

**IN THE FAMILY DIVISION OF THE HIGH COURT
APPELLATE JURISDICTION**

APPEAL NUMBER:	0001 OF 2016 (Labasa)
BETWEEN:	ESITERI
AND:	SUSANA
Appearances:	Mr A Parker for the Appellant Mr P R Lomaloma for the Respondent
Date/Place of judgment:	Thursday 11 June 2020 at Labasa
Judgment of:	The Hon. Acting Chief Justice Mr Justice Kamal Kumar
Category:	<i>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 persons are purely coincidental.</i>
Anonymized Case Citation:	Esiteri v Susana – Family High Court Appeal Number 16 Lbs of 2016

JUDGMENT OF THE COURT

Introduction

1. On 27 September 2016, Appellant filed Notice of Appeal (Form 26) dated 25 May 2015, to appeal Learned Magistrates Ruling delivered on 15 December 2014 (“**the Appeal**”).

2. Grounds of Appeal stated in the Notice of appeal are as follows:-

“The Learned Magistrate erred in law when she summarily dismissed the Appellant’s child maintenance application without realizing that:-

- (a) At the time the application was filed, the Family Law Act 2003 had already come into force;

(b) Regulation 7 of the Family Law Regulation was applicable.

(c) Section 26 of the Family Law Act was applicable.”

3. The Appeal was called on 15 November 2016, when there was no appearance for both parties and matter was stood down until 10.00am.
4. When the Appeal was called Counsel for the Appellant appeared and this matter was adjourned to 30 November 2016, for hearing with Registry being directed to serve Notice of Adjournment Hearing on Respondent’s Solicitor.
5. Appeal was heard on 30 November 2016, and adjourned for Judgment on Notice.

Background Facts

6. Monika X (hereinafter referred to as the **“Child”**) was born on 25 February 2004 out of wedlock.
7. Child was looked after and raised by her grandmother, the Appellant.
8. On 12 August 2013, when child was nine (9) years old, Appellant filed Application for Maintenance of the Child on the ground that Respondent was Child’s biological father (**“Maintenance Application”**).
9. Birth Certificate of the Child did not bear father’s name.
10. Maintenance Application was called before the Learned Magistrate on 26 September 2013, for service of Maintenance Application on the Respondent.
11. On 21 November 2013, Learned Magistrate at request of Appellant directed Court Sheriff to serve Maintenance Application on the Respondent and adjourned the Application to 30 January 2014, and thereafter to 6 March 2014.
12. Maintenance Application was served on the Respondent on 4 February 2014.

13. On 27 February 2014, Respondent filed Acknowledgement of Service and Response to Maintenance Application seeking an Order for dismissal of Maintenance Application and disagreed with Maintenance Application on the ground that:-

“That it has taken Applicant about 4 years to finally apply for maintenance against me. That I am currently legally married and have 3 children of marriage. I will not be able to pay for maintenance as I am supporting my family and only work as a labourer.”

14. On 6 March 2014, Maintenance Application was adjourned to 3 April 2014, for mention.
15. On 3 April 2014, Mr Lomaloma appeared for the Respondent and sought Leave to withdraw Response in Person and to file fresh Response.
16. Learned Magistrate granted Respondent’s Counsel Leave to withdraw Respondent’s Response in Person and file fresh Response and adjourned the Maintenance Application to 31 July 2014, for mention.
17. On 31 July 2014, Learned Magistrate granted further time to Respondent to file Response and directed parties to file Submission with Maintenance Application adjourned to 9 October 2014, for mention.
18. On 1 August 2014, Respondent through his Solicitor filed Response to Maintenance Application seeking an Order that Maintenance Application be struck out on the ground that:-

“1.(a) Because at the time the child was born on 25 February 2004, the applicable law was the Maintenance and Affiliation Act which required under Section 6 that any application should be made within 12 months of the birth of the child.

(b) Since the mother and the Respondent were never married or lived together in a de-facto relationship, the first issue is whether the Respondent is the father of the child and it is extremely unfair to expect

the Respondent to know where he was at the time the child was conceived some 11 years ago.

2. That the Respondent is now married with 3 children and a wife to support.”

(“Respondent’s Response”)

19. On 9 October 2014, Counsel for the parties informed the Court that they filed Submission and no further submission is to be made in respect to Strike Out Application.
20. On 5 December 2014, Learned Magistrate delivered the Ruling whereby she dismissed and struck out Maintenance Application and granted Appellant thirty days, time to appeal.
21. Appellant failed and/or neglected to Appeal within prescribed time.
22. On or about 29 May 2015, Appellant filed Application for Extension of Time to Appeal when on 16 September 2016, by consent, Appellant was granted Leave to Appeal Learned Magistrates decision.

