

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

<b>CASE NUMBER:</b>	17/Suv/ 0003
<b>BETWEEN:</b>	FESAITU
<b>AND:</b>	RUBY
<b>Appearances:</b>	Mr. R. Singh for the Appellant. No Appearance of the Respondent
<b>Date/Place of judgment:</b>	Friday 15 May 2020 at Suva
<b>Coram:</b>	Hon. Madam Justice Anjala Wati.
<b>Category:</b>	<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 is purely coincidental.</i>
<b>Anonymised Case Citation:</b>	Fesaitu v. Ruby - Fiji Family High Court Appeal Case Number:17/SUV/0003

**JUDGMENT OF THE COURT**

**A. Catchwords:**

**FAMILY LAW - ENFORCEMENT PROCEEDINGS - MAINTENANCE ARREARS - JUDGMENT DEBTOR SUMMONS - appropriate procedure for service of the Judgment Debtor Summons relating to the matter at hand - whether service proper in the circumstances for the Court to proceed to hear the same - whether the defaulter should be paid travelling expenses to and from Court to answer the claim on the JDS in Family Court matters where the recovery concerns a parent's obligation imposed by the statute to maintain the children - recommendations issued to the Court below for effective disposal of the matter at hand.**

**B. Legislation:**

- 1. Family Law Act 2003 ("FLA"): S. 129.**
- 2. Family Law Rules 2005 ("FLR"): Rules 4.08; and 4.12.**

### ***Cause***

1. The father appeals against the decision of the Family Division of the Magistrates' Court of February 2017 when the Court issued a bench warrant against the husband for failing to appear in Court on the Judgment Debtor Summons ("**JDS**"). The JDs was for a sum of \$8,600.
2. It appears from the court records that the amount on the JDS was for arrears of maintenance for the children in the sum of \$100 per week. It also appears from the records that the order for the maintenance was entered into by consent.
3. The JDS was issued on January 2017 and listed in Court on February 2017. What transpired in the Court on that day is reflected in the Court records. The mother was present in Court. She was unrepresented. The father was not present but represented by Mr. R. Singh.
4. The counsel for the husband raised that it was for the Court Registry to serve the father with the JDS. The Court then informed the counsel that it was not the responsibility of the Registry to effect the service of the JDS on the father. The mother then informed the Court that she had sent the JDS to the father through a courier service being TNT and that she was awaiting return of the acknowledgment slip. As at that date, no affidavit of service was filed in Court. It is admitted by the counsel for the father that an affidavit of service was filed later after the bench warrant was issued.

### ***Magistrates' Court Findings***

5. The Court ruled that the counsel for the father had written to the Court and asked for re-calculation of the arrears and since no issue of service was raised at that time, it was unfair if the counsel for the husband was allowed to raise it subsequently. The Court also found that since the father was represented, the matter ought to proceed instead of the question of service being made an issue in Court. Since the husband was not present, a bench warrant was therefore issued.

### ***Grounds of Appeal***

6. The husband has raised that:

1. *The Court erred in law and in fact in proceeding to hear the JDS against the father who was not resident within the jurisdiction and who, at the time of the purported service, was not within the jurisdiction.*
2. *The Court erred in law and in fact in proceeding to hear the JDS when there is no provision in the law and in the rules for JDS to be issued against the father who at the time was not resident within the jurisdiction.*
3. *In the event the Court had power to issue and hear the JDS against the father who was not resident within the jurisdiction and who at the time of the purported service, was not within the jurisdiction, then the Court erred in law and in fact in proceeding to hear the JDS when the purported service was effected by registered mail.*
4. *The Court erred in law and in fact in proceeding to hear the JDs when there was no evidence before the Court that the JDS had been served on the father.*
5. *In the event that the Court has power to hear a JDS that has been served by the registered mail, then the Court erred in law and in fact in proceeding to hear the same when there was no evidence before the Court that any conduct money was paid and/or tendered to the father.*
6. *The Court erred in law and in fact in making an order for a bench warrant against the father.*

***Law and Analysis***

7. The first issue that the father's counsel has raised is that the JDS could not have been issued and heard against him since he was not resident in Fiji and outside the jurisdiction of the Court.

