

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	FAMILY APPEAL CASE NUMBER: 2 OF 2019 (Original Case Number 16/Suv/0130)
BETWEEN:	SAMANTHA <p style="text-align: right;">APPELLANT</p>
AND:	DYLAN <p style="text-align: right;">RESPONDENT</p>
APPEARANCES:	Mr. N. Prasad and Ms. P. Verma for the Appellant. Ms. L. Vaurasi and Ms. V. Seduadua for the Respondent.
DATE/PLACE OF JUDGMENT:	Friday 26 April 2024 at Suva.
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 similarity to any persons is purely coincidental.

JUDGMENT

Catchwords:

FAMILY LAW – WIFE SEEKS ENFORCEMENT OF PENALTY CLAUSE– CONSENT ORDERS pursuant to the DEED OF SETTLEMENT - are the orders choate to clearly identify the extent of liability of the husband in the case of non-compliance – can an inchoate order be enforceable in the circumstances to the detriment the husband – what was the proper issue before the court below arising from the consent order- did the exchanges by way of emails clarify the lacuna on the issue of the extent of penalty payable by the husband for non-compliance of the consent order in the deed of settlement and was the clarification acknowledged and accepted by the husband – was the husband’s non-compliance due to his wilful disobedience of the orders- was the penalty payable because of the fault on the part of the husband- should the husband be liable to pay the penalty.

.....

Cause and Background

1. The wife has filed an appeal from the decision of the Family Division of the Magistrates' Court delivered on 28 June 2019. The wife has also applied for leave to adduce fresh evidence on appeal.
2. On 28 June 2019, the court below had found that whilst the husband had not moved out of the property by the end of the first week of August 2017, as required by the consent orders of 29 June 2017, he was not to pay any penalty as there was no evidence of a penalty in the sum of \$20,000 being paid to the purchaser for late settlement under the Sale and Purchase Agreement entered between the wife and the purchaser.
3. The court found that the affidavit of the wife did not contain any receipts or any other document to show that a penalty was paid for late settlement of the property. The court accepted that the applicant man was liable for any penalties from his failure to vacate but no penalties were shown to be paid. The court found that a settlement sheet/record, a trust account statement, or any other supporting document to show that a penalty was paid would have helped. The court therefore found that the husband was not liable to pay the penalty.
4. The conflict between the parties arose out of the consent orders of 29 June 2017. One of the consent orders was that the subject property registered in the name of the wife would be sold to the person named in the sale and purchase agreement or her nominee. It further noted that the proceeds of the sale would be distributed to the husband and wife in the ratio of 35: 65 respectively.
5. The consent order also required that the husband shall move out of the said property by the end of first week of August failing which the husband shall be liable for any penalties arising from his failure to vacate. This is the consent order from which the issue of penalty arises.

The Appeal and Application to Adduce Fresh Evidence

6. In the appeal the husband contends that the court below erred in fact and in law in finding that it had not been provided any document or evidence that any penalty was paid.
 - (i) *When the penalty was in fact deducted from the sale price at settlement;*

- (ii) *The husband acknowledged the existence of the penalty in paragraph 15 of his affidavit of 12 November 2018;*
- (iii) *The husband acknowledged the existence of the penalty and approved the payout of the sale proceeds with late settlement penalty in the sum of \$20,000; and*
- (iv) *Notwithstanding the above, the payment of deduction of penalty was not decisive to the issue at hand.*

7. The wife also applies for leave to adduce further documentary evidence on appeal. The documents sought to be introduced as further evidence are:

- (i) *Sale and purchase agreement in respect of the subject property;*
- (ii) *Settlement statement comprised in a letter issued by the wife's law firm;*
- (iii) *Amended settlement statement comprised in an email from the wife's law firm to the purchaser's lawyer.*
- (iv) *Bank cheque in the sum of \$412,201.74 payable to the wife's legal firm's Trust Account;*
- (v) *Trust account receipt number 16115 issued by the wife's law firm; and*
- (vi) *Trust account ledger held by the wife's law firm.*

Law and Analysis

8. The first aspect is for me to deal with the application for leave to adduce further evidence identified in paragraph 7 above.
9. The wife's counsel, Mr. Prasad argued that he did not adduce the above documents at the hearing as it was their position that the issue before the court was only the question of when the husband had moved out of the property and in particular whether he followed the consent orders to move out of the property by the end of the first week of August 2017? Mr. Prasad contends that if the husband did not comply with the orders, the penalty will follow as he agreed to that in clause 2 of the Deed of Settlement entered into between the parties which gave rise to the consent orders.
10. Although I find that the wife's counsel's conception of what the proper issue before the court below could not be what he reflects it to be, I am content that the reason he did not introduce all those documents at the hearing is because he found it irrelevant at the time. Mr. Prasad may be

misconceived in framing the issue, but, given his position, I accept that the documents based on his understanding of the issue were not required to be produced. I find no malice on his part that the documents were not produced.

