

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2012/ 0141

BETWEEN:

GEARY ANDREW JOSEPH

Applicant

AND

ZEPHEPHA ROSE MAE JOSEPH

Respondent

Appearances:

Dr. David Dorsett for the Applicant

Mr. Steadroy Cutie Benjamin for the Defendant

2013: February 14
March 19

RULING

[1] REMY J.: Geary Andrew Joseph, the Applicant in this case, and Zephepha Rose Mae Joseph, the Respondent, are husband and wife. They were married to each other on the 29th December 2009. On 22nd October, 2012, Mr. Joseph filed a Petition for Divorce against Mrs. Joseph. The Petition has not yet been heard and no Divorce Decree has been granted.

[2] On the 22nd October 2012, Mr. Joseph also filed a Notice of Application seeking an Order that:- "The order of the Magistrate Court requiring the payment of maintenance by

the Applicant to the Respondent is hereby set aside and any sums currently due under the said order is likewise set aside.” Mr. Joseph also seeks costs. The grounds of the application are stated as follows:-

1. “Within days of the marriage of the parties, the Respondent left the matrimonial home.
2. The Respondent shortly after leaving the matrimonial home instituted proceedings and obtained an order from the Magistrate Court that the Applicant pay maintenance in the amount of \$75.00 per week.
3. The Applicant is a security guard earning less than \$240.00/week. Continuation of maintenance is manifestly unjust and oppressive.”

[3] The above application was accompanied by an Affidavit in which the Applicant deposed, among other things that he was not represented at the maintenance hearing at the Magistrates’ Court. He stated that there was hardly a marriage between his wife and himself. His wife came from Jamaica, married, and then left him. They spent very little time living as man and wife and having spent very little time with him, “there is very little that she did for him”. He states that the maintenance order is “oppressive.” Further that “his take home pay tops out at \$237.79 per week, and this includes working overtime.”

[4] After at least two adjournments at the request of the Respondent who was unrepresented, the matter came up for hearing before this Court on the 14th February 2013. On that occasion, the Respondent was represented by Counsel Mr. Steadroy Cutie Benjamin. No Affidavit in Reply was filed. Learned Counsel Mr. Benjamin informed the Court that he was taking a preliminary point. He referred to Part 60 of the Civil Procedure Rules (CPR) 2000, in particular, Part 60.2 (1) which states that :-

“60.2 (1) An appeal to the court is made by issuing a fixed date claim form in Form 2 to which must be annexed the grounds of appeal.

- 60.2 (2) The appellant's grounds of appeal must state the -
- a) decision against which the appeal is made;
 - b) enactment enabling an appeal to be made to the Court
-
-
- e) grounds of the appeal, identifying any finding of -
 - i). fact; and
 - ii). law;
 which the claimant seeks to challenge.”

[5] Learned Counsel also referred the Court to Section 153, Part V11, and Cap. 255 of the Revised Laws of Antigua and Barbuda, which speaks to reviewing a decision of the Magistrate. The Court will deal with Section 153 later in the ruling.

[6] Mr. Benjamin submitted the following:-

- i). What Learned Counsel for the Applicant Dr. Dorsett ought to have done, within 8 days of the making of the Order/Judgment, was to ask the Magistrate to review the decision, pursuant to Section 153 above which states that upon the review, the Magistrate may “re-open and re- hear the case wholly or in part and take fresh evidence, and reverse, vary or affirm his previous judgment or decision.”
- ii). For Dr. Dorsett to have come before the Court is irregular, and there is nothing which enables him, in any event to come to this Court for review.
- iii). Part 60.3 of CPR states that the making of an appeal does not operate as a stay of proceedings on the decision against which the appeal is brought unless the -
 - a) court; or
 - b) tribunal or person whose decision is being appealed;
 so orders.

- iv). Part 60.5 of CPR states that the claim form and grounds of appeal must be served within 28 days of the date on which notice of the decision was given to the claimant.
- v). Dr. Dorsett did not comply with the requirements of bringing the matter before the Court.
- vi). By way of analogy, under the Registered Land Act, a person dissatisfied with the decision of the Registrar can appeal to the Judge for a review of the Registrar's decision. That must be made under the provisions of Part 60.5 of CPR within 28 days of the decision of the Registrar. When this is done, Section 60.2 (2) (b) of CPR kicks in.
- vii). The application filed by the Applicant is improper and ill-conceived.

