CIVIL COURT

(FAMILY SECTION)

THE HON. MADAM JUSTICE

JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)

Today, 30th of June 2021

Sworn Application no. : 231/2018/7 JPG

Case No. : 25

CC

Vs

AK

The Court:

Having the application by CC dated 5th May, 2021, a fol 2, wherein Applicant requested:

> *Therefore, CC humbly requests that this Honourable Court grants her special leave to appeal the decree delivered on the 4th of May 2021, in terms of Article 229 of Chapter 12 of the Laws of Malta and this under all those conditions which this Honourable Court deems fit to impose.*

Having seen the reply by AK dated 6th May 2021 2019, a fol 6, wherein he objected to Plaintiff's requested since said request does not fall within the parameters of Article 229 of Chapter 12 of the Laws of Malta.

Considers:

This is a decree following a request by Plaintiff for leave to appeal the decree given by this Court on the 4th of May 2021, by virtue of which, this Court acceded to an application filed by AK, regarding AK's access with the parties' child in accordance with article 229(3) of Chapter 12 of the Laws of Malta.

Plaintiff argues that there was absolutely no change in the circumstances since the date of the decree dated 8th May 2018 whereby the Court had ordered that AK's access be reverted to supervised access visits within the premises of Agenzija Appogg. Applicant *inter alia* asserts that supervised access visits had been imposed for very serious concerns which had resulted during the course of the hearing of the mediation proceedings some of which include AK's history of driving under the influence even with his other minor child on board. Moreover, Plaintiff points out that the Defendant's other minor child was also the subject of supervised access visits for the same reasons.

On the other hand, Defendant contends that there is no right of appeal on the decree given by the Court regarding access as this does not will within the parameters of article 229 of Chapter 12. Defendant argues that this matter is regulated by article 37 of the Civil Code, the application of which, extends beyond married couples, to cover children born out of intimate relationships between former partners. AK points out that sub-article 7 of Article 37 states that decrees and orders mentioned in this article, including those mentioned in sub-article 9 may only be reviewed, altered or revoked upon an application made by the party seeking such review, alteration or revocation. According to Defendant the wording of this provisions makes it clear that this is not an appeal, but a reconsideration by the same court. Moreover, Defendant also makes reference to sub-article 4 of the same Article 37 which states that the decree shall be an executive title deemed to be included amongst the decrees mentioned in article 253(A) of Chapter 12 and shall be enforceable in the same manner an under the same conditions in which such acts are executed. Consequently, he argues that the Court has to uphold its own decree and may not, even if it wanted to, grant permission to appeal as no appeal lies therefrom.

Deliberates:

The Court notes that Plaintiff is basing her request on Article 229 (3) of the COCP, which states that:

> ***Save as otherwise specifically provided for in this Code an appeal from any other interlocutory decree not included in sub-articles (1) and (2) may be entered before the definitive judgment only by special leave of the court hearing the case, to be requested by an application to be filed within ten days from the date on which the decree is read out in open court. The court, after hearing the parties, may grant such leave of appeal if it deems it expedient and fair that the matter be brought before the Court of Appeal before the definitive judgment and the time limit for the filing of such an appeal shall commence to run from the date of the said decree.***

In its judgment in the names of ***Catherine Balzan pro et noe vs Tarcisio Balzan*** decided on the 4th of May 2001, the Family Court, diversely presided, held that:

> ***"[l]-Artikolu 229 li gie sostitwit bl-Att XXIV tal-1995 u emendat b'dak IV tal-1996 gie ntrodott fis-sistema taghna biex jigu evitati l-kwantita' ta' appelli li kienu jsiru fil-prosegwiment ta' kawza fil-prim'istanza li diversi drabi l-uniku skop taghhom kien li jitwalu l-proceduri. Kien ghalhekk illi l-legislatur hass li kellu jimponi dawk il-kazijiet fejn ma kellu qatt isir appell hlief mis-sentenza finali (sub-artikolu (1) ta' l-Artikolu 229) u dawk il-kazijiet, invece, fejn kien assolutament necessarju li jsir appell qabel dak l-istadju ghall-prosegwiment gust u effikaci ta' dik il-kawza partikolari [sub-artikolu (2)].***
>
> ***Dawn il-listi pero' ma setghux kienu kompleti u kien ghalhekk illi, f'kazijiet ohra, id-diskrezzjoni dwar appell qabel is-sentenza definittiva giet imhollija f'idejn il-gudikant. Bil-mod kif huwa redatt pero' l-istess sub-artikolu jindika li ghandu jigi nterpretat b'mod illi dan il-permess ghandu jinghata biss ghar-ragunijiet ta' certu portata. Infatti l-gudikant irid ikun konvint illi jkun "ahjar u gust" illi l-materja tingab quddiem il-Qorti ta' l-Appell fi stadju prematur ta' l-andament tal-kawza. In-norma ghalhekk hija li jekk l-Ewwel Qorti ma***

