

NOVA SCOTIA COURT OF APPEAL
Citation: *Islam v. Sevgur*, 2011 NSCA 114

Date: 20111207
Docket: CA 336980
CA 338493
CA 338817
Registry: Halifax

Between:

Muhammed R. Islam

Appellant

v.

Serperi Beliz Sevgur

Respondent

Judge: The Honourable Mr. Justice Jamie W.S. Saunders

Motion Heard: September 7, 2011, in Halifax, Nova Scotia, in Chambers

Held: Registrar's motions to dismiss appeals granted.

Counsel: Yavar Hameed, for the appellant
Tanya Nicholson, for the respondent

Decision:

[1] These matters (involving three separate files - CA 336980; CA 338493; and CA 338817) came before me during my term in Chambers. The appellant Muhammed Rafiquel Islam commenced three interlocutory appeals from divorce proceedings in the Nova Scotia Supreme Court (Family Division). The divorce file is identified as SH No. 1201-064014 (066970).

[2] The Registrar brought motions to dismiss the appeals based on non-compliance with the **Rules**.

[3] This decision will apply to each of the Registrar's motions in the three appeal files noted above.

[4] The Registrar's motions were originally scheduled to be heard in Chambers this summer. Justice Beveridge adjourned the motions based on the appellant's representations that he had only just received notice of the Registrar's intended action, and had retained a lawyer in Ottawa to oppose the motions to dismiss.

[5] When these matters came before me in Chambers, counsel for the appellant had, the night before, filed a lengthy affidavit, which neither I nor counsel for the respondent had had time to consider.

[6] During my initial telephone conference with the parties, counsel for the respondent objected to the admissibility of much of the affidavit filed by the appellant as being hearsay and not confined to facts but advancing arguments. Respondent's counsel raised other procedural irregularities concerning the form and content of the appellant's filings.

[7] Given the variety and nature of counsels' arguments, I did not think it appropriate to dispose of the Registrar's motions in the context of a telephone conference. I reserved and asked counsel to file brief written submissions to better explain and articulate their respective positions.

[8] I have now had the opportunity to consider their submissions as well as the extensive record in all three proceedings.

[9] Having done so, I would allow the Registrar's motions, and dismiss the three interlocutory appeals for the reasons that follow.

[10] I will begin with a brief review of the background that brought this ongoing litigation to this Court.

Background

[11] The parties were married in Ankara, Turkey on August 18, 1996. They separated on June 15, 2009. They have two children, Jaan Sulaiman Islam born October 24, 1998, and Ali Omer Islam born October 28, 2002. The parties were divorced by a divorce order granted orally on December 9, 2010, by the Honourable Justice Elizabeth Jollimore of the Nova Scotia Supreme Court (Family Division). On that date, the parties confirmed their agreement on all aspects of their financial support and property division corollary relief. To complete the remaining corollary matters, and in particular the details relating to the parenting of the two children, Jollimore, J. presided over a binding settlement conference which resulted in specific terms of custody and a parenting schedule for the two children. That Parenting Agreement is incorporated in Justice Jollimore's Consent Corollary Relief Order as Schedule "A". Justice Jollimore also issued a pension division order which provides for the division of the appellant's Dalhousie University pension plan contributions. That order is incorporated as Schedule "B".

[12] The Divorce Order was issued on July 26, 2011. The Certificate of Divorce was issued August 29, 2011 and records that the divorce became effective on August 26, 2011.

[13] The recitals of the divorce order granted by Justice Jollimore state that it replaces the interim order granted by Justice Douglas C. Campbell on October 25, 2010, and all other interim orders.

[14] The interlocutory appeals all relate to interim rulings and orders made by Justice Campbell. Each of the three interlocutory appeals pre-dates the divorce order and the consent corollary relief order granted by Justice Jollimore. I will now refer to each of these appeals in the chronological order in which they were filed.

[15] The first appeal is **CA 336980**. This file contains a notice of appeal filed September 24, 2010. It appeals an interim decision of Campbell, J. made August 25, 2010. The order is dated August 27, 2010. I will summarize the effect of Justice Campbell's impugned order, and the grounds of appeal set out in this notice of appeal. Justice Campbell denied Dr. Islam's request to adjourn the hearing or call further evidence with respect to the interim application. The judge obliged the parties to return to the Supreme Court (Family Division) on September 1, 2010, to make final submissions on the interim issues. He required them to produce and file certain documentary evidence in advance of the hearing if they intended to refer to it during the course of argument. Justice Campbell's interim order gives other directions regarding the interim care and custody of the two children. In Dr. Islam's notice of appeal regarding this interim order of Campbell, J., he lists 13 grounds of appeal covering a range of complaints which I would distil down to allegations of bias and "violation of procedural fairness" by the judge, and errors in the way the judge admitted, or ignored, certain evidence.