11. I find that the documents sought to be adduced are relevant for the determination of the appeal. If it was not Mr. Prasad seeking leave to introduce those documents, I would have called for some of it to be able to decide on the issues I am confronted with, in the appeal. The documents are apparently credible and is going to assist both the parties and the court to deal with the issue in contest.
12. I now turn to the appeal. The wife's counsel raises that the only issue before the court was whether the husband had vacated the property on time as per the consent orders. He says that the husband accepted that he did not do so. It was argued that on the husband's admission, he vacated the property on 18 August 2017. In light of that he must pay the penalty as that there cannot be any issue about whether he is liable to pay or not. His liability, argued Mr. Prasad, is clearly established by the consent orders.
13. I am not able to agree with the counsel for the wife that the issue of whether the husband was liable to pay the penalty was not within the issue arising out of non-compliance of the consent orders. The issue whether the husband had moved out on time cannot be decided alone and independently in an abstract manner.
14. In fact that could not be an issue as the parties were well aware that the husband did not move out of the property on time. There was no dispute surrounding that. The question or the issue that connects to the act of non-compliance is the issue of enforcement of the penalty. The proper issue is whether the penalty can be enforced against the husband. If the answer is in the affirmative, then the next pertinent issue would be the amount of penalty that should be payable as the consent orders does not specify the amount of penalty payable on default.
15. Mr. Prasad asserts that if the court had decided that the husband moved out of the property later than the end of first week of August then the penalty was automatically payable. Mr. Prasad is only reflecting on what the consent order says. He simply does not wish to go beyond that, which position is unfair when it comes to the question of deciding whether a person should pay the penalty for defaulting, because a person can only be made liable if he has willfully disobeyed the order of the court.

16. It has to be established by the person seeking to enforce an order that the defaulting party had deliberately not complied with the order and the reasons advanced for non-compliance are unreasonable and unjustifiable.
17. There are so many reasons why a person obligated by an order cannot comply with it. It can be an Act of God precluding compliance or justifiable reasons beyond the control of that party.
18. The wife's counsel cannot expect the court to decide only an issue which he has raised and require the court to ignore the issue raised by the other party. The counsel for the husband, as the court record shows, had in no uncertain terms raised before the court the issue of liability. The counsel had said that his client was not liable to pay the penalty. I will come to this in detail later. What I want to clearly state is that, given the position of the husband, the counsel for the wife cannot say that he only expected the court to decide on when the husband moved out of the property as per the consent orders.
19. The court below said that since the husband did not comply with the order, he was liable to pay the penalty, but it will not make an order for payment as there was lack of evidence of payment. I am unable to agree with this finding that non-compliance automatically gave rise to liability. In this case the court had to be convinced that the non-compliance was due to the husband's willful disobedience.
20. The husband explained in his affidavit that the wife contends that the penalty of \$20,000 was incurred because of his failure to move out of the property and his reluctance to sign the bank discharge document. He refuted that position. He explained that when he was preparing to move out of the house, the wife visited the property without notice and had an altercation with another person there. She then got the police to lay charges against the husband. He was then locked up in police custody from 4 to 6 August and was produced in Court on 7 August 2017. He was granted bail on this day. He says that the criminal court had allowed him to reside on the property until 18 August 2017 to facilitate the removal of his belongings.
21. The wife denies this assertion in the affidavit of the husband. She says that she is not aware of any order made by the Magistrates' Court and if there was any, the husband ought to have advised her solicitors of the same. He did not and is guilty of laches.
22. The wife does not specifically deny that the husband was charged and put in police custody arising out of an altercation caused when she visited the property. She may not be aware of any orders of the

criminal court. What is sufficient is that there were intervening circumstances which came about unexpectedly causing delay in vacation of the property. It had to be established in the court below that the intervening circumstances were occasioned through the fault of the husband alone. There was no evidence to this effect in the court below. The wife had to establish this as she was seeking to enforce the penalty clause against the husband. It may be that he was charged but there was no evidence that his fault was established.

