

IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER: 13/LTK/0015
(Appeal from 09/LTK/0134)

BETWEEN: JOPE
APPELLANT

AND: JAIN
RESPONDENT

Appearances: Appellant in Person.
Respondent in Person.

Date/Place of Oral Judgment: Thursday, 21 July, 2014 at Lautoka.

Date/Place of Written Judgment: Wednesday, 10 September 2014 at Lautoka.

Judgment of: The Hon. 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 similarities to any persons is purely coincidental..

Anonymised Case Citation: Jopev. Jain – Fiji Family High Court Appeal Case Number 13/Ltk/0015.

JUDGMENT

Catchwords:

Child Maintenance- orders made in absence of father- orders challenged on the ground that father was not able to present his case to Court- application served- due process accorded to father- orders cannot be challenged at appellate level on the grounds that a party was not provided the right of hearing- the proper procedure is to ask for a setting aside of the orders made in absence of a party.

Legislation:

The Magistrates' Courts Rules Cap. 14: Order XXX Rule 5.

The Appeal

1. In 2013, the Court, upon and application by the mother of the child, varied child maintenance from \$40 per month to \$40 per week.
2. The husband appeals against those orders on the grounds that the orders made are unjust as he was not heard by the Court. He is not working and his means to pay maintenance was not examined. He seeks an order that the maintenance orders be dismissed and the maintenance application be reheard.

The Background

3. The child in respect of whom maintenance was sought and ordered is Vesikula , a male.
4. The initial order for child maintenance was made in 2011 for \$40 a month. At that time the child was 2 years old.
5. The parents of the child were never married. When the initial order was made, the father did not appear to defend the proceedings. Upon hearing the evidence the Court had found that \$40 a week maintenance was just and reasonable for the child but unfortunately in the final orders there was an order contrary to the findings. An order was made to the effect that the father should pay child maintenance in the sum of \$40 a month when the finding was that \$40 per week was appropriate.
6. A finding of paternity was made in 2010. I note that the father had never challenged paternity in any Court including the appellate Court.
7. When the child started going to school, the mother made an application for variation of maintenance. The father was again served with the application and he failed to defend the proceedings. The Court heard the matter on an undefended basis.

8. The Court found that the child was about to go to school and the child was sick. The mother was unemployed and thus a sum of \$40 a month was not sufficient for the child. The Court noted the contradiction in the earlier finding that \$40 a week was found to be the appropriate order but a sum of \$40 per month was ordered in child maintenance.
9. The Court varied the order to \$40 a week for the child.

The Law and Analysis

10. The father asserts that the order is unjust as he was not heard in the proceedings. He is unemployed and was not given a chance to give his side of the story.
11. The father was served with all applications, the initial one and the one for variation. After being served he chose not to defend the proceedings. If he wanted to give his side of the story, he should have attended Court.
12. From the Court file it appeared to the Court that the application was served on the father. Since the due process was given to the respondent, the Court was duty bound to proceed with the hearing. In the undefended hearing, the father was deemed to have admitted the expenses of the child and his ability to pay maintenance in the amount sought.
13. There is no way to compel attendance of a party to the proceedings in a maintenance case. Under the old law, a bench warrant would have been issued but under the new law the matter should proceed on an undefended basis. That is clearly outlined in the application form being Form 5. The notice reads to the effect that:

“ Notice to respondent (person against whom the applicant seeks orders)

If you oppose the orders sought in item 6, you must:

- ***Attend the hearing listed above (if you do not attend, the Court may make an order in your absence); and ...”***

14. There was clear notice to the respondent that if he wants to be heard he must come to Court. The respondent defied the notice and now cannot say that the Court did not hear him. It is him who did not want to be heard and he cannot challenge the orders now at the appellate level that he was not heard.
15. If the order was made in absence of the father, the proper procedure for him was to have applied for a setting aside of the orders instead of appealing the same. **Order XXX Rule 5** of the **Magistrates' Courts Rules Cap 14** provides that "*any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit*".
16. Since the appellant is raising evidential issues, it is proper that he applies for a setting aside of the orders or for a variation of the same as the appellate court is not in a position to hear his evidence on income and earning capacity. These are matters which ought to have been properly raised at the trial.

Final Orders

17. The appeal is dismissed.
18. Each party shall bear their own costs.

ANJALA WATI

Judge

10.09.2014

To:

1. **Appellant.**
2. **Respondent.**
3. **File Number 13/LTK/0015.**