[16] The next appeal is **CA 338493**. This notice of appeal was filed September 30, 2010. It appeals the interim decision of Justice Campbell dated September 22, 2010. Again to summarize, the impugned order relates to the sale of the matrimonial home, and gives specific directions to the parties concerning choosing a real estate agent, listing the property, and obtaining an appraisal. The order provides that upon the sale of the home, the proceeds were to be held in trust by a "real estate lawyer hired jointly by Serperi Sevgur and Rafiguel Islam", and not released to either party until either an order of the Court, or a signed agreement between the parties, was obtained. In the notice of appeal to which this order relates, Dr. Islam repeats some of the same complaints made in his notice of appeal in CA 336980, but adds allegations of fraud and misrepresentation on the part of the respondent Serperi Sevgur and says the judge erred by ignoring both the conduct of the respondent as well as certain contractual agreements related to ownership of the property "by the Islamic Co-operative Housing Incorporation Ltd.".

[17] The last appeal is **CA 338817**. It contains a notice of appeal filed on November 1, 2010. This relates to an interim decision of Justice Campbell said to have been rendered August 25, 2010. In my view the appellant is mistaken when he says in his notice of appeal that he "appeals from the judgment dated August 25, 2010 ... court no. 1201-064014 (066970) made by Justice Douglas Campbell". I

say this because the same notice of appeal states that the “Order ... appealed from ... was made on October 25, 2010” and when one looks at the body of that impugned order, the recitals reflect that it relates to a hearing before Justice Campbell on Wednesday, September 1, 2010. I will treat the impugned order issued by Campbell, J. on October 25, 2010, as accurately reflecting the date of the hearing. As with the two previous files this is another interim order of Justice Campbell. The order is five pages long. It gives many specific directions concerning interim custody. Day-to-day care and control of the two children is left to the respondent Ms. Serperi Sevcur “subject to parenting times” for the appellant Dr. Islam “as set out in this Order”. It establishes parenting schedules during holiday periods; orders professional counselling for both the appellant and the respondent; sets child support; settles possession and financing of two motor vehicles, and the payment of certain private school fees; and directs that the issue of any retroactive child support be put over for determination at trial. Justice Campbell’s interim order also states that it “replaces the custody related provisions of the order issued by the Honourable Court on February 2, 2010” and makes clear that:

4. If, for any reason, this Interim Order is not replaced with a Corollary Relief Order before the commencement of the Christmas School Break and the summer school break, the parenting time should be agreed to by the parties with a shared parenting model in mind for the periods of school breaks.

[18] The notice of appeal to which this interim order relates sets out 27 grounds of appeal. Some repeat the same complaints made in the first two notices of appeal. Others allege bias and “violation of procedural fairness” on the part of the judge in his conduct of the hearing, or the way in which he admitted, or interpreted, or ignored certain evidence and testimony at the hearing.

[19] The appellant’s filing of each notice of appeal was acknowledged by the Registrar. In her letters she gave explicit directions to the appellant as to the steps and deadlines he was obliged to satisfy, in default of which she would move to dismiss his appeals for failure to perfect them as ordered.

[20] In CA 336980 the appellant was told that he was obliged to file a Certificate of Readiness, and then his Notice of Motion not later “than January 25, 2011”. In CA 338493 he was told that his deadline for filing his Notice of Motion was “no

later than January 17, 2011". In CA 338817 the appellant was told his deadline for filing his Notice of Motion was "no later than March 1, 2011".

[21] The appellant failed to meet any of these procedural requirements, which caused the Registrar to move to dismiss, as **Rule 90.43** requires her to do.

[22] As I have already explained, each of the decisions of Justice Campbell under appeal were interim orders granted during interim proceedings. They are clearly labelled as such and the directions therein contained are obviously intended to sort out and enforce the parties' ongoing relationship until the issues between them could be finally resolved by negotiation or court order.

[23] The divorce order by Jollimore, J. and issued July 26, 2011 says:

"Effective Date

2. The effective date of the divorce is thirty-one days after the date of this Order, as provided in the *Divorce Act*, unless an appeal is started."

