EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(DIVORCE)

CLAIM NO. BVIHMT 2006/0014

BETWEEN:

RAISHAUNA WHEATLEY

Applicant/Petitioner

and

LAWRENCE WHEATLEY

Respondent

Appearances:

Ms. Susan Demers of Price Demers & Co. for the Petitioner
Menelick Miller of Farara Kerins for the Respondent

2013: December 4

JUDGMENT

BACKGROUND

[1] BYER J.:- On the 11th November 2009 the Respondent filed an application to vary the judgment of the 16th April 2007 of Joseph-Olivetti J., which was made upon the hearing of the application for

ancillary relief filed by the Petitioner, and a cross application at the time for custody of the children of the family filed by the Respondent.

[2] By the Judgment of Joseph-Olivetti J., custody of the minor children was awarded to the Petitioner with liberal access to the Respondent. After some years of this arrangement being in force, the Respondent by an application filed on the 11th November 2009, sought to vary that custody order by seeking to have primary custody given to him with the liberal access being given to the Petitioner. The application was supported by the affidavit of the Respondent also filed on the 11th November 2009.

[3] Upon the filing of this application the Petitioner indicated that she sought to make Preliminary Objections to the hearing and determination of this application, and by order of 18th November 2009, Joseph-Olivetti J. ordered that the Preliminary Objections were to be filed on or before the 18th December 2009, with leave to the Respondent to respond to the same on or before the 8th January 2010, and any further responses by the Petitioner on or before the 18th January 2010.

[4] Due to the voluminous nature of the file and the myriad applications that were filed by the parties in the proceedings, there was an unavoidable delay in the determination of the said preliminary objections.

[5] At the hearing of the matter before the present Court as constituted on the 18th September 2013, it became apparent that the issue of the preliminary objections was still outstanding. At that hearing the parties agreed for a determination to be made on paper based on the submissions as filed since 2009 and 2010.

[6] The parties were given an opportunity to file further submissions, which opportunity these parties did not utilize and on the basis of the documents filed, this Court will now determine the matter.

The Basis of the Preliminary Objections

[7] The Petitioner on the 17th December 2009 filed the preliminary objections based on 3 grounds.

(a) That the Respondent was not entitled to be heard by this court until he fully complied with the orders of the court.

(b) That any matters regarding the custody of the children should be dealt with in Florida, where they presently reside.

(c) Forum non Conveniens

[8] I will now address each ground in turn.

The Respondent is not to be heard until he fully complies with the court orders:

[9] The Petitioner has advanced to this Court that the Respondent, even though at the time had not been found guilty of contempt by any court of competent jurisdiction, he having failed as a matter of fact to adhere to the orders of court for the payment of sums to the Petitioner, was *ipso facto* in contempt, and should be barred from making any application

[10] The Petitioner sought to rely on the principle as enunciated in the case of Hadkinson v Hadkinson[1], in which the Learned Judge there spoke to failure to obey an order of the court having two consequences:

"*The first is that anyone who disobeys an order of the court……. Is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt."*

[11] It is not doubted by this court that at the time this principle was enunciated, it was good law. However, this court must now recognize that the law has moved away from this general principle, and instead, view it as a guideline upon which the Court can exercise a discretion to hear the alleged contumelious litigant.

[12] The Respondent's response to this point is short. In a nutshell, he relies on the fact that there having been no finding of contempt as against him, the Petitioner is barred from so relying on an alleged contempt of court. Further, and in any event, it is submitted on his behalf that if he was

[1] [1952] 2All ER 566 at 568

found to be in contempt, it is within the discretion of the court to hear the contemnor in his own cause.

[13] The court was referred to cases in 2004 and 2006 long after the decision made in Hadkinson, in which it is now clear that the Court must consider, "*whether in the circumstances of an individual case the interests of justice were best served by hearing a party in contempt or by refusing to do so always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders*". (per Chadwick L.J. in Raja v Van Hoogstraten[2] quoting Lord Bingham in case of X Ltd v Morgan Grampian (Publishers) [3]

[14] It is therefore very evident that there is indeed a discretion reposed in the Court to consider in the interest of justice, whether the party who has disobeyed the court order, should be heard in his own cause or application.

[15] At the time this application was filed, there had been no finding of contempt on the part of the Respondent. That is the operative set of circumstances which this Court must now have in mind, in looking at the preliminary objections, and, not the circumstances that presently apply.

[16] Bearing all this in mind, this Court is of the opinion that it is a " *strong thing ...for a court to refuse to hear a party to a case [unless] justified by some consideration of public policy"* (per Lord Denning in Hadkinson as approved in the case of Elena Rybolovleva and Dimitri Rybolovleva & ors[4]

[17] This Court therefore considers that the step to bar this Respondent, should only be considered in the absence of a public policy consideration, if the disobedience complained of would "*impede the course of justice and there is no other effective means of ensuring his compliance"* (per Lord Deming in Hadkinson)

[18] I am not convinced by a shred of evidence, or otherwise, in this case at Bar, that if the Respondent is allowed to pursue his application, the Petitioner would be disadvantaged from enforcing her

[2] [2004]4 All ER 793
[3] [1991]1 A.C. 1
[4] BVIHCV2008/0403 per Foster J

judgments against him, or that it would in any way pervert the course of justice. In these circumstances I am not prepared to accede to this ground of the preliminary objection.