23. Then the next pertinent issue for the court below would have been the amount of the penalty payable as the consent order does not specify the amount. Where does the sum of \$20,000 in penalty come from? The concern is whether the consent orders of 29 June 2017 are choate, clear and precise for it to be imposed on the husband. Does the order clearly spell out the extent of the liability for non-compliance? Can the husband be made liable for payment of a sum that he has not agreed to?
24. The consent order does not at all specify that the penalty for late vacation of the property will be \$20,000. The parties ought to have clearly spelt out the rights and obligations of each party before entering into the deed of settlement. Even so, the court granting the consent orders ought to have only endorsed it if the parties' rights and liabilities were clear.
25. It was not clear to the husband that he would pay a penalty of \$20,000 for late vacation of the property. If he was a day late, would he still be liable to pay \$20,000? Would that not be an unjust and inequitable order incapable of being enforced? I am of the finding that the husband did not ever accept in the agreement that he will pay the penalty of \$20,000 if he is late to vacate. Indeed, he agreed to pay any penalties. In absence of any precise sum, the only expectation is that he would pay any reasonable penalty incurred on the property. What would be a reasonable sum is a matter for determination which has not been assessed by the court below as the parties did not require that assessment. On any assessment, a reasonable sum for a maximum of two weeks delayed vacation of the property cannot equate to \$20,000.
26. Mr. Prasad says that the penalty was deducted by the purchaser from the sale price for late settlement (*Ground 1(a) of the appeal*). He has tendered evidence to that effect. How did the purchaser calculate \$20,000? Mr. Prasad says that the sale and purchase agreement states that one of the things that the purchaser can do if the vendor defaults in complying with the agreement is to charge interest at the rate stipulated on page 1 of the sale and purchase agreement.

27. The date of settlement in the sale and purchase agreement is “60 days or earlier from unconditional date”. “Unconditional date” is defined as “when all further terms of sale have been satisfied, and all consents under clause 24 have been granted”.
28. Even if the husband ought to have known about the sale and purchase agreement, although he was not a party to it, it had to be established by the wife that she could not comply with the settlement date within 60 days or earlier from the date when all further terms of sale had been satisfied and all consents under clause 24 of the sale and purchase agreement had been granted. The wife had to tender evidence to establish when all terms of sale had been satisfied and whether the husband did not vacate the property within 60 days of that date and that the only hold up in the settlement was because the husband did not vacate the property. No evidence was tendered on this to claim the penalty from the husband.
29. Further, the wife had to satisfy the court below why she did not ask the purchaser for extension of the settlement date as provided for in clause 4 of the sale and purchase agreement. The clause states that the date of settlement can be extended if mutually agreed to in writing by both parties to the sale and purchase agreement. The purpose of the consent order and the sale and purchase agreement is not to penalize the husband. It was to work the property distribution effectively.
30. Mr. Prasad says that the vendor’s default attracts 15% interest as per the sale and purchase agreement which sum should be payable by the husband. Clause 16 of the sale and purchase agreement reads as follows:

“ **Vendor’s Default**

If the Vendor shall make default in the performance or observance of any stipulation or agreement on the Vendor’s part herein contained and if such default shall continue for the space of thirty (30) days from the due date then in any such case the Purchaser without prejudice to any other remedies available to it may at its option exercise all or any of the following remedies namely:

- (a) May rescind this contract of sale and thereupon all monies paid or under the terms of sale applied in reduction of the purchase money shall be refunded to the Purchaser. Harcourts fees and commission shall be paid by the vendor.*
- (b) May sue for specific performance of this Agreement.*
- (c) May claim damages in addition to seeking specific performance of this Agreement.*

(d) Charge interest at the rate of as stipulated on page 1 for delay on extension of time for settlement.”

31. Page 1 of the sale and purchase agreement states that interest rate for late payment is 15% per annum. The sale and purchase agreement does not specify 15% of what sum. It says 15% for late payment. What is the amount that 15% is to be worked on? There was no evidence to this effect. How can the wife then calculate and convince the court that the husband knew for certainty his liability will be 15% on x amount of dollars which equals to \$20,000?
32. The consent order on the question of the amount of penalty is so inchoate and the sale and purchase agreement does not assist in clearly establishing the extent of the liability of the husband. That order therefore is unenforceable due to lack of certainty.
33. Further, clause 16 of the sale and purchase agreement states that in case of default on part of the vendor, if the default continues for 30 days then clause 16(d) can be activated as one of the options. If the husband says that he vacated the property by 18 August 2017 then the default in compliance should not have continued for 30 days for clause 16(d) to be activated and levied on the husband. The wife should have attended to the settlement in the remaining 15 days. What is the reason she did not? There is no evidence to that effect.
34. The wife’s counsel had produced evidence that the purchaser had deducted the sum of \$20,000 from the sale price at settlement. I am of the finding that that is not the issue that is crucial to deciding whether the husband is liable to the penalty.
35. One other aspect that the counsel for the wife raised was that the husband acknowledged the existence of the penalty and approved the payment of the sale proceeds with the penalty of \$20,000.
36. Mr. Prasad drew my attention to an email by the husband’s counsel in which she stated that her client agreed to the distribution of the funds as per the document attached to the email of the wife’s counsel of 21 March 2018. Mr. Prasad says that the 21 March 2018 email by the wife’s counsel had a document titled “*Distribution of Proceeds*”. That document, Mr. Prasad argues, provided for the late settlement penalty in the sum of \$20,000 except that it was marked as “*contentious*”. Mr. Prasad says that it was marked as contentious as it was to be resolved as to when the husband vacated the property. If he vacated late, the \$20,000 penalty will apply.