Appeal

23. The gist of the Grounds of Appeal is that the Learned Magistrate erred in law when she struck out the Maintenance Application on the ground that child’s mother failed to file Application for Maintenance within twelve months after the birth of the child as required under section 16 of the Maintenance and Affiliation Act (“**MAA**”) which makes the claim for child’s maintenance barred.
24. It is noted that Counsel for Appellant relied on sections 4 and 214 of Family Law Act 2003 (“**FLA**”) during the hearing of Striking out Application and in this Appeal.
25. Appellant has reproduced that section fully in the Submissions filed and as such I do not think that it is appropriate or relevant to reproduce the whole section. To do so will be just a waste of time.

26. Section 4 of FLA in very simple terms states that any proceedings that were at the date of commencement of provisions of FLA pending under the provision of Acts repealed pursuant to section 214(1) of FLA and the Schedule **shall continue as if FLA has not been passed.**

27. Section 214(2) of FLA in addition to section 4 of FLA provides that Orders made under the repealed Acts would be in force as if made under provision of FLA except if “decree for nullity of marriage, decree of judicial separation, decree of jactitation of marriage” and “separation order under s4(a) of MAA”.

28. Provisions relevant to Maintenance Application in this processing is made under provisions of FLA which commenced on 1 November 2005.

29. Question that needs to be asked is: “Was there any proceeding pending at the commencement of relevant provision of FLA or was any Order made under the repealed Acts at the commencement of relevant provision of FLA?”

Answer to that question is that there was no pending proceedings or Order in force under the repealed Acts at the commencement of relevant provision of FLA.

30. Therefore, sections 4 and 214 of FLA are totally irrelevant and Learned Magistrate correctly held that those provisions are not applicable in this matter.

31. Next question that needs to be answered is whether Learned Magistrate erred in striking out the Maintenance Application for failure by Appellant to comply with section 16 of MAA?

32. There is no dispute that the Maintenance Application was filed under the provision of FLA and well after relevant provisions of FLA commenced.

33. The provision in FLA dealing with maintenance for children does not set any time limit as was the case in MAA.

34. Time limitation under FLA applies to spousal maintenance and property rights.
35. Under the provisions of FLA a child is entitled to be maintained by her/his parent irrespective of how the child is born.
36. Relevant provisions of FLA dealing with child maintenance and relevant to this proceedings are:-

Section 2(1): “Child means a person who is under the age of 18 years”;

Section 26:- “A court exercising jurisdiction under this Act must, in the exercise of that jurisdiction, have regard to:-

- (a)
- (b)
- (c) the need to protect rights of children and to promote their welfare.”

Section 86(1) “The parents of a child have, subject to this Division, the primary duty to maintain the child.

(2) Without limiting subsection (1), the duty of a parent to maintain a child-

- (a) is not of lower priority than the duty of the parent to maintain any other child or another person;
- (b) has priority over all commitments of the parent other than commitments necessary to enable the parent to support-
 - (i) himself or herself; or
 - (ii) any other child or another person that the parent has a duty to maintain; and
- (c) is not affected by the duty of any other person to maintain the child.”

Section 88(1) “Unless subsection (2) applies, a child maintenance order in relation to a child may be applied for by-

- (a)
- (b)
- (c) any person concerned with the care, welfare or development of the child.”

37. It must be noted that definition of child does not exclude child born out of wedlock. Hence, every child under the 18 years of age is entitled to be maintained by her/his parent.

38. The fact that Legislature has repealed the MAA which would have disentitled a child born out of wedlock to claim maintenance for her/his development would not have him entitled to do under MAA if child's mother failed to institute proceedings within 12 months of child's birth. This would leave the child in a very precarious position and affect her/his development and welfare.
39. FLA removed that hurdle and gives the child all the rights to be maintained and developed by child's parent.
40. **I would like to state that the Appellant became entitled to claim maintenance for the child from commencement of the relevant provisions of FLA. In other words Appellant is not entitled to claim for maintenance from the date child came into her care until commencement date of the relevant provisions of FLA.**

In short, Appellant is only entitled to claim for maintenance from a date after 1 November 2005.

41. I therefore hold that Learned Magistrate erred in law when she struck out the Maintenance Application filed under provisions of FLA in reference to section s16 of MAA which provision was repealed pursuant to section 214(1) of FLA.
42. It is only appropriate that this matter be referred to Magistrates Court for Resident Magistrate to deal with this matter.
43. It is noted that Respondent is challenging paternity which matter needs to be raised and determined by the Magistrate on evidence.

Costs

44. I take into consideration that both parties filed Submissions, made bring oral submissions and Appellant is represented by Legal Aid Commission.

Orders

45. I make following Orders:-

- (i) Appeal is allowed.
- (ii) Application for Maintenance or Contribution filed on 12 August 2013, in File No. 13 LAB 0197 is re-instated.
- (iii) Application for Maintenance and Contribution filed on 12 August 2013, in File No. 13 LAB 0197 be re-listed to Magistrates Court cause list and file referred to a Magistrate to hear the Maintenance Application and any incidental matters.
- (iv) Each party bear their own cost of the Appeal.

K. KUMAR
HON. ACTING CHIEF JUSTICE

At Labasa
11 June 2020

Legal Aid Commission for the Appellant
Penjamini R. Lomaloma Esq. for the Respondent