IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA **APPELLATE JURISDICTION**	
ACTION NUMBER:	**APPEAL CASE NUMBER 15/LTK/0580**
BETWEEN:	**BEN** **APPELLANT I** **B COMPANY** **APPELLANT II** **X COMPANY** **APPELLANT III**
AND:	**MONICA** **RESPONDENT**
Appearances:	*Mr. R. Gordon for Appellant I.* *Mr. Pillay for Appellants II and III.* *Ms. V. Patel for the Respondent.*
Date/Place of Judgment:	*Tuesday 20 February 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

A. Catchwords:

FAMILY LAW – PROPERTY DISTRIBUTION – APPEAL –INTERLOCUTORY ORDERS – could orders for valuation costs to be borne by the companies be made against it when the companies were not parties to the cause – the proper approach to determining who should value the properties again in light of suspicion raised by one party regarding the authenticity of the valuation report- orders made on applications ex-parte can be set aside– setting aside of interlocutory orders made in absence of a party cannot be set aside unless it is an application striking out a party's application, pleading or claim.

B. Legislation:

1. ***Family Law Act 2003 ("FLA"): s. 22.***
2. ***Magistrates Court Rules 1945 ("MCR"): Order 26 Rule 11.***

Cause

1. The appeal before me is against two interlocutory rulings of the Family Division of the Magistrates' Court, Lautoka. The rulings were delivered on 15 September 2017 and 13 October 2017. The substantive matter in which the rulings were delivered was a claim by the husband for distribution of the property of the parties to the marriage.

The Rulings in the Magistrates Court

2. The ruling of 15 September 2017 was on the husband's application to set aside the orders of 29 September 2016. On 29 September 2016, the court had allowed the wife's application that the husband obtains the valuations of the 2 companies and the costs of the valuations be paid by the companies.

3. The court had refused to set aside the orders on the basis that it was functus and as such it could not revisit its orders.

4. The ruling on 13 October 2017 was on the husband's application to sell the residential property. The basis for the request for sale was that the parties were living in the same house, had an acrimonious relationship and that the husband was responsible for paying all the outgoings on the property.

5. The application for sale of the said property was refused on the basis that the court had not decided on what was the final appropriate outcome of the distribution proceedings and to sell the property before reaching the final stage would amount to *"putting the cart before the horse".*

Law and Analysis

6. I will first of all deal with the appeal on the decision refusing to set aside the order for the husband to carry out the valuations of the two companies and for the companies to pay for the costs of the valuation.

7. The reason why the court refused to look into the issue of setting aside of the order was that it was functus. It did not decide on the merits of the application by the husband and the two companies

which had intervened to address the orders made against it. The issue that I need to address is whether the court was functus, as it found, and whether the orders were legally and factually justified.

8. Let me first deal with the order against the companies to pay the costs for the valuation. When the order for costs against the companies were made, the companies were not parties to the proceedings. The application for costs against the companies was made ex-parte as the companies were not served with the application. The companies were also not heard.

9. There are no provisions in the Family Law Rules that provides for setting aside of orders made ex-parte. Pursuant to s. 22(2) of the FLA, I have to turn to the MCR. Order 26 Part B of the MCR contains the provisions on ex-parte motions.

10. Order 26 Rule 11 states:

"Where an order is made on a motion ex-parte, any party affected by it may, within 7 days after service of it, or within such further time as the court shall allow, apply to the court by motion to vary or discharge it, and the court, on notice to the party obtaining the order, either may refuse to vary or discharge it, or may vary or discharge it, with or without imposing terms as to costs or security, or otherwise, as seems just."

11. By the time the application for the setting aside of the orders were heard, the companies were allowed to intervene temporarily to address the issue of costs against it. I find that since the application was made ex-parte against the companies, the court was not functus in determining the application to set aside the orders made against the companies. It derives it powers from Order 26 Rule 11 to hear a party which it had not heard before on an ex-parte application and examine the correctness of the order it had issued.

12. A court cannot make a final order affecting a party's right on an application ex-parte. If it has made an interim order, it should give the other party an opportunity to be heard. That is one of the fundamental principles of natural justice.

13. In this case, the court had made a final order for valuations costs to be paid by the companies. This was not proper. The costs for valuation is in the vicinity of $10,000. The issue before the court therefore does not involve a small amount.

14. The counsel for the wife argues that the companies and the husband is one single entity and the companies are the alter ego of the husband. No such factual finding was ever made. I cannot be

convinced with that submission without hearing evidence and determining that the companies in fact are the alter ego. I thus set aside the order for costs against the companies.

15. I now turn to the order which stated that the husband carries out the valuations of the two companies. The day this order was made, the husband was not in court. His application for property distribution was struck out, the wife was made the applicant to the proceedings and an order made that the husband carries out the valuations of the companies.