Any proceeding with respect to custody should now be heard in Florida:

[19] The basis of this ground for the Petitioner, is that the children now having resided in the United States since the making of the order granting the Petitioner custody, the State of Florida would be the proper forum within which any application regarding custody of the children should be brought.

[20] The Petitioner does however concede that this ground does not necessarily indicate that the Court in this jurisdiction is unable to deal with the matter, simply that the place where the children live may be better able, or equipped, to so deal with the matter.

[21] The Respondent again disagrees with the premise upon which this objection is based.

[22] The Respondent's answer is that the application is to vary an order of this Court. Therefore by natural interpretation, this Court has the jurisdiction to deal with the application. It is not a new application in the sense that it is dealing with new issues. As the Respondent's posit, this is an application dealing with an old issue determined by this Court, to which this Court must retain the power to vary.

[23] This Court is of the view, that if it did not retain power to vary its own orders, an anomaly would arise that would certainly undermine the integrity of any order of the Court.

[24] Regardless of where the children reside once this Court retains jurisdiction over them, this Court can certainly make orders that affect their well being.

[25] In the case of Harben v Harben[5] the judgment of Sachs J. made it very clear that the court retained jurisdiction over children born of parents who belonged to the court's jurisdiction, and exists "*irrespective of where the child may be physically located at the relevant time".*

[26] It is trite law that a court will not deliberately act in vain, and, it may appear that by determining matters regarding children, who are not within the physical jurisdiction of the Court, may be considered as an invitation to the Court to do just that.

[27] However, this court is of the view that the relevant application filed by the Respondent for the variation of this Court's own order, although differently constituted at the time, is within the purview of this Court to determine. I therefore dismiss the second ground of the Preliminary Objections.

Forum non Conveniens

[28] The Petitioner's final ground under the filed Preliminary Objections, is that there is another available forum having competent jurisdiction to hear this matter, therefore, this Court should decline jurisdiction to hear the application.

[29] This ground seems to be linked to the ground as stated above, as it continues to speak to the locality of the children, and further develops it, relying on the facts that the incidents relied on by the Respondent all transpired in the United States, and therefore that is the forum to test the evidence.

[30] The Respondent has however responded that both he and the Petitioner have invoked the jurisdiction of this Court.

[31] The Respondent further states that the Petitioner invoked the jurisdiction of this court regarding enforcement proceedings against the same Respondent. It is therefore not now open to her to argue that the Respondent must be denied access to that same jurisdiction. The Respondent argues that either this court is the proper forum, or, it is not.

[32] Further, the Respondent submits, the difficulties envisaged by the Petitioner, in testing the evidence sought to be relied upon by the Respondent, are matters which did not require a change of forum to be dealt with at a hearing.

[5] [1957] 1 WLR 261

[33] It is clear from the basis of the complaints which have led to the application for variation by the Respondent, that all the incidents relied upon occurred within the United States of America. However, at this stage, the procedure for the hearing of this application is still uncertain, and in any event, in this age of technology, logistical matters can be overcome by appropriate arrangements.

[34] This Court must be mindful that there are certain factors which will determine whether this Court will decline jurisdiction under this principle. In looking at the factors to consider whether Florida is the more suitable forum, the case The Spiliada [6] sets out the principles which were cited with the approval of Remy J. in the case of SDP Gestion SAS and anr v Franciane's Bakery Limited and ors[7] .

[35] These principles include, the efficiency, expenditure and economy of bringing the action, the places where the parties live and carry on business, the law governing the relevant transactions, (the said order in this instant case), as well as the availability of witnesses and the likely language they speak.

[36] When this Court assesses those matters, the Court is of the view that the balance weighs in favour of this matter being heard, and determined within the jurisdiction of this Court; because, the Petitioner has not laid before this Court any evidence upon which the court is satisfied answers those considerations in her favour.

[37] The Petitioner's position in relation to the application for variation has not been placed before this Court. The proceedings have not yet reached that stage.

[38] It is therefore this Court's opinion that the Petitioner has not made out her case to have this matter heard in another forum and this particular ground of the Preliminary Objections also fails.

[39] The court therefore orders as follows:

1. The Preliminary Objections filed on the 17th December 2009 are dismissed.

2. The application for variation of the order of 16th August 2007 will now proceed for hearing.

[6] [1987]AC 460
[7] ANUHCV2010/0340 unrep.

3. Case Management directions for the hearing of the application will be duly given by the Court.

4. Costs to the Respondent to be ‘costs in the cause’.

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Nicola Byer

High Court Judge