[24] The corollary relief judgment of Jollimore, J. is headed "Consent Corollary Relief Order". The opening recitals state:

... This proceeding is before the Court for determination following an appearance on December 9, 2010, wherein the parties confirmed their agreement on all aspects of their financial support and property division corollary relief.

AND WHEREAS to complete the corollary matters, and in particular, the details pertaining to the parenting of ... two children ... Justice Elizabeth Jollimore presided over a binding settlement conference, which has resulted in Schedule "A" to this order;

AND WHEREAS Schedule "A" represents the agreement of the parties with the exception of paragraphs 17, 18, and 19(c), which were determined by Justice Jollimore ...

AND WHEREAS this order replaces the interim order granted by the Honourable Justice Douglas C. Campbell on October 25, 2010 and all other interim orders.

ON motion of Tanya G. Nicholson: The following is ordered under the *Divorce Act*; the *Matrimonial Property Act*; the *Pension Benefits Division Act*; and all other applicable legislation

[25] In light of all of this, it must have been clearly understood by both the appellant and the respondent that the Divorce Order, and the Consent Corollary Relief Order which incorporated both the Parenting Agreement and the Pension Order as Schedules “A” and “B” respectively, finally concluded all issues between the parties.

[26] When the parties made their submissions in Chambers, the appellant had not taken any steps to challenge the validity, or seek to vary, the orders granted by Justice Jollimore. He had not appealed the Divorce Order, or the Corollary Relief Judgment. Neither had he applied for an extension of time to commence an appeal, or stay, the divorce order or corollary relief judgment. Nor had he initiated other proceedings in the Family Division to vary or set them aside.

[27] Having presented enough of the background to provide context, I will now address the appellant’s request that he be allowed to pursue his three interlocutory appeals.

[28] It would appear that the appellant had a falling out with the lawyer who represented him during the divorce proceedings and the events leading up to it. That lawyer withdrew after a dispute over his retainer. The appellant says part of the reason for his delay in advancing the appeals was that he was “frustrated in part by his lawyer’s refusal to provide him with a copy of the transcripts of proceedings relating to the divorce.” The record also reveals that the appellant is embroiled in an ongoing dispute with Dalhousie University. On June 9, 2008, he was suspended from his position in the Faculty of Engineering at Dalhousie University by its President, Dr. Tom Traves. Dr. Islam grieved the suspension through his union and sought a full return to his duties as a professor as well as compensatory damages for what he describes as bad faith on the part of the university, and its failure to accommodate a perceived medical disability. That dispute is yet to be resolved. The appellant sought the assistance of his Ottawa based employment lawyer in opposing the Registrar’s motions to “preserve his rights until appropriate counsel can be retained.”

[29] In the brief filed by the appellant's current lawyer, he alleges "bad faith on the part of the respondent in negotiating the arbitrated settlement upon which the divorce was based". In his submission, "... where the corollary relief order is set aside on the basis of bad faith negotiation ... the divorce order cannot be maintained which predicates itself upon the arbitrated settlement between the parties".

[30] He concedes that his "three appeals on matters of financial, parenting and procedural issues ... were rendered moot as a function of the divorce order granted by Justice Jollimore based on the arbitrated settlement between the parties". Nonetheless he asks that he be granted leave to pursue those interlocutory appeals (or at the very least have them held in abeyance) so that he can consult with counsel to challenge the validity of the corollary relief judgment.

[31] In the alternative, if I were to grant the Registrar's motions, the appellant asks that it be without prejudice to his "conditional right of recommencing same in the future".

[32] The appellant's submissions are vigorously opposed by the respondent. She rightly points out that other than file the three notices of appeal, the appellant has done nothing to perfect the appeals, despite the Registrar's explicit warning as to the consequences of noncompliance. She says that to continue these appeals, or even hold them in abeyance, prejudices her interests. Given the protracted litigation that has consumed the parties for years, to maintain frivolous and meaningless appeals to which she may need to respond in future, adds considerably to the financial burden she carries. She denies any bad faith conduct and says that any "delay" between Justice Jollimore's granting the divorce order on December 9, 2010 and its eventual issuance on July 26, 2011 was caused by the appellant's own obstruction in failing or refusing to instruct his counsel.

[33] Having summarized the parties' respective positions I will address the Registrar's motions on their merits.

Analysis

[34] **Civil Procedure Rule 90.43** provides:

(3) In an appeal not perfected before 80 days from the date of the filing of the notice of appeal, or before any other time ordered by a judge, the registrar **must** make a motion to a judge for an order to dismiss the appeal on five days notice to the parties.

