

IN THE HIGH COURT OF FIJI AT LABASA
APPELLATE JURISDICTION

Appeal No. 02 of 2017

Family Case No. 17/LAB/0334

BETWEEN

KUMAR MADHUKAR SHYAM of

Lalakoro, Seaqqa.

APPELLANT

AND

DEEPIKA DEVI MAHARAJ Otahuhu, Jack Brown Place,

Auckland, New Zealand

RESPONDENT

Counsel	:	Mr. A. Sen for the Appellant Ms. Sharmila Devi for the Respondent
Date of hearing	:	24 th April, 2018
Date of Judgment	:	09 th May, 2018

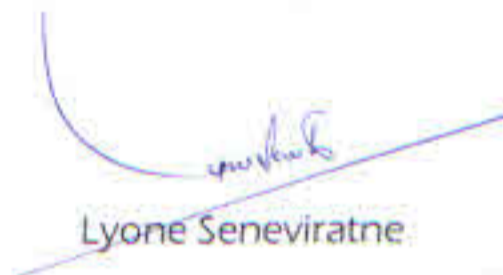
JUDGMENT

- [1] This is an appeal from the decision of the learned Magistrate dated 27th October, 2017, wherein the learned Magistrate ordered the appellant to pay \$30 per week as an interim payment of spousal maintenance and imposed a stop departure order on him.
- [2] The appeal of the appellant is based on the following grounds:
 - [1] That the learned Magistrate erred in making interim order for maintenance against the appellant when there was no such application.
 - [2] That the learned Magistrate erred in making final orders against the appellant ex-parte without allowing the appellant to be heard thereby failing to follow the principle of audi alteram partem rule.
- [3] The learned counsel for the appellant submitted that for the learned Magistrate to order an interim payment of maintenance she should have an application in Form 5 of the Family Law Rules 2005 and the learned Magistrate has made an order for interim payment of maintenance without an application.
- [4] The respondent was represented by the Legal Aid but the counsel from the Legal Aid submitted that she had no instruction from the respondent to appear for her. However, the learned counsel brought to the notice of the court that there was in fact a Form 5 application filed by the respondent. The learned counsel for the appellant submitted that we are bound by the copy record and there is no such application is found in the copy record given to him.
- [5] The court perused the original record of the Magistrate's Court and found that in fact a Form 5 Application has been filed on 27th October, 2017 at 9.00 a.m. Therefore, the argument that the learned Magistrate made the order without and application before her is without merit. The failure to include the Form 5 application in the copy record is not a fault on the part of the respondent. It is a mistake on the part of the officers of the court who prepared the copy record. A party cannot be penalized for the mistakes of the court. This is a case where the maxim *actus curae neminem gravabit* (act of court should prejudice no person) should be applied.

- [6] Audi alteram partem (hear the other side) is one of the basic principles of Rules of Natural Justice. Before arriving at a finding affecting a person's substantive rights in a judicial or quasi-judicial hearing, it is a fundamental principle that the party whose rights are at stake must be given a fair hearing.
- [7] None of the orders sought to be challenged by the appellant in this appeal has the effect of determining the substantive rights of the parties. Both these orders are interim orders and effective only until the substantive matter is heard with notice to the parties.
- [8] The second order made by the learned Magistrate is an order restraining the appellant from leaving the country. This is also an interim order. The appellant is entitled to make an application to have the stop departure order set aside. If the party who is sought to be restrained from leaving the country is given prior notice of the application he can leave the country and any order made thereafter will be negated.
- [9] For these reasons the court is of the view that there is no violation of the rules of natural justice by the learned Magistrate as claimed by the appellant.
- [10] The court accordingly makes the following orders:
- [1] The appeal of the appellant is dismissed.
 - [2] Parties to bear their own costs of the application.



09th May, 2018


Lyone Seneviratne

JUDGE