IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

ACTION NUMBER:	**0012/2016**
	(Original Case Number: 15/Ba/0054)
BETWEEN:	**ARUNESH**
	APPELLANT
AND:	**CYNTHIA**
	RESPONDENT
Appearances:	*Mr. Iqbal Khan for the Appellant.*
	Mr. Tomasi Tuitoga for the Respondent.
Date/Place of Judgment:	*Friday 25 August 2017 at Lautoka.*
Coram:	*Hon. Madam Justice Anjala Wati.*
Category:	*All identifying information in this judgment has been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.*
Anonymised Case Citation:	*ARUNESH V CYNTHIA– Fiji Family High Court Appeal Case Number:*
	0012/2016 (Original Case Number: 15/Ba/0054).

JUDGMENT

Catchwords:

FAMILY LAW – Child Recovery – child recovery order granted- pending proceedings for parenting orders - propriety of bringing the application ex-parte on the allegation of child abuse when allegations of similar nature in existence prior to the recovery application being made– the need for investigation of the allegation of child abuse by inter-partes hearing before any orders for recovery be made in circumstances where there has been previous allegation of child abuse and no application for investigation being made.

FAMILY LAW – Procedure – challenging an order by appeal outside the prescribed timeframe- the need for leave from lower court- the appellate court's jurisdiction to hear the appeal without leave to file appeal outside the time period.

Legislation:

1. The Family Law Act 2003 ("FLA"): s.113.

2. The Family Law Rules 2005 ("FLR"): Rule11.01.

Cause and Background

1. On 5 September, 2016, the appellant being the father of the only child of the marriage -, born -in - 2010 filed an appeal seeking various orders as follows:

   a. to set aside the following orders of the Family Division of the Ba Magistrates' Court:

   (i). order of 9 June 2015;
   (ii). order of 7 July 2016; and
   (iii). order of 10 August 2016.

   b. to reinstate the orders of 5 June 2015 made by the Family Division of the Magistrates' Court in Lautoka; and

   c. for Resident Magistrate ("RM") Mr. Mosese Naivalu to be disqualified from hearing the case.

2. Before I spell out the crux of the appeal, it is important that the background of the case be highlighted.

3. The parties to the marriage have had their marriage dissolved. The child lives with the mother and her step-father. She has contact with her natural father.

4. On 24 July 2013, the mother had filed an application for residence of the child. The application was set for hearing on 9 November 2015.

5. On the above parenting order application, interim orders for residence and contact were made by the Family Division of the Magistrates Court in Nasinu where the matter was initially filed and later transferred to Ba Court.

6. The interim order granted interim residence to the mother and interim fortnightly contact to the father on Saturdays and Sundays from 8.00am to 6.00pm.

7. When the father exercised contact in May 2015, he alleges that the child told him about the maltreatment and abuse by the mother and her step-father. That prompted him to file an application for child recovery.

8. Since the court in Ba was not sitting that day, the father requested his lawyers to send the file to Tavua, Rakiraki or Lautoka Magistrates' Court.

9. The matter was heard by the Lautoka Magistrates Court and the child recovery order was granted in favour of the father.

10. Then on 9 June 2015, the mother filed an ex-parte motion to dissolve the orders of the Lautoka Magistrates' court. The orders were granted on the same day. The father then appealed the order.

11. The matter was heard by the High Court and the appeal was dismissed with an order for costs against the father in the sum of $1,500.

12. The judgment of the appellate court was based on the premise that the order of 9 June 2015 was granted ex-parte and that an appeal cannot lie from an ex-parte order. It was found that a proper application was to set aside the order in the Magistrates' Court.

13. Following the decision of the appellate court, the father then filed an application for setting aside of the ex-parte order in the Ba Magistrates Court and for an order that RM Mr. Naivalu does not hear the proceedings anymore.

14. The application for recusal was heard first and an order declining the application was made on 7 July 2016. This order is subject to appeal in the proceedings as well.

15. Subsequently the Court heard the application for dissolution of the orders of 9 June 2015 and declined the same on 10 August 2016. The orders of 10 August 2016 are also part of the notice of appeal in this proceeding.