8. There is no prohibition in the Family Law Act for a party to issue enforcement proceedings and in particular enforcement proceedings by way of a JDS against a party who lives outside the jurisdiction of Fiji.
9. There is also no requirement for leave to issue a JDS against a party to the marriage who lives outside the jurisdiction of Fiji.
10. S. 129 of the FLA states the jurisdictional requirement to issue proceedings in relation to a child. It reads as follows:-

*“129 (1) – Proceedings may be instituted under this Act in relation to a child only if –*

*(a) the child is present in the Fiji Islands on the relevant day;*

*(b) the child is a citizen of the Fiji Islands, or is ordinarily resident in the Fiji Islands, on the relevant day;*

*(c) a parent of the child is a citizen of the Fiji Islands, is ordinarily resident in the Fiji Islands, or is present in the Fiji Islands, on the relevant day;*

*(d) a party to the proceedings is a citizen of the Fiji Islands, is ordinarily resident in the Fiji Islands, or is present in the Fiji Islands, on the relevant day; or*

*(e) it would be in accordance with a treaty or arrangement in force between the State and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings”.*

11. S. 129 does not make a distinction between principal and enforcement proceedings. I find that s. 129 applies to enforcement proceedings as well. It would be absurd to hold that s. 129 only provides for the jurisdiction for principal or substantive proceedings and not enforcement proceedings relating to the children. If an order is made regarding a child on a substantive matter where the jurisdictional requirement in s. 129 has been met then there is no legal hurdle to enforce that order if one of the criterion in s. 129 is met.

12. The father's counsel has not raised that the requirements of s. 129 was not met. In that regard, I do not find that the Court erred when it heard the JDS against the respondent who lives in New Zealand.
13. The next issue is that of hearing the JDs when it was served by registered mail. In this case, the father lives overseas. He was served by registered post. The father became aware of the proceedings that is why he engaged a counsel. He also got the counsel to write and request for the calculation of the arrears. I do not think that the counsel would have made this request without instructions from the father.
14. The conduct of the father's counsel was sufficient to find that he became aware of the JDS proceedings being issued and that he had received the JDS. Although the affidavit of service was not filed in Court, the request for recalculation of arrears of maintenance and the subsequent appearance of the father's counsel was enough for the Court to hold that the service had been effected.
15. In any event, Rule 4.08 of the FLR, which is a general provision on service of all other documents for which there are no specific provisions in the FLA, permits service by pre-paid post in a sealed envelope addressed to the individual at that address. Since there is a provision on service of documents in the FLA, there is no need for us to rely on the standard rules for service. The FLA allows for service of all other processes by pre-paid post as well. It will be absurd if the service of the enforcement proceedings are restricted to hand delivery only.
16. As an aside, I wish to say that in this day and age, people in the world are always on the move. They travel from one place to another for many reasons including work. It is hardly possible to restrict service to hand delivery only. Service of the documents should be permissible in other ways given the era of technology and demand of the day.
17. The father is overseas and it is preposterous to require the JDS to be served on him by handing it to him. Why should the mother be burdened to find someone to locate him

overseas and then serve the documents? Why should such a stringent measure be implemented when litigation is about access to justice?