tikkonsidrax li jkun sew "ahjar" sew "gust" li jsir dan il-permess, dan il-permess li jissejjah "specjali" mill-istess ligi ma ghandux jinghata."

Additionally the Courts have also affirmed:

Illi l-legislatur b'din id-disposizzjoni ried li jirregolarizza u jirrazjonalizza meta u kif seta' jsir appell minn digrieti moghtija mill-Qorti mahsuba biex jiffavorixxu l-andament korrett tal-proceduri quddiemha. Infatti l-artikolu jipprovdi ghal digrieti kamerali u interlokutorji ta' kull xorta u jiddetermina jekk setax jew le jsir appell minnhom qabel l-ghoti tas-sentenza definittiva u f'dawk il-kazijiet fejn digriet interlokutorju seta' jigi appellat qabel is-sentenza definittiva, id-disposizzjoni timponi procedura li kellha tigi segwita.

Id-dispozizzjoni pero` taghmilha cara illi dawk il-provvedimenti kienu japplikaw biss ghad-digrieti msemmija fis-subincizi (1) u (2) ta' l-istess artikolu u ghal kull appell "minn kull digriet interlokutorju iehor li mhuwiex inkluz fis-subartikolu (1) u (2) ta' dan l-artikolu". Dan ifisser illi jekk id-digriet ma jkunx wiehed interlokutorju (naturalment ukoll jekk jkun kamerali) – u dana kif qed jigi definit li hu id-digriet taht ezami – l-artikolu 229 tal-Kap 12 ma kienx applikabbli ghalih. Infatti l-incizi sussegwenti (4), (5) u (6) huma lkoll marbutin mad-dispozizzjoni precedenti. Kienu allura biss japplikaw ghal dawk ix-xorta ta' digrieti imsemmija fl-incizi (1) u (2).[1]

The Applicant bases her request on Article 229(3) as quoted above and as such, attests that the impugned decree, namely the decree delivered by this Court on the 4th May 2021, falls within the parameters envisaged by the same article. Applicant's request was spurred by the Defendant's request to have supervised access removed, which this Court acceded to in light of the considerations delineated in its decree. This Court had in fact ordered:

The Court, after taking cognizance of all the previous decrees awarded in the mediation proceedings, all the reports compiled and filed therein by the relative social workers in charge of the case and the recommendations put forward, holds that it would not be in the child's best interest to further

[1] Vide *Paul Tanti et vs Sammy Mifsud* deciza 19 ta' Novembru 2001 (Qorti tal-Appell Sede Superjuri).

> ***prolong the obtaining access arrangement, an arrangement which has now being going on for more than a year and a half. The Court believes that it is not beneficial for the child to forge a relationship with his father and his brother within the confines of the Appogg's building.***
>
> ***Therefore, the Court, revokes the order for supervised access between AK and his son, however orders that Agenzija Appogg conducts monitoring of access sporadically and files their final report within 4 months.***
>
> ***Thus, and in light of the above considerations, the Court disposes of Mr AK's request by acceding to Mr AK's requests as above explained. Furthermore, orders that a copy of this decree be communication to Agenzija Appogg.***

After careful consideration of sub-article 3 of Article 229(3), this Court does not consider the said disposition of Chapter 12 to be applicable in the present case. Sub-article 3 provides that an appeal may be entered before the definitive judgment only by special leave of the court hearing the case, which authorisation is, to be filed within ten (10) days from the date on which the decree is ***read out in open court.***[2]

The decree in question was delivered by this Court as presided, **in camera** on the 4th of May 2021 and therefore does not fall within the parameters envisaged by Article 229(3), Chapter 12, since it was not read out in open court as prescribed and intended by the Legislator nor did the decree purport to regulate matters of procedure. On this matter, the Court makes reference to the pronouncement of the **Court of Appeal in Mary Cassar vs Edward Cassar decided on the 27th May 2016:**

> ***"peress li minnu nnifsu hu ta' natura provvizorja intiz sabiex jirregola temporanjament is-sitwazzjoni fil-mertu bejn il-partijiet, sakemm tinghata s-sentenza finali. Ghaldaqstant, ma jistax jitqies bhala li jinkwadra fl-imsemmi sub-inciz 3."***

The same line of reasoning was adopted by the Court of Appeal in ***Steve Caruana v. Lucy May Bailey*** decided on the 30th of September 2016. The Court of appeal held that:

[2] Court's emphasis.