16. I shall now look at the grounds of appeal against the orders issued on the above days.

Grounds of Appeal/Law and Analysis

17. The appellant raised 10 grounds of appeal. Grounds 1 to 8 and ground 10 relates to the orders of 9 June 2015 and 10 August 2016. Ground 9 relates to the order of 7 July 2016. I shall deal with the various orders under the following heads:

A. (i) Setting aside orders of 9 June 2015 and 10 August 2016

(ii) Reinstating orders of 5 June 2015.

18. The orders of 9 June 2015 have already been subject of an appeal before Hon. Justice Sapuvida, which appeal was dismissed for want of correct procedure being invoked first. The grounds raised before Sapuvida, J; are the same as grounds 1 to 8 and ground 10 of the notice of appeal in this proceeding.

19. The father therefore cannot ask me to re-look at the orders of 9 June 2015. The finding of Justice Sapuvida is final until such time an appeal court overturns the decision. I have no jurisdictional capacity as the judge of the High Court to discuss the veracity of the

orders of his Lordship Justice Sapuvida notwithstanding whether I agree or disagree with the same.

20. Sapuvida, J. had made a finding that the proper procedure was for the father to file a setting aside application which was later done in Ba Court. A decision was delivered by the Ba court refusing the setting aside application essentially on the basis that it is important that the initial status quo be maintained and the best interest of the child be finally determined in the hearing.

21. The Ba Court also found that since all applications between the parties were vehemently objected to and if the recovery application initially came before the same court, recovery orders would not have been granted.

22. The Court also found that the final hearing date could have resolved the issue but a different court was chosen for the relief and this has the effect of delaying the final investigations of the best interest of the child.

23. I have the jurisdiction to examine the veracity of the orders of 10 August 2016 where the court refused the setting aside application. This would essentially mean that I have to now deal with grounds 1 to 8 and ground 10 of the notice of appeal which I cannot otherwise examine if the orders of 9 June 2015 are asked to be scrutinized.

24. The grounds of appeal in respect of the decision to refuse to set aside the recovery orders complain of many errors of law and fact.

25. It is contended that the ex-parte orders for child recovery in favour of the father was based on the social welfare officer's evidence of child abuse and that the court failed to take into account s. 121 (2) (g) of the FLA and s. 41(d)(2) of the Constitution of the Republic of Fiji.

26. I have perused the report of the social welfare officer - and have gone through the court records thoroughly. If the Lautoka Magistrates' court had done the same and had the benefit of all the files and perused it thoroughly then the court would have realized that this was not the first time that the father had complained of the abuse.

27. The father and the grandfather had been complaining of child abuse at least since 2014 to the social welfare officer when he visited them on 25 April 2014 to prepare a report.

28. No action was taken then by the father and the social welfare officer to have the abuse of similar nature being investigated that the child was being slapped, shouted at and put in the naughty corner by the mother. If the alleged facts existed since 2014 then the father ought to have had filed a child abuse application and have the issue investigated properly instead of waiting for almost a year and then filing a child recovery application: ***s. 113 of the FLA.***

29. In that one year, the issue of child abuse could have been investigated by the relevant authorities like the Police Force and the Social Welfare Officer. These allegations would then be properly made part of the factors to be considered at the final hearing which was only five months away but the father chose to file a child recovery because he wanted to fast-track the dispute on an ex-parte basis. This is improper conduct on his part. He chooses to emphasize on the best interest of the child in the appeal proceedings but he has failed in his duty to have the allegations investigated and tried in a transparent manner.

30. Since the final hearing on parenting orders was to take place within 5 months and the issues of abuse were not raised for the first time, the proper procedure was an inter-parties application for child recovery. Even the orders for child recovery were procedurally improper as it did not investigate into the allegation of child abuse in a proper way.

31. The father is also contending that the child is undergoing violence and the court must consider its duty to protect the child from such violence as the Constitution requires that the child's interest be paramount in every proceeding.

