

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA**

**APPELLATE JURISDICTION**

<b>ACTION NUMBER:</b>	Family Appeal Case Number 10 of 2020
<b>BETWEEN:</b>	<b>VAISHALI</b> <b>APPELLANT</b>
<b>AND:</b>	<b>VANRAAJ</b> <b>RESPONDENT</b>
<b>APPEARANCES:</b>	Ms. Kete P. for the Appellant. Mr. Nand R. for the Respondent.
<b>DATE/PLACE OF JUDGMENT:</b>	Friday 20 October 2023 at Suva.
<b>CORAM:</b>	Hon. Madam Justice Anjala Wati
<b>CATEGORY:</b>	All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.

**JUDGMENT**

**A. Catchwords:**

***FAMILY LAW – MARITAL STATUS PROCEEDINGS – Conditional order for dissolution of marriage granted – was service of the application for dissolution of marriage by newspaper proper when the husband knew of the wife’s whereabouts and had her phone contact – service deemed ineffective – conditional order set aside - costs granted.***

**B. Legislation:**

- 1. Family Law Act 2003 (“FLA”): ss.24 (2).**
- 2. Family Law Rules 2005 (“FLR”): Rule 1.05, 4.06 and 4.12.**

.....

## Cause

1. The appeal arises out of a conditional order for marriage granted by the Court on 6 October 2020 which was to become final in a month. An appeal was filed before the order became final. The application for dissolution of marriage was filed by the husband in July 2020.

## The Appeal and the Determination

2. In the first ground of appeal, the wife seeks that the conditional order issued by the Court be rescinded for 3 reasons:
  1. *The order was obtained fraudulently as the husband who had sought dissolution of marriage did not appear in court nor was his presence excused.*
  2. *The service on the wife was improper and illegal.*
  3. *The parties had not lived separately and apart for a period of 12 months or more.*
3. In respect of the issue that the husband was not in court when the dissolution for marriage was granted or that his presence excused, I note from the trial magistrates notes of 6 October 2020 that the husband was represented by his counsel to move his application and to seek orders from the court. The husband was not present in court and he need not have as long as he was represented.
4. There is no rule or practice requiring the presence of the applicants in dissolution of marriage cases to be present in court when they are represented. There may be instances where a court may require the presence of one or both parties irrespective of them being represented but in absence of any specific indication or direction from court, usually cases are proceeded with in their absence when they are represented. The absence of a party from court in such cases does not make the grant of conditional order bad in law or invalid.

5. The wife also contends that the service of the application was improper and illegal. In July 2020 the husband made an application that he be allowed to advertise his dissolution of marriage application in the Canadian newspaper. He stated that his wife was living somewhere in Canada as it was informed to him by his family and friends. He stated that her exact address was not known to him. He stated that he did not have any other contact of her or knew the whereabouts of the wife. He said that it would be impracticable to effect service personal on his wife.
6. The application for substituted service was granted by court on 1 September 2020. The dissolution of marriage application was advertised in one of the newspapers in Surrey, Canada called “Surrey – Now Leader” and the service was then deemed proper by the Magistrates Court. The application for dissolution of marriage was then heard and conditional order issued to become final in a month’s time.
7. The affidavit in support of the application for substituted service was sworn in Canada. The husband had indicated to the court that he was temporarily living in Surrey Canada with his sister and brother in law until he returns to Fiji which he said he could not do because of travel restrictions and border closure.
8. Rule 4.06 of the FLR states the method for service of applications for marital status proceedings. It states:

*“4.06. A sealed copy of an application for dissolution of marriage or other principal relief must be served on the respondent by –*

*(a) handing it to the respondent; or*

*(b) sending it by pre-paid post in a sealed envelope addressed to the respondent at the respondent’s last known address.”*

9. There is also another rule relating to court exercising discretion in relation to service. That is Rule 4.12 of the FLR which reads:

*“4.12. Nothing in this order affects the power of a court exercising jurisdiction under the Act or another Act –*

*(a) to authorize service of a document by means of a newspaper advertisement or in another manner that is not provided for in Division 4.1 or 4.2;*

*(b) to find that a document has been served; or*

*(c) to find that a document has been served on a particular date.”*

10. What is the effect of Rules 4.06 and 4.12? It is plain and clear that Rule 4.06 prescribes the primary method of service of marital status applications. If for any proper and satisfactory reason, the primary method of service cannot be effected on another party, the applying party can seek leave of the court to exercise its jurisdiction to allow him to serve the affected party by an advertisement in the newspaper.
11. It must be made very clear that newspaper advertisement is not as of right. It can only be used as a method of service if the court, exercising its jurisdiction, grants permission or authorizes the service by newspaper advertisement.
12. Any court which is asked to exercise its jurisdiction under Rule 4.12 of the FLR needs to be properly and honestly informed on why service by hand or post cannot be effected.
13. Was the husband honest in making a claim that he does not know the address and whereabouts of the wife? The answer is that he was extremely dishonest in alluding to the statements in his affidavit in support of the application for substituted service that he did not know the whereabouts of his wife.
14. According to the husband's travel history by Fiji Immigration Border Control, it is clear that he left Fiji in May 2017. The wife says that this is the date he migrated to live with her after their marriage. She deposed that they have lived together in the address shown in the marriage certificate under her details until sometimes in 2019 when the husband went to reside at a different address but that they continued to meet, communicate and have sexual relationship until July 2020.