[7] In his response, Learned Counsel for the Applicant Dr. Dorsett submitted as follows:-

- (a) The Applicant has filed a petition under the Divorce Act; divorce matters are solely within the province and purview of the High Court; matters relating to marriage generally are within the purview of the High Court. The petition having been filed, it is like an originating summons; it starts the whole thing. With the divorce, arise or may arise, what are commonly referred to as ancillary matters. Whereas the Divorce Petition is a matter for open court, ancillary matters are matters for Chambers upon application.
- (b) The Divorce Act deals with the breakdown of a marriage and all of the incidents that flow from that breakdown. Those incidents included in the Divorce Act include matters of custody of children, support for the children and support for a spouse. It is on that basis, that the Applicant has approached the High Court with this application.

- (c) This is not an appeal to the High Court. Mr. Benjamin has correctly stated the relevant parts of Rule 60.5 which states that “the claim form and grounds of appeal must be served within 28 days of the date on which notice of the decision was given to the claimant.”
- (d) In the present case, there is an Order for support, given in the early part of 2010. The order is an ongoing order; pay weekly; there is no end date; it is an indefinite order. If the logic of Mr. Benjamin were to be accepted, by extension, once that support order is granted, the order would continue, once it is alive, for 28 days. There is a grace period of 28 days in which to appeal; after that 28 days, you’re basically stuck. There is a manifest absurdity in that, because the order for support is to a married person, i.e. to a wife; it would be absurd for the wife to have the benefit of such an order when she is no longer a wife.
- (e) Apart from the general practice of all ancillary matters being dealt with by the Court, once the originating process is invoked, there is a statutory basis for what the Applicant has asked the Court to do and this is something the Court does instinctively, and has done, on countless occasions.
- (f) Section 20 of the Eastern Caribbean Supreme Court Act stipulates that there is a duty upon the Court when dealing with matters to render a decision or ruling that will conclusively settle all disputes between the parties whether or not those remedies that would settle the dispute were applied for or pleaded in the claim.
- (g) This is a divorce; there are matters that arise between the parties; the Applicant has approached the Court vested with the appropriate jurisdiction, i.e. to deal with marriage, the breakdown of a marriage and all ancillary matters. The Applicant is not pursuing an appeal; he is asking the Court to exercise the jurisdiction vested in it under the Divorce Act and by Section 20 of the Eastern Caribbean Supreme Court Act, so that this regrettable matter may be concluded with some efficiency and to avoid the multiplicity of proceedings, because the Magistrates Court has always honoured any order of this (High) Court.

[8] Mr. Benjamin in his Reply stated that Section 20 of the Eastern Caribbean Supreme Court Act is based on the presumption of regularity; namely, that all things placed before it are regular. He acknowledged that the Supreme Court has an inherent jurisdiction to deal with all matters touching divorce proceedings and all ancillary matters connected thereto. In this case, contended Mr. Benjamin, since early 2010, there was an order in force made by the Magistrates Court which said order declared that the Applicant ought to pay a certain sum to the Respondent until further order of the court or the party sooner dies. It does not follow that that order made in 2010 is in perpetuity. What ought to have happened was that Dr. Dorsett ought to have followed the procedure outlined in the Magistrates Civil Procedure Act, and/or failing which he ought properly to have complied with the procedure set out in Part 60 of CPR.

[9] Mr. Benjamin further stated that Dr. Dorsett is asking this Court not only to dispense with the Magistrates Court Order, but further, to dispense with any arrears which the Applicant may be found to be owing to the Respondent as a result of the said Order. Mr. Benjamin opines that no court can entertain such a request as made by Dr. Dorsett. Counsel re-iterates that the application is irregular and ought not to be entertained in its present form.

ANALYSIS

[10] The application filed on behalf of the Applicant on the 22nd day of October 2012 is to “set aside a maintenance order made by the Magistrates Court in 2010”. Further that the Court dispense with any arrears which the Applicant may be found to be owing to the Respondent as a result of the Magistrates Order. The Court notes however, that Exhibit “TB1” attached to the Affidavit of Tyzena Bailey, Office Manager in the firm of the Applicant’s Solicitors, shows that the said Order is in fact dated the 16th May 2012.

[11] In the application Dr. Dorsett has failed to specify the relevant provision under which the application has been made. He states, however, that “continuation of maintenance is

manifestly unjust and oppressive.” He states in his submissions that the Applicant is not pursuing an appeal, but rather that what is before the Court is an application made pursuant to the Divorce Act, and Section 20 of the Supreme Court Act.

