

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 14/Suv/ 0012
(Original Case Number: 11/ Nau /0046)

BETWEEN: AMIT
APPELLANT

AND: PRIYA
RESPONDENT

Appearances: Mr. S. Kumar for the Appellant.
Mr. A Chand for the Respondent.

Date/Place of Judgment: Wednesday 13 January 2016 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 similarities to any persons is purely coincidental.

Anonymised Case Citation: AMIT v. PRIYA - Fiji Family High Court Appeal Case Number: 14/ Suv/0012.

JUDGMENT

Catchwords:

FAMILY LAW - Appeal against decision refusing leave to appeal - were factors governing grant of application for leave properly considered by Court: length of delay; the reason for the delay; chances of appeal succeeding; and hardship or injustice caused to the respondent.

Legislation:

1. Family law Rules 2005 ("FLR"): Rule 4.03.

Cause

1. The husband appeals against the decision of the Resident Magistrate ("**RM**") of 16 September 2014 where his application for leave to appeal out of time was refused.
2. The husband intended to appeal the decision of the Court of 29 December 2011 granting spousal maintenance.
3. The application for spousal maintenance was heard on 29 August 2011. The ruling date was fixed for 14 November 2011. Unfortunately the RM dealing with the matter was transferred to Ba and the ruling was not prepared and delivered on this date. However when the file was called in Court on 14 November 2011, the new presiding RM adjourned the matter for ruling on notice.
4. Sometimes on or about 9 December 2011, a ruling was dispatched to Nausori Court for delivery.
5. The Nausori Court issued Notice of Adjourned Ruling. The wife was informed on phone about the date.
6. The Court Clerk tried to serve the same notice on Mr. Sunil Kumar's Office as he was still counsel on record. The clerk made a note in the file that Mr. Kumar refused to accept the notice on the basis that his client was not coming to see him and that he would not be available on the day as he would be in overseas.
7. The ruling was then delivered on 29 December 2011. Only the wife was present in Court to collect the ruling.
8. On 31 January 2012, the wife issued a Judgment Debtor Summons ("**JDS**") for arrears of maintenance. The JDS was served on the husband on 9 February 2012.
9. This JDS was called in Court on 21 February 2012. Then on 20 March 2012, an application for extension of time to appeal was filed.
10. The grounds upon which time was sought was that neither the client nor the counsel was informed of the day on which the ruling was to be delivered and that they only came to know that a ruling had been delivered when they were served with a judgment debtor summons. By that time they were out of time in filing an appeal against the decision.

Magistrates' Courts Findings

11. The Court refused the application for leave to appeal out of time. It found that the appellant was out of time by 48 days and that the conduct of the husband and his counsel was not acceptable by Court when his counsel refused to accept the notice of the judgment date.

12. The Court found that the FLR required that every party must provide an address for service and for the husband the address for service was noted to be Mr. Sunil Kumar Esquire. If there was to be any change in the address, the husband was to have filed a form 20 pursuant to rule 4.03 of the FLR which is the Notice of Address for Service and that was not done.

13. The Court also relied on Order IV Rule 1 of the Magistrates' Courts Rules which states that unless a notice of change is filed, the former barrister and solicitor shall be considered the barrister and solicitor of the party until the final judgment unless allowed by the court for any special reason to cease from acting therein.

14. It was found that if Mr. Kumar was not receiving any further instructions from his client, it was his duty to have made an application to withdraw as counsel or he ought to have accepted the service of the notice and appeared in court to collect the judgment or instructed another counsel to appear on his behalf.

15. Mr. Kumar was still on record and his reasons for refusing the notice was not acceptable and thus the reason for not filing the appeal on time, also not acceptable.

16. The Court also noted that Mr. Kumar had not filed any proposed grounds of appeal for it to assess whether there were any chances of success.

17. It was also found that the wife would be in hardship as she received the maintenance when she was pregnant. By that time she had given birth and was not receiving any child maintenance. She needed to be maintained by the husband who was working and capable financially to maintain her.

Grounds of Appeal

18. Aggrieved with the orders, the husband appealed on the grounds that the court erred in law and in fact:

1. In denying the husband rules of natural justice by failing to inform him of the ruling date;

2. By taking irrelevant consideration into account and leaving out relevant consideration in determining the leave to appeal out of time; and

3. By adjourning the ruling on notice and failing to serve the notice on the husband.

Submissions

19. Mr. Kumar filed his submission on 1 September 2015. His submission mostly relates to setting aside of the orders. Most of the submission is irrelevant and does not address the grounds of appeal.