15. There is uncontroverted evidence that the husband was continuously in touch with the wife at least until 2 June 2020 through phone. This evidence was produced by the wife. The husband knew by all means the wife's phone number, where she lived and where she could be traced to exercise the primary method of service on her.
16. If he wanted, he could have had the application handed to her. He just did not want to do that. He preferred to be dishonest for reasons best known to him. It could be very well that he did not want her to contest the application.
17. If he really did not want to hand her the application, he could have sent it by pre-paid post in a sealed envelope addressed to her at her last known address. The marriage certificate showed her last known address. If posting was not possible, it could be sent to that address physically.
18. The court knew by the information in the affidavits provided by the husband that he was in Canada. It could have then ordered that the application be posted or delivered to the last known address which was in the marriage certificate. I find that the court exercised its discretion improperly by authorizing the service of the application in the Surrey Newspaper.
19. The wife states in her affidavit that she only learnt about the newspaper advertisement on 7 October 2020 when a friend of hers showed her the advertisement. This was post the hearing of the application for dissolution of marriage and the granting of the orders.
20. I am of the firm finding that if the court was properly informed that the husband was in Canada since 2017, that he was living with the wife in Canada for some time at a particular address, and that he had personal contact of the wife until June 2020, it would not have granted the application for substituted service.
21. The order for substituted service was obtained dishonestly and it has in fact precluded the wife from defending the application. She has been deprived of natural justice by a

fraudulent act on the part of the husband. She would have contested the application as her position is that there was never any separation which could amount to irretrievable breakdown of marriage.

22. One may be of the view that the wife could have defended the application when it was served on her by a newspaper advertisement despite the husband's dishonestly. I must reiterate that the application should never have been advertised in the newspaper in this case. If proper method of service was invoked, the application would have been contested. It is the wife's right to defend the application that has been deprived and that must be corrected by the appellate court. The wife did not see the newspaper advertisement and so she could not defend the application. That is the direct consequence she is suffering as a result of the husband's dishonestly and that should not be promoted or condoned by any court.
23. Litigants must not be encouraged to mislead court or obtain orders dishonestly otherwise that is going to damage the fundamental principle of law that one must come to court with clean hands.
24. I find that the service of the application for dissolution of marriage to be improper and that any orders on the application ought to be set aside.
25. The wife also contests that the marriage of the parties had not broken down irretrievably as they had not lived separate and apart for a period of 12 months prior to the filing of the application for dissolution of marriage.
26. The court granted the conditional order because the ground that the marriage had broken down irretrievably as established by 12 months separation was not contested. If the application was contested, the outcome may or may not be the same. The wife needed to address that aspect but she could not for want of proper service of the application on her.

27. I do not find that the grounds that the marriage had broken down irretrievably could be established as the husband had not acted honestly in the proceedings to have that ground established.

28. The second ground of appeal is that the Family Division of the Magistrates' Court did not have jurisdiction to hear the application as both parties resided in Canada and were not in Fiji on 6 October 2020 and that the husband had misrepresented his address as 289 Ratu Mara Road, Nabua which is non-existent.

29. The husband is a Fiji Citizen. On that basis, he could apply for dissolution of marriage in Fiji. The relevant provision of the law governing jurisdiction is s. 24 (2) of the FLA which states that:

*“Proceedings for an order of dissolution of marriage may be instituted under this Act by a party to the marriage if, at the date on which the application for the order is filed in a court, either party to the marriage –*

*(a) is a Fiji Islands citizen;*

*(b) is domiciled in the Fiji Islands; or*

*(c) is ordinarily resident in the Fiji Islands and has been so resident for one year immediately preceding that date. ”*

30. The husband need not have been in Fiji at the time of filing or hearing of the application for dissolution of marriage. He being a Fiji Citizen gave him the right to file an application in Fiji.

31. On the issue of a non-existent address in Suva, there is clear evidence from a private investigator/licensed bailiff and from the records by Suva City Council that the address provided by the husband as his residential address is not in existence. No one knows his true address in Fiji. The marriage certificate shows an address in Lautoka.

32. I cannot fathom why the husband had to fake his address in Suva. Even if he noted the address that appears in the marriage certificate, he would still be entitled to file an

application in Fiji but not in Suva unless special circumstances were shown as Rule 1.05 of the FLR states:

*“Proceedings under the Act (other than proceedings to which section 17(3) of the Act applies) must be commenced in the Family Division of the Magistrates’ Court and unless there are special circumstances must be filed in the registry closest to the place in which either the applicant or respondent resides.”*

33. The non-existent address was noted maybe to mislead the Registry Staff so that the application is filed in Suva otherwise the Registry would have asked the proceedings to be filed in Lautoka. It could also be to strengthen the husband’s argument that he is in Canada temporarily and not aware of the wife’s address. He did not want to disclose to the court that his going to Canada was due to his marriage and that he has left Fiji permanently.

34. I find the husband’s conduct so fraudulent that it has impacted the wife’s right to defend the proceedings in court. This is a matter where the husband’s obtaining of the orders fraudulently must be corrected. His conduct has incurred costs to the wife. She had to engage a counsel to file an appeal and correct the wrong she has suffered. An order for costs in her favour will justify the hardship she has seen and suffered.

Final Orders

35. In the final analysis I find that the service of the marital status application on the wife was improper and invalid and that the grant of the conditional order was improper. I set aside the conditional order for dissolution of marriage. The Registry is to now destroy the conditional order papers to avoid it accidentally being released to the husband.

36. I also orders costs against the husband in the sum of \$5,500 to be paid within 21 days to the wife directly.

.....

Hon. Madam Justice Anjala Wati

20.10.2023



To:

1. Pillai, Naidu and Associates, Nadi for the Appellant.
2. Oxford Chambers, Nasinu for the Respondent.
3. File: Family Appeal Case Number: 10 of 2020.