16. The application was not made ex-parte against the husband. He was served. There is no provision in the MCR to set aside an order obtained in absence of a party. There is a provision which states how a judgment obtained either by default or in absence of a party can be set aside. The judgment that is referred to is the final judgment by default or after an undefended trial.

17. This subject order on appeal was an order without a trial. It was an interlocutory order. I do not find that the provision on setting aside of a judgment in absence of a party applies to interlocutory orders obtained in absence of a party. Striking out applications are an exception because it finally brings one party's right to litigate to an end.

18. The purpose of interlocutory orders are to ensure progress of matters to trial. It is therefore required that parties attend court and be heard on interlocutory procedures and processes so that there is no delay in finalizing cases. If parties do not appear, orders will be made in their absence.

19. Understandably there are no legal provisions to set aside the interlocutory orders made in absence of a party because if that is allowed, it will allow an inactive, lethargic or clever party to delay the matter. The party will not appear in court and when orders are made against it, will apply to set aside and then continue with the act, in the hope to frustrate the proceedings.

20. The husband therefore could not have asked for a setting aside of the orders. In that regard, I accept that the court below was correct that it could not have considered the application to set aside. I am however faced with an appeal to determine whether the court was correct in issuing the orders in the first place? The parties had initially agreed to do joint valuations of the properties and for the costs to be borne equally by both the parties. The wife is now of the view that the valuations are not proper and lacks independence. She has her doubts about the husband interfering with the process.

21. It is established from the wife's affidavit evidence that she does not wish to depend on the valuations that are carried out earlier and that she is of the view that it could be interfered with. She wants her

own valuations to be carried out. The only way forward to address such situations is for both parties to produce their own valuations of all the properties and each can adduce evidence of that. The other party will have a right to test the evidence. It will be for the court to accept the valuations it deems just and fair.

22. I now turn to the appeal against the decision to sell the residential property. I find that the court was correct in finding that the issue of whether it is appropriate to sell the residential property is normally the last issue for consideration unless the property has to be sold for some very cogent, important or serious reason in the interim.

23. Indeed the wife also pleaded that the residential property should be sold and the proceeds divided but her position had been that it be done after the final orders for distribution. She is not agreeing to a sale in the interim.

24. The affidavit evidence does not demonstrate any justifiable need to sell the residential property. The evidence from the husband is that the parties are living in the same house, the relationship is acrimonious and that he is paying all the outgoings on the property.

25. If the husband is paying all the outgoings and maintaining the property, he can address this when the issue of contribution is addressed. His effort will not be unrewarded if he has been maintaining the property and paying the mortgage and other costs.

26. The evidence shows that he is not impecunious that the payment of the mortgage and costs are overtly taxing and affects his livelihood. If that was the case, there would be merits worthy of consideration.

27. One must not forget that final orders for distribution are only made if it is just and equitable to do so. It is not automatic that the residential property would be sold. The sale of the residential property may not reflect a just and equitable order.

28. It is only upon hearing the parties, their contribution to the property and the future needs factors that will assist the court in determining whether a sale is necessary. It maybe that due to one party's weaker economic situation, he or she may be allowed to retain the residential property. No one knows what would be an appropriate order.

29. To rush and sell and say that converted cash will adequately replace the loss of that asset, is a premature statement and made without regard to the understanding of how the distribution process works. Money as converted cash, in most situations, is not an adequate replacement. It does not replace the asset(s) lost. Money in most situations cannot replace a home. I myself do not know at this stage whether a sale would be a justified order.

30. Mr. Gordon also complained about not being heard on the application for sale of the residential property. I find his complaint to be unfair. I note from the records that on 15 September 2017, a request was made for the hearing date but the court indicated that it will proceed to rule on the application. By this it was understood that the application would be dealt with on papers. Such applications are normally dealt with on the basis of the affidavits. Oral addresses for simple matters like this are only prolonging cases. It was in the interest of case management that the matters be heard on papers. This is not denial of access to justice. Parties are expected to put in proper affidavits to address their situations on the need to sell the property. Lengthy literature on law is not needed when dealing with such applications. I therefore find that hearing on papers was allowable and there was no breach of natural justice in this case.

31. Finally, I wish to encourage the parties not to consume time in all these interlocutory applications. They should concentrate on finalizing the substantive matter. If good sense prevails, most interlocutory processes can be attended to harmoniously.

Final Orders

32. I allow the appeal in part. I set aside the order for the costs of valuation to be borne by the companies. I also set aside the order for the husband to carry out the valuations of the two companies. The parties are to produce their own valuations at the trial at their own costs.

33. I dismiss the appeal against the order refusing sale of the residential property.

34. Each party is to bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

20.02.2024

To:

1. ***Rams Law for Appellant I.***
2. ***Mr. Pillay for Appellants II and III***
3. ***Vasantika Patel Lawyers for the Respondent.***
4. ***File: Lautoka Family Court Appeal Case Number: 15/LTK/0580.***