37. I accept that the husband's counsel had agreed to payment of the monies as outlined in the document titled "***Distribution of Proceeds***". That document clearly outlines that the issue of late penalty in the sum of \$20,000 was a contentious issue.
38. It is not written in that document that the contentious issue is the date of vacation of property. Mr. Prasad gives his own arbitrary interpretation to the statement. The document says "***contentious - late settlement penalty - \$20,000***".
39. It is clear from the face of the statement in the document that the issue of the late penalty in the sum of \$20,000 was in question. The husband's counsel agreed to the document which means that she agreed that the question whether her client is liable to a sum of \$20,000 is to be determined as there is a dispute. The word "*contentious*" means something *likely to cause disagreement between people or likely to involve argument or a lot argument*.
40. I am fortified in my view given the email of the wife's counsel of 21 March 2018 through which she is asking the husband's counsel on his client's position on the late settlement penalty of \$20,000. The email says that the late settlement penalty arose when the husband did not vacate the property on time and further refused to sign the bank discharge documents for a further week which delayed settlement.
41. By 21 March 2018, the wife's counsel knew that the husband's counsel had not agreed to the late penalty of \$20,000, that is why she is enquiring about the husband's position. The husband's counsel agreed to proceed to the payment and make the issue of late penalty in the sum of \$20,000 contentious. That cannot on any basis be used to say that the husband's counsel agreed to the penalty of \$20,000.
42. If what Mr. Prasad says is correct that the husband's counsel agreed to the payout as in the document titled "***Distribution of Proceeds***", then why does he ask the court to determine the date on which the husband vacated the property. Would not the husband's agreement to pay with the late penalty settle the issue totally as there is nothing left to be decided? I am of the firm finding that the wife's counsel knew that the issue of late payment of \$20,000 was in contest.
43. The court records fortify that. The court records show that the wife's counsel at various stages of the proceedings clearly states to the court that the issue before the court is that of penalty and that was to be argued and determined. The record notes:

“Wife’s counsel at p. 198: Also discussed issues of penalty will come before this court and argue.”

Wife’s counsel at p. 199: “Issue of penalty for vacant processions.”

*Wife’s counsel at p. 202: “Issues: 1. \$20,000 penalty.
2. Family Loan. ”*

Wife’s counsel at p.202: “Hearing on penalty...”

44. During the hearing the husband’s counsel clearly said that her client disputed that \$20,000 be deducted from his share. It was also raised that there is no evidence that the penalty was incurred due to her client’s fault. It was also raised that the delay in moving out was not deliberate as the husband was in police custody on the complaint of the wife.

45. The focus of the hearing was the dispute on liability. The wife’s counsel therefore cannot say that that was not an issue before the court. It was at all times.

46. The wife’s counsel also submits that the husband had acknowledged by paragraph 15 that he was made aware of the settlement penalty in the sum of \$20,000. The husband said in his affidavit clearly that he was not aware of the sum of \$20,000 being claimed from him and that he disagrees to payment of this. His actual statement is:

“That I was not aware that a late settlement penalty fine of \$20,000.00 was being claimed and I was charged a portion of it until it was disclosed by the Respondent Lady and her solicitor to my lawyer and to which I totally disagreed to because I was not a party to it.”

47. I do not find any merits in the wife’s grounds of appeal. I find that the wife’s application has caused the husband costs in defending the appeal. He should be compensated.

Final Orders

48. I make the following orders:

- (i) ***The appeal is dismissed. I affirm the orders of the lower court, albeit for different reasons, that the husband is not liable to pay the penalty of \$20,000.***

(ii) *The wife shall pay costs of the appeal proceedings in the sum of \$3,500 within 21 days.*

.....
Hon. Madam Justice Anjala Wati

26.04.2024

To:

1. *Mitchell Keil Lawyers for the Appellant.*
2. *Shekinah Law for the Respondent.*
3. *File: Family Appeal Case Number: 2/2019.*