IN THE FAMILY DIVISION OF THE HIGH COURT	
CASE NUMBER:	08/LTK/0482
BETWEEN:	KELERAYANI
AND:	ADAM
Appearances:	Mr. S. Sharma of LAC for the Appellant. Respondent in Person.
Date/Place of judgment:	Thursday, 20th January, 2011 at Lautoka
Judgment of:	The Hon. Justice Anjala Wati.
CORAM:	
Category:	*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.*
Anonymised Case Citation:	KELERAYANI v ADAM - Fiji Family High Court Case Number: 08/ LTK/0482.

JUDGMENT OF THE COURT

Catchwords

APPEAL -PRACTICE AND PROCEDURE - right to apply for parenting orders-locus standi, one does not have to be declared a putative father before he has locus standi to apply for parenting orders.

Legislation

Faniily Law Act No. 18 of2003.

The Appeal

1. The parties have reconciled in this matter but for academic purposes Mr. S. Sharma has informed the court that a ruling is required as there are many matters which have same issues in the lower court.

2. Both the parties were explained that this matter is only proceeded with for reasons of clarification on the subject issues and that it will not affect them at all.

3. The parties had agreed that the issues be tried as per Mr. Sharma's request. Both parties had also agreed that the orders of this court should not affect them and that they should not be liable for costs of the appeal. The orders were made by consent.

4. The substantive appeal raises three grounds:

The Grounds of Appeal

5. The grounds of Appeal are as follows:-

Ground1

The Learned Trial Magistrate erred in law when he did not address the issue of child recovery.

Ground 2

The Learned Trial Magistrate erred in law when he held that there was no declaration of putative father required after the respondent had admitted being the father of the child contrary to section 134(1) of the Family Law Act.

Ground 3

The Learned Trial Magistrate erred in law in upholding the fact that the respondent had the "locus standi" to seek custody of the child born out of wedlock when the court had not made any declaration in this regard.

The Appellants Submissions

6. Mr. Sharma submitted that:-

- The mother had filed an application for final orders and when the respondent did not appear a bench warrant was issued. There was no need for a bench warrant and matters could have been decided in absence of the respondent man.
- When the man appeared under bench warrant he agreed to give the child to the mother. When the child was given to the mother the issue of child recovery was determined.
- The respondent did not have any authority in law to ask for residence of the child as no declaration had been made that he is the father of the child. He did not have any locus to make the application.

The Law and the Determination

7. The first application that was filed was by the mother on the 12th day of November, 2008. The application was to be called in court on the 8th day of January, 2009. In that application the mother

sought an order for "full custody" and her reasons were that she could fully support the child, the child was with the grandparents and when she visited the child, they refused to give the child to her. She also attached a statement in the application, from which it is very clear that the respondent is the father of the child.

8. On 12th November, 2008 the mother again filed an application via Form 12 to get an early date on her substantive application as the child was very small. In her affidavit, she stated that she was seeking an early date and wanted full custody of her child. The application was to be called on the 21st day of November, 2008.

9. When the matter was called before the court on the 21st day of November, 2008, the father did not appear and a bench warrant was issued. The issue is whether the issuance of the bench warrant was proper.

10. The applicant mother had applied for residence of the child and her application is clear. If service was proper and the father did not appear, there was no need for a bench warrant. The court could proceed in absence of the father and appropriate orders could be made. If the court thinks that the evidence of the father is necessary to determine the best interest of the child, then, a subpoena could be issued and served on the father. If there is failure to comply with the command in the subpoena to attend court, a bench warrant may be issued.

11. Ground 1 alleges that his worship did not deal with the recovery application. There was no recovery application before the court. The application was for final orders for residence of the child. How can the court consider a recovery application? I do not consider the form 9 application for final orders as an application for child recovery and nor did Iris worship heat it the same. He rightfully did not.

12. In any event, when the father appeared in court on the 11th day of May, 2009 he admitted being the father of the child and said that he wanted to talk things over with the mother and that the child could go with the mother. The mother agreed. Mr. Sharma submitted that there is no indication that she agreed that the he is the father but agreed to take the child. I differ from Mr. Sharma's analysis. The mother had indicated in her statement attached to her substantive application about her relationship with the respondent and how she gave birth and lived with the respondent. Her statement indicates that the respondent is the father. She has never contested otherwise. She challenged his locus standi in

a subsequent application filed on 27th October, 2009.

13. On 11th May 2009, the court gave the child to the mother as it was agreed by the parties and then adjourned the matter for mention only and ordered the parties to discuss the issue. The order was not a recovery order as it did not require the father to return the child to the mother. It was an order for interim residence and it was not an order upon courts finding but an order upon consent. It shall not be erroneously termed as a recovery order.