(4) A judge, on motion of a party or the registrar, **may** direct perfection of an appeal, set the appeal down for hearing, or, on five days notice to the parties, dismiss the appeal.

(Emphasis mine)

[35] The **Rule** is silent as to the factors which may guide a judge in the judicial exercise of his or her discretion when deciding whether to grant or deny the Registrar's motion. See generally **CIBC Mortgage Corp. v. Ofume**, 2004 NSCA 134 (in Chambers); **Mason v. Mason**, 2007 NSCA 43 (in Chambers); **MacDonald v. Nova Scotia (Workers' Compensation Appeals Tribunal)**, 2010 NSCA 23 (in Chambers); and **S.S. v. D.S.**, 2011 NSCA 14 (in Chambers).

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of her intended motion has been given, the defaulting appellant must satisfy me, on a balance of probabilities, that the Registrar's motions ought to be denied. To make the case I would expect the appellant to produce evidence that it would not be in the interests of justice to dismiss the appeal for non-compliance. While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
- (ii) whether the grounds of appeal raise legitimate, arguable issues.
- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.
- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the **Rules**.

- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.
- (vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.
- (vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.
- (viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

[37] It seems to me that when considering a Registrar's motion to dismiss, a judge will wish to weigh and balance this assortment of factors, together with any other circumstances the judge may consider relevant in the exercise of his or her discretion.

[38] **Civil Procedure Rule 90.43(a)** is mandatory. It obliges the Registrar to enforce the **Rules** and chase delinquent appellants.

[39] In my opinion, the Rules and the Registrar's explicit directions concerning the perfecting of an appeal and the consequences of non-compliance ought to be strictly interpreted and applied so as to give effect to the object of the Rules which is to achieve the just, speedy, and inexpensive determination of every proceeding.

[40] Based on my view of the matter, it will not be necessary to address the respondent's objections to the affidavit sworn by a law clerk of the appellant's employment lawyer.

[41] The appellant's principal reason for resisting the motion to dismiss his appeals is his expressed intention to prove that his former spouse negotiated in bad faith, and in that way seek to set aside both the arbitrated settlement and the divorce upon which it was based.

[42] With respect, the appellant's position is misconceived. The impugned interim orders of Campbell, J. are no longer binding upon the parties. They have

been rendered moot by the final orders of Jollimore, J. The appellant has not consulted with a lawyer on the merits of his interlocutory appeals. Whether he even qualifies for legal aid has not been decided, and that may depend on his employment status and division of his university pension, which are the subject of this matrimonial, as well as work place, litigation.

[43] The appellant has not appealed the divorce order, or the corollary relief order granted by Justice Jollimore. He has not taken any steps to set those orders aside, challenge their validity, or stay their enforcement. If the appellant has proof that the respondent is in contempt of the orders or that there are other reasons to challenge their validity or vary their terms, he has other avenues available to him under the Rules. The appellant's current allegations of bad faith, fraud, misrepresentation or other such conduct on the part of the respondent do not relate to the three interim rulings made by Justice Campbell during previous interim hearings. Those interim orders have long since been superceded by the divorce order, and the corollary relief order, which the appellant now seeks to quash.

[44] Based on my review of the record and after taking into account the factors referred to earlier, I see no merit to the appellant's primary assertion that the Registrar's motions ought to be denied for the reasons advanced, or his alternative submission that I ought to "park" his three appeals, pending an eventual determination of his challenge to Justice Jollimore's orders, which he has not yet initiated. In particular, I am not persuaded by the appellant's reasons for default. Given the other options available to him, I see no prejudice in granting the Registrar's motions to dismiss all three appeals. By contrast, I think the respondent would be seriously prejudiced in having to respond to these meaningless appeals. Permitting their continuance would not do justice between the parties.

[45] In my view, there is no reason to clog this Court's calendar with appeals from findings and rulings on interim matters which have long since been overtaken by the trial court's final judgments. Our docket should be cleared of such cases so that meritorious appeals, requiring hearing dates, may be assigned their proper places in line.

[46] The appellant would be better advised to consult with counsel concerning the proper method and forum for attacking the divorce order and the corollary

relief order on grounds he characterizes as bad faith negotiation and conduct amounting to a fraud upon the court requiring “abrogation of the contract”.

[47] For all of these reasons the Registrar’s three motions are allowed and the interlocutory appeals in CA 336980; CA 338493; and CA 338817 are dismissed with costs of \$500 inclusive of disbursements to the respondent in each proceeding, resulting in total costs and disbursements of \$1,500 payable to the respondent, in any event of the cause.

Saunders, J.A.