32. To protect the child from violence, the court must first make a finding regarding the nature of the violence and whether the child has undergone violence. In most cases of parenting order applications, there are allegations of violence on the child. In every case, such allegations are to be established and that cannot be done in an ex-parte proceeding. The evidence of the parties needs to be tried and tested and for that both parties must be given audience in court.

33. The father's version of child abuse is not an established finding of fact which the court can rely on safely to deprive a custodian parent of residence of the child.

34. The next complaint is that there was substantial miscarriage of justice when the court set aside the order on 9 June 2016 when it made certain comments against the Lautoka RM who had granted the recovery orders. The comments are reproduced below:

"I am therefore appalled that the relevant Resident Magistrate in Lautoka entertained this application when I'm fully aware that in other matters he either further remands accused persons or refuses to hear cases from this jurisdiction. I have had on 2 separate occasions had to break my leave to come and preside on urgent matters here in Ba court after this type of behavior from my neighboringjurisdiction.

In all this I see gross injustice practiced on the part of Judicial Officer and must see that it is immediately addressed and corrected and therefore I dissolve all the Lautoka Orders of 5 June and grant orders in terms of application being Nos. 1 – 6 and with status quo to remain following my orders of 2/4/15 as of right with $1,000 costs on a higher scale".

35. The above comments were made on 9 June 2015 which became the subject of an appeal and was dismissed. Following the dismissal a setting aside application of the orders of 9 June 2015 was filed. In considering that setting aside application, the Ba court did not use the same reasoning to refuse the setting aside. The setting aside application was considered on merits. I therefore find that although the above comments are non-judicious and improper of any court to make in determining any application, there was no continued miscarriage of justice as the court had subsequently and finally considered the application to set aside the orders of 9 June on merits.

36. This does not mean that I endorse the above comments of RM Mr. Naivalu. The above comments amount to personal attack based on working relationship of two judicial officers and should not influence the finding on any application. It is improper for a remark of such a nature to be made. The remark is unprofessional and disregards the duty of the judicial officer to deal with every case on its facts and to deal with the issues putting aside personal differences that may affect the outcome of the case.

37. The other complaint raised by the father is that the setting aside application by the mother ought to have been made inter-partes. It is correct that the application for setting aside of an ex-parte order should be made inter-partes otherwise there will not be an end to litigation. Each party will be endlessly attacking every order on an ex-parte basis with new information at hand every time.

38. I find that the Court wrongly allowed an ex-parte setting aside of the order. However I must not overlook that the crux of the issue is child abuse and for a proper finding to be made on the allegation, a full blown hearing is required. The hearing on the best interest of the child is pending. The proper course now is to have the parenting order application heard and the allegation of child abuse determined finally in that proceeding.

39. The initial application for child recovery ought not to have been made ex-parte given the fact that the allegation was not a new matter between the parties and in the parenting

order proceedings. If the child abuse was a new matter and there were no pending proceedings in Court to deal with the issue, the application would have been justified.

B. (i). Setting aside orders of 7 July 2016

(ii). An order disqualifying RM Mr. Naivalu from the proceedings.

40. On 7 July 2016, the court refused the father's application for RM Naivalu to recuse himself from the proceedings. The appeal was filed on 5 September 2016. The appeal is therefore out of time.

41. Pursuant to Rule 11.01 of the FLR, an appeal against an order shall be made within a month from the date of the order. The father did not appeal the order within a month nor did he obtain leave to file the appeal outside the time frame from the Magistrates Court.

42. Since the appeal is not within time, it cannot be sustained. In any event, Mr. Naivalu is now a presiding RM in Lautoka jurisdiction. This file would be sent to Family Division of the Ba Court as that court is seized of the file. Naturally another RM will now deal with the file.

Final Orders

43. In the final analysis, I dismiss the appeal in its entirety and order that the final parenting order application be listed for hearing as soon as possible.

44. Each party must bear their own costs of the appeal proceedings.

45. The file must be sent to the Ba Magistrates' Court immediately and the Registrar of the Court to bring the direction regarding the need for an expedited hearing to the attention of the presiding RM.

Anjala Wati
Judge
25.08.2017