18. It is against the principles of speedy access to justice and the interest of the children to uphold the father's argument when is very much aware that there are proceedings pending against him for arrears of maintenance for his children. He ought to answer the claim. He forgets the need for the children's interest to be looked after and be treated as paramount.
19. Rule 4.12 of the FLR provides that the rules cannot preclude a Court from finding that a document has been served on the person. In this case, the Court found that service has been effected from the conduct of the father and his counsel. I would not come to any other conclusion if I were to reassess the issue. The father is not disadvantaged by the proceedings and there is no prejudice to him.
20. I cannot help disagreeing with counsel for the father that there was no affidavit of service when the bench warrant was issued. The counsel represented the father. What is the point of making the process difficult? If there was any prejudice due to the document not being delivered, the counsel should have ask for a copy of the JDS and then sought further instructions on the same. As it is, it appears that the intention was to protract the proceedings or to halt the same without serving the interest of the children. I will not endorse such manner of litigation in Family Court.
21. The remaining issue is that of the conduct money which is travelling expenses to and from Court. This is a requirement in civil proceedings. Under the Family Law enforcement proceedings, the civil rule of providing to the debtor travelling expenses to and from the Court must not apply. The application of such a rule will be result in injustice and does not promote the spirits of the Act.
22. The requirement to provide conduct money is very onerous and burdensome on the person who is collecting the money on behalf of the children for their benefit. It is the duty of the parents under the family law to provide for their children. This duty is not conditional upon the children or those acting on behalf of the children to provide for a person (s) costs to

attend Court to fulfill their duty. The parents should fund their own expenses to come to Court when proceedings are instituted against them on their failure to abide by the law to maintain their children.

23. If the requirement for conduct money is to be enforced in Family Court, the result would be absurd, unlawful, and inequitable. Where will the children find the money to pay for the expenses of the person liable in law to maintain them? Why should the person acting for the children, be it a parent, or an approved institution looking after the interest of the children to be asked to pay for the expenses of the person liable to maintain the children to come to Court? If this rule of conduct money is enforced, most of the parents will avoid coming to Court and live in places from where it is difficult to bring them to Court. If they were to be brought to Court, it would mean spending a lot of money every time they fail in complying with the order for payment of the monies. This travelling expenses may costs more than what is sought to be recovered. How can this be justified on any standard?
24. It is common knowledge that in Fiji, the amount that is usually paid in maintenance for the children and the spouse is not much. In case of the children, the obligation is imposed by the law for the parents to maintain their children. So the issue of conduct money will stand as a direct impediment to fulfilment of that obligation if conduct money was to be levied.
25. In case of spousal maintenance, the obligation to pay will be found by the court. If conduct money were to be levied to recover the monies, the purpose of making the order for spousal maintenance will be lost. If a spouse cannot maintain herself for reasons found by the Court, she then cannot find money to bring the other person to Court.
26. In this case, the father is in overseas. It is most unfair to ask for the children and/or the mother to pay his travel fare to come to Court. Why did he not make arrangements to comply with the order before leaving the country? How was he even allowed to leave the country without making provisions to comply with the order? He has not fulfilled his obligation and is now asking for conduct money. This is most absurd to say the least.

27. On the issue of the bench warrant being issued, my view is that the order is futile. How is the bench warrant going to be an effective process in the circumstances? If there are any chances of the father returning to Fiji, then the warrant is effective as he could be arrested and brought to Court. If not, it would be difficult to execute the same outside the country and the JDs process may be halted.
28. It would be better if counsel for the father is asked to advise the father to be examined on oath touching his means to pay the arrears on Skype and orders for payment made. Once the orders are made, the mother can consider enforcement of the same in overseas through the Registrar of the Family Division of the High Court who will issue the proper papers for recovery of maintenance.
29. Since I do not know the full circumstances on the effectiveness of the bench warrant I will send the file back to the Magistrates' Court without setting aside the order and request that the viability of the process be examined. It is also recommended that a stop departure order be considered against the father. Once he enters the shores, he will have to clear his arrears and make proper arrangements for the payment of future maintenance before leaving the shores.

***Final Orders***

30. In the final analysis, I find that the appeal has no merits and I dismiss the same. The Magistrates' Court is at liberty to deal with the JDS on its merits and is also at liberty to invoke a suitable, expeditious and effective method of doing so. My recommendations in paragraphs 27 to 29 are not binding but may be relevant in dealing with the JDS.
31. There shall be no order as to costs.

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***Hon. Madam Justice Anjala Wati***

***Judge***

***15.05.2020***



**To:**

1. *Parshotam Lawyers for the Appellant.*
2. *Respondent.*
3. *File: Appeal Case Number: 17/Suv/0003.*