child from leaving the country.

3. Mr. Sharma argued that the dismissal was contrary to law as it affected the child's right in that his best interest was not considered. The application should have been granted on merits. He stated that there is no provision in Form 9 to disclose about pending proceedings so the appellant could not have stated anywhere that there was a previous order for joint custody.

4. She wanted the residence of the child to be with her alone, so she applied for the residence and that ought to have been considered on merits.

5. Mr. Sharma also argued that the prohibition order could not have been issued against the child.

6. Ms. Tabuakuro conceded to the appeal. Both parties agreed that the matter ought to be sent back to the lower Court for hearing of the application for residence of the child as no hearing had been conducted so far.

7. Before I delve into the main issue I would like to make a comment on the filing procedure. The parties had an existing file. The file was initiated before the FLA came in force. The initial case number was ***Matrimonial Cause Number 0129 of 2002*** and when the FLA came in force it was assigned a number ***06/Ltk/0416***. The new numbering system started under the new legislation and all old files were given new numbers.

8. It was a requirement under the FLA that each party will have one file and one number so that each presiding officer was allocated that file and that there would not be duplication of orders by various Courts and that each Court dealing with the parties had full information on every aspect before it.

9. When the current application was filed, it was an error by the Registry to have created another file and issued it with another number being ***13/Ltk/0098***. If a second file was not opened, then there would not have been any issue about material non-disclosure about a previous order of the Court regarding joint custody.

10. The appellant had little or no control in determining the file number of her application or having her application filed in the previous file. What she may or could have done was to indicate to the filing clerk about the previous case, which I do not know was disclosed by her or not or whether she was asked about any pending or completed proceedings. The clerks of the Registry are trained to ask this routine question so that they are aware of pending or completed proceedings for them to decide where the application ought to be filed.

11. Leaving the administrative error aside, I wish to now focus on the application and orders thereon.

12. The orders that the appellant sought was in the following terms:

" That I seek full custody for my -child of marriage born -in 2000 with no access to the Respondent/Man".

13. The application was filed in person. Although, properly the application ought to have asked for variation of earlier orders, I do not find that there was deliberate non-disclosure by the appellant about the previous orders. She would not have known that she has to apply for a variation and sought orders as if the application was a fresh application for parenting orders.

14. If she had indicated to the Court that her application was for variation of the earlier orders of the Court, it would have been an indication that there was an order in existence.

15. The application for variation of parenting orders is filed by Form 9 application and even if there was no indication that a variation was sought, upon the Court discovering that there was an earlier order of the Court, it ought to have treated the appellant's application as an application for variation of the earlier orders instead of dismissing the matter.

16. The Court has powers under s. 66(2) of the FLA to make a parenting order that discharges, varies, suspends or revives part or all of an earlier parenting order. In doing so the Court must regard the best interests of the child as the paramount consideration.

17. When the Court dismissed the application, it did not consider the best interest of the child. The Court punished the child for the appellant's mistake that she did not indicate to the Court about earlier proceedings.

18. Even if there was deliberate non-disclosure by the appellant, the orders made ought not to affect the child which it did in this case as his best interest was never a consideration when the application was dismissed.

19. When the appellant failed to indicate that she was applying for a variation of the earlier order, the proceedings did not become a nullity. Instead it was a mere irregularity which could have been cured by an amendment instead of the proceedings being dismissed.

20. I find that when the Court was aware that there existed an earlier order, the proper course for it was to have regard to the real merits of the case because the respondent was also fully aware of the order and he did not suffer any injustice or was prejudicially affected by the application.

21. I find that in dismissing the application, the Court erred in law. Normally when a party does not disclose about a previous order and the application is to be heard inter-partes, then the onus is on the respondent to disclose about the existence of the order, which the respondent did in this case. Once the disclosure is done, The Court ought to proceed to hearing of the application. It is another matter if the Court heard the matter ex-parte and granted the order. Then non-disclosure would be a material factor in determining whether the later orders should stand or not.

22. The court erred in law in applying the principle of non-disclosure to dismiss the application when it did not have any bearing on the case.

23. The next issue is that of issuing a prohibition order against a child. The Court only has powers to grant an injunction for the welfare of the child and not against the child: ***s. 118(1) of the FLA***.

24. It would have been proper if the orders were made that the child was not to be removed out of the jurisdiction of the Court and if either party breached the order, it could be enforced against that party.

25. In the final analysis, for the reasons outlined above, I make the following orders:

(a) The order of the lower Court in dismissing the appellant's application for residence of the child is set aside. I order that the application be heard and determined on merits. The matter is referred to the Registrar of the Family Division to allocate this matter to another RM in Lautoka.

(b) The prohibition order against the child is set aside and substituted with an order that the child is not to be removed out of the jurisdiction until the determination of the variation of the parenting order application. The lower Court has powers to uplift this order at any time before the hearing and determination of the above application for an interim period if it is in the interest of the child.

(c) After the hearing and determination of the application for variation, the lower Court has powers to uplift this order in the interest of the child either on an interim or permanent basis.

ANJALA WATI
JUDGE
22.04.2015