[12] While Dr. Dorsett has correctly stated that the High Court has jurisdiction, under the Divorce Act, to deal with all matters pertaining to marriage and divorce, the Court must examine the application in its totality. In the instant case, there is an Order of the Magistrates Court dated 16th May 2012. The Order states, inter alia, that “this order shall remain in effect until satisfied, varied or revoked by a court of competent jurisdiction.”

[13] Section 153 of the Magistrate's Code of Procedure Act, Cap. 255, Part V11, of the Laws of Antigua and Barbuda (Volume 6) states:-

“The Magistrate may, in any civil matter, upon such grounds as he in his discretion thinks sufficient, review any judgments or decisions given by him within eight days from the date thereof (unless either party has appealed and the parties do not agree to the withdrawal of the appeal); and upon the review he may re-open and re-hear the case wholly or in part, and take fresh evidence, and reverse, vary or affirm his previous judgment or decision.”

[14] The Applicant therefore had two options available to him, if he was dis-satisfied with the said Order. He could have appealed that decision – to the Court of Appeal - or he could have applied to the Magistrate for a review of the said decision. He did neither. Dr. Dorsett contends, however, that the application is not an appeal.

[15] The Court is unable to endorse Dr. Dorsett's contention that the application before the Court is not an appeal. Halsbury's Laws of England (Fifth edition, Vol. 12, page 459, paragraph 1657) defines an appeal in the following terms:-

“An appeal is an application to a superior court or tribunal to reverse, vary or set aside the judgment, order, determination, decision or award of a lower court or tribunal in the hierarchy of courts or tribunals on the ground that it was wrongly made or that as a matter of justice or law it requires to be corrected.”

Based on this definition, the Court is of the view that the application before it is in fact an appeal. In his submissions, Learned Counsel Dr. Dorsett readily concedes that an application for an appeal would have to be made pursuant to Part 60 of CPR. On that basis alone, the Court is of the view that the application before the Court must fail, since there has been no compliance with Part 60.

- [16] The law is settled that an Order of the Court stands unless and until it is discharged. Romer L.J. in the case of *Hadkinson v Hadkinson*¹, at letter C of the said judgment had this to say:-

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

- [17] The Order of May 16th 2012 has not been discharged.

- [18] It is Dr. Dorsett's contention that the application before the Court is made pursuant to the Divorce Act, and also pursuant to Section 20 of the Eastern Caribbean Supreme Court Act. The Court will now examine the relevant provisions of the Divorce Act. Under the Divorce Act, a spouse can make application for a “support order” under section 13(2). An application can also be made under Section 15 (1) for a variation of a support order. It is significant that, for the purposes of Section 13(1), as well as Section 14 (dealing with an order for custody), “spouse” includes a “former spouse.” The application before the Court is neither an application under Section 13 (2) nor an application under section 15(1). It is also worth noting that an application under Section 15(1) is not an appeal. Under Section 15(1), the Court can “make an order varying, rescinding or suspending, prospectively or retroactively (a) a support order...” If, however, a spouse was dis-satisfied with the original order/ decision made on an

¹ [1952] 2 All ER 567

application for ancillary relief, and wanted it set aside, as opposed to having it varied, he would have to file an appeal against that decision.

[19] In the view of the Court, therefore, the application before the Court cannot truly be said to be an application under the Divorce Act, as contended by Dr. Dorsett. It is not couched as an application under the Divorce Act, neither does it comply with the provisions of the Divorce Act or the Divorce Rules.

[20] Dr. Dorsett also contends that the application is made pursuant to Section 20 of the Eastern Caribbean Supreme Court Act, Cap 143. Section 20 states:-

“The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act shall in every cause or matter pending before the Court grant either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided.”

[21] With the greatest of respect, the Court is of the view that the above section does not assist Dr. Dorsett. The words “in the exercise of the jurisdiction vested in them by this Act” are at the heart of the said Section. They define the scope and power of the Court. The application before the Court seeks the intervention of this Court to discharge an existing order of the Magistrates Court on the basis that it is oppressive. The Court, however, must act within the confines and parameters of its jurisdiction. For all the reasons stated above, the court’s finding is that it has no jurisdiction to set aside the order of the Learned Magistrate. Accordingly, the said application must be dismissed.

ORDER

[22] My Order is as follows:-

- a) The Applicant's application is hereby dismissed.
- b) That there shall be no order as to costs.

JENNIFER REMY
Resident High Court Judge
Antigua and Barbuda