> ***digriet [id-digriet appellat] moghti mill-Qorti tal-Magistrati [Ghawdex] fil-gurisdizzjoni superjuri taghha, sezzjoni familja, fl-udjenza tal-11 ta' Dicembru 2015 in segwitu ghar-rikors prezentat mill-konvenuta fis-27 ta' Novembru 2015 li permezz tieghu hija kienet talbet lil dik il-Qorti sabiex tawtorizzaha sabiex issiefer lejn l-Ingilterra mal-wild komuni tal-partijiet fid-dati ta' bejn l-24 u l-31 ta' Dicembru 2015, kif ukoll sabiex dik l-istess Qorti App. Civ. 5/15 2 tordna li jsir dak kollu mehtieg da parti tal-attur sabiex il-konvenuta tkun tista' ssiefer mal-minuri.***
>
> ***Fil-kaz odjern jirrizulta car li d-digriet appellat huwa wiehed provvizorju li, ghalkemm jista' jigi meqjus bhala wiehed ancillari ghal-proceduri, mhuwiex ta' natura interlokutorju, stante li ma jirregolax l-andament tal-proceduri li fih inghata. Ghalhekk l-appell odjern huwa irritu u null.***

Similarly, the Court of Appeal in its decision in the names: ***Joseph Camilleri vs Nadia Vella*** decided on the 9th of July 2020, whilst referring to the above-mentioned cases, considered:

> ***Id-digriet li minnu sar appell m'għandu x'jaqsam xejn mat-tip ta' digriet li jissemmew fl-Artikolu 229 tal-Kap. 12. Id-digriet li ngħata mill-Qorti Ċivili (Sezzjoni tal-Familja) hi ordni lir-Reġistratur sabiex jibda proċeduri ta' disprezz kontra l-intimata bl-akkuża tkun li ma obdietx id-digriet ta' dik il-qorti dwar l-aċċess tal-missieru għall-ibnu. 9. Għalhekk ifisser li l-Artikolu 229 (l-artikolu li proprju jirregola d-dritt ta' appell minn digrieti) jipprovdi dwar digrieti interlokutorji. Fil-fatt ġie kkonfermat diversi drabi mill-qrati tagħna li appelli minn digrieti li ma jirrigwardawx l-andament tal-proċeduri li fih jingħataw (bħal ma huma per ezempju digrieti provviżorji li jirregolaw is-sitwazzjoni fil-mertu sakemm tingħata s-sentenza finali) huma nulli…***
>
> ***Għaldaqstant, ma hemmx jedd ta' appell mid-digriet li bih l-ewwel Qorti ordnat li jittieħdu proċeduri ta' disprezz kontra l-appellanti.***

The First Hall of the Civil Court in its Constitutional Jurisdiction, has also addressed this matter in ***Nadia Vella et vs Avukat Generali et*** decided on the 30th of May 2019. The Court upheld this principle in an appeal relating to a decree delivered by the Family Court on the 1st

October 2015, prohibiting with immediate effect Applicant's partner from being present while the Applicant's minor daughter is in their residence:

> ***Rigward d-digriet li nghata fil-1 ta` Ottubru 2015, u li huwa l-mertu tal-kawza odjerna, dan ma jistax jitqies li kien interlokutorju jew definittiv, ghaliex kien intiz biss sabiex jirregola s-sitwazzjoni temporanjament sakemm tinghata s-sentenza finali. Ghalhekk ma setax jintalab permess biex isir appell.***

Thus, and in light of the above, this Court does not deem Article 229(3) Chapter 12 of the Laws of Malta, invoked by the Applicant, to be applicable in this case.

Thus, and for the above-stated reasons the Court rejects Applicant's request as delineated in her application dated 5th May 2021 and orders the continuation of the case.

Costs are reserved pending judgement.

Read.

Madam Justice Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Christabelle Cassar
Deputy Registrar