20. I will attempt to summarize what has been very unintelligibly put together.

21. Mr. Kumar argued that the husband was not informed of the date of ruling. The notice ought to have been served on the husband. That is not denied. He only became aware of the judgment when he was served with a judgment debtor summons. As a result an appeal could not be filed on time.

22. Mr. Chand argued that even after the service of the JDS which indicated that there was a judgment on foot; the husband did not file the application for leave to appeal within a month. They were initially late as well.

23. The explanation is also not satisfactory. Mr. Kumar continues to be on record as counsel for the husband and as such it was his duty to have accepted the notice when it was given to him. He refused and also failed in his duty to inform his client of the date for the decision. They now cannot assert that they were not informed of the date for the decision.

24. Mr. Chand further argued that all the relevant factors were properly considered in determining the application for leave. The Court had considered what the delay was; the reason for the delay; the chances of the appeal succeeding; and the hardship or prejudice caused to the wife if leave were to be granted. In all cases for leave, these are the factors that are normally addressed by the Court.

25. Mr. Chand said that the Court had considered the proper law for governing grant of spousal maintenance. The facts required that the maintenance be granted. The wife was pregnant and could not attend work. She also does not have any assets of her own which could derive income for her. On that basis she qualified for spousal maintenance. There are therefore no chances of the appeal succeeding even if leave were granted.

26. Since the grant of the order for spousal maintenance, no maintenance is being paid. There is now a child who is also not being paid any maintenance. It would be manifestly harsh if leave is granted as the spouse and the child will be left without any support from the husband.

Law and Analysis

27. I find it improper on the part of the counsel for the husband to having refused to accept the notice stating when the judgment in the case will be given, to argue that no notice was served on the husband.

28. It is correct that in the response to the spousal maintenance case, the address for service of the documents is noted to be **Sunil Kumar Esq; Old Court House Building, Court Street, P.O. Box 2315, Nausori.**

29. This indicates that until the spousal maintenance proceeding was finalized, all service was to be effected on the above address. If there was any change of address for service, there is a special form provided to the parties to fill in and lodge. After the filing of that form the Court Registry will note the changes in the address of service.

30. Rule 4.03 states that "a party to the proceedings may change the party's address for service in the proceedings by filing a notice of address for service in accordance with Form 20".

31. There was no form 20 filed and on that basis Mr. Kumar had the responsibility to accept the notice indicating the date of decision in the case. He does not dispute that he refused to accept the notice. I agree with the RM that his conduct as a senior counsel is much to be desired about.

32. Mr. Kumar ought to have fulfilled his obligation to the client and his excuse that his client ought to have been served with the notice is equally naive.

33. The explanation why the notice was not received is inadequate and an affront to the legal system.

34. Even if Mr. Kumar could not file an appeal within one month from the date of the ruling, there is no explanation why he could not immediately after receiving the JDS file leave to appeal out of time. The JDS was served on 9 February 2012. The application for leave was made after a month. This shows that neither the husband nor his counsel treated time with any diligence.

35. I also find that there is no basis on which the order for spousal maintenance is challenged. Normally in an application for leave to appeal out of time, the proposed appellant shows the strength of the grounds of appeal. Nothing in this regard has been argued in the Court.

36. The spousal maintenance was granted on the basis that the wife was pregnant and was experiencing morning sickness. She could not go out and work and she did not have any assets or financial resources from which she could support herself. In absence of any contrary argument, I do not find that factually the assessment of spousal maintenance was made in error or that legally the wife is not entitled to any maintenance on this ground.

37. The RM considered the factors of the delay, the reasons for the delay, the chances of appeal succeeding and the hardship that the wife will face if leave were to be granted. These are the relevant factors for grant of leave to appeal out of time and I find that the factors were properly considered and the application refused on proper grounds. I find that the appeal has no basis.

Final Orders

38. The appeal is dismissed and each party shall cost of the proceeding.

Anjala Wati

Judge

13.01.2016

To:

- 1. Mr. S. Kumar for the Appellant.*
- 2. Mr. A. Chand of LAC for the Respondent.*
- 3. File: 14/Suv/0012.*