14. Mr. Sharma then filed an application asking for orders that the court declares itself functus as the issue of child recovery had been decided and that the respondent had no legal basis to challenge the custody application. This application was filed on the 23rd day of October, 2009.

15. His worship refused the application and the material part of his judgment is very apt. He said:-

"Firstly I do not think that it is only if the Court had declared that the Respondent is the putative father of the child that the Respondent had legal basis to challenge the custody of the child because Section 65 and in particular sub-section (c) makes it clear that a person who is concerned about the care, welfare or development of the child can make an application for a parenting order. Section 65 states:

65. A parenting order in relation to a child, other than a child maintenance order, may be applied for by-

(a) either or both of the child's parents;

(b) a person representing the child under an order made under section 125; or

(c) <u>any other person concerned with the care, welfare or development of the child.</u>

(Bold and underline provided)

Further it is not only upon a declaration that a person becomes a putative father of a child as that is only one way under Section 134 of the Family Law Act. There are also presumptions dealt with under Division 11 Sub-Division B of the Family Law Act. Also the Respondent has on 11/05/09 gone on record to admit that he is the father of the child.

The Respondent submits that the court had not made a final order since the child who was in the

Applicant's custody was ordered by the Court to be given to the Applicant pending the full hearing of the matter. However all the court record says is with respect to that is "*Adjourned to 25/6/09 for mention only for both parties to talk-child is to go with Applicant/lady todaij*".

Than on 25/6/09 the court record inter-alia states "Applicant lady advised to seek legal advise legal aid. Child is to remain with Applicant".

Than on 1/09/09 a Social Welfare Officers report was ordered by the Court.

With the greatest of respect I think that a decision to give the child to the Applicant Lady ought to have been made after a full consideration of a Social Welfare Officers report, due consideration of the factors under Section 121 of the Family Law Act 2003, and hearing evidence of the parties.

In all the circumstances I hold that the court is not functus as matters raised in Paragraph 22 above are yet to be considered.

Further I think that the Court record as cited in paragraphs 19 and 20 above indicate that the issue of Residence was yet to be decided by the Court Otherwise the Court would not have advised the Applicant to seek legal advise or consult legal aid and nor it would have given a further date in the matter.

Accordingly I order that the Respondent is to file a Response to the Form 9 (Final Orders) filed by the Applicant lady within 14 days, a Social Welfare Officers report be obtained as soon as possible and the matter regarding residence of the child proceed to Hearing..."

16. His worship was correct in that he does not need to declare the respondent the father of the child. It is only in disputed cases for child maintenance orders that such a declaration is necessary. In parenting orders the respondent could have the locus standi as a parent because the parties had agreed that he is the father of the child or he could have locus as the person concerned with the care, welfare and development of the child as he claims that he is the father and he is concerned as he also looked after the child. One does not have to be a caregiver to be concerned about the care, welfare and development of the child as Mr. Sharma suggests.

17. I am not confused. The court record clearly indicates that the appellant lady had agreed that the respondent was the father.

18. Grounds 2 and 3 have no merits at all.

19. I must say that the order to return the child was only an interim order like his worship properly noted. It was not an order for recovery at all. The substantive action had not been tried and it was open to the same court to hear the substantive application for residence of the child.

20. There was no use of the term interim but the order could not have been made final as the husband sought time for discussion as well. The proceedings were never finalised.

21. The court correctly held that it was not functus. Making of final orders for residence does not make a court functus otherwise the same court can then never hear an application for modification of parenting orders as provided for by s. 66 (2) of the Family Law Act

22. When the interim order was made to let the mother have the child, it was made by consent and it was not necessary for the court to consider the best interest factors of the child as those were consent orders. The court may, but is not required to have regard to all or any of the best interest factors: s. 121(3) of the Family Law Act. It is better and safer to have some basis to make the consent orders and the court may wish to have a quick discussion on the best interest of the child and may order reports if it deems fit.

23. I am of the judgment that his worship had very aptly dealt with the issues, of the court being functus and the respondent having no legal basis to contest the application. I do not need to enhance his judgment in any way.

24. I do not consider it necessary to deal with the provisions of child recovery as there was never an application for child recovery. Mr. Sharma wishes to treat his application for residence as application for child recovery but the court was never asked to treat it as a child recovery application

25. There is no need for any orders, as I have earlier noted that the parties have reconciled and started living together.

Final Orders

26. There is no need for final orders on Appeal for reasons outlined above.

27. There shall be no order for costs.

ANJALA WATI

JUDGE

20.01.2011

To:

1. *Mr. S. Shanna of LAC, Solicitor for the Appellant.*
2. *Respondent.*
3. *File Number. 0S/Ltk/(HS2.*