

CANADA / JUDGMENT

Milani v. Milani

2019 BCCA 361

COURT

British Columbia Court of Appeal

DECIDED

16 October 2019

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2019 BCCA 361 Milani v. Milani COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Milani v. Milani, 2019 BCCA 361 Date: 20191016 Docket: CA46227 Between: Farshid Milani Appellant (Claimant) And Nima Ali Milani Respondent (Respondent) Before: The Honourable Madam Justice D. Smith The Honourable Mr. Justice Fitch The Honourable Madam Justice Griffin On appeal from: An order of the Supreme Court of British Columbia, dated March 28, 2018 (Milani v. Milani, New Westminster Docket E50984). Oral Reasons for Judgment The Appellant, appearing in person: F. Milani Counsel for the Respondent: R. Soni Place and Date of Hearing: Vancouver, British Columbia October 16, 2019 Place and Date of Judgment: Vancouver, British Columbia October 16, 2019 Summary: The appellant appeals an order dismissing his application for "clarification" of a previously-entered order. Held: the appeal is quashed on the ground that it is so devoid of merit as to be an abuse of process.

- [1] D. SMITH J.A.: Ms. Rirash, formerly Milani, applies to quash Mr. Milani's appeal pursuant to s. 10(2)(a) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, on the ground that it is so devoid of merit as to be an abuse of process.
- [2] The appeal is from an order dismissing Mr. Milani's application for "clarification" (the "Clarification Decision") of the trial judge's decision in the parties' family law proceeding (the "Family Law Decision"). In the Family Law Decision, Justice Harvey made an order pursuant to the Family Law Act, S.B.C. 2011, c. 25, dividing the parties' family property. He also granted the parties an order of divorce.
- [3] Mr. Milani appealed the Family Law Decision. He did not serve the notice of appeal on Ms. Rirash and the time limits for the filing of an appeal record, appeal book, transcripts, and factum eventually passed. Mr. Milani then applied for an extension of time to file those materials, which Ms. Rirash opposed.
- [4] Justice Garson, sitting in chambers, dismissed Mr. Milani's application on the grounds that his appeal rested on overturning factual findings that were based on his lack of credibility and for which he was unable to demonstrate any palpable and overriding error. She accepted Ms. Rirash's submission that Mr. Milani's sole motive in seeking to bring the appeal was to frustrate the enforcement of the Family Law Decision. Applying the test in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.) at 259-260, Justice Garson found that Mr. Milani's

appeal had no chance of success and that the interests of justice did not favour granting the extension of time requested. Accordingly, she dismissed the application and held the appeal stood as dismissed.

- [5] An application by Mr. Milani to a division of the Court to vary Justice Garson's order pursuant to s. 9(6) of the Court of Appeal Act was also dismissed: *Milani v. Milani*, 2018 BCCA 466.
- [6] Eight months later, Mr. Milani filed an application requesting Justice Harvey to clarify the Family Law Decision. The application was summarily dismissed in the Clarification Decision. The Family Law Decision with its attendant order had been filed in the trial court. Justice Harvey, therefore, was *functus officio*.
- [7] Mr. Milani then filed an appeal of the Clarification Decision. He also filed a *factum*, which essentially attempts to reargue the issues in the Family Law Decision.
- [8] Mr. Milani's appeal of the Clarification Decision triggered an application by Ms. Rirash for an order that the appeal be quashed as an abuse of process. The application came before Justice Fenlon, sitting in chambers, who properly referred it to a division for determination.
- [9] Ms. Rirash submits that Mr. Milani's appeal of the Clarification Decision amounts to a collateral attack on the order of this Court that dismissed Mr. Milani's appeal of the Family Law Decision. I agree.
- [10] First, even if Mr. Milani could successfully appeal the Clarification Decision, that would not change the division of property made by Justice Harvey in the Family Law Decision. That issue is spent in both the trial court and in this Court.
- [11] More significantly, the appeal of the Clarification Decision constitutes a collateral attack on the Family Law Decision in that it is "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment [the Family Law Decision appeal]." See *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at p. 599, as quoted in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 33. In short, Mr. Milani cannot appeal the Family Law Decision in his appeal of the Clarification Decision.
- [12] His appeal of the Clarification Decision also engages the doctrine of *res judicata*, which precludes the relitigation of issues previously decided in court in another proceeding (*Toronto* at para. 23) where: (1) the issues being advanced are the same as the ones in the prior proceeding; (2) the prior decision was final; and (3) the parties to the prior proceeding were the same: see *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at 254. Mr. Milani is attempting: (1) to relitigate the issues that were determined in the Family Law Decision; (2) where a division of this Court made a final decision in dismissing his application to vary the order of Justice Garson, dismissing his appeal of the Family Law Decision; and (3) the parties to the appeal of the Clarification Decision are the same as the parties to the Family Law Decision.

- [13] In these circumstances, I find Mr. Milani's appeal of the Clarification Decision to be so devoid of any arguable merit as to amount to an abuse of process. This Court has the inherent jurisdiction to quash such an appeal as was confirmed in *Kaiser (Re)*, 2007 BCCA 253 at paras. 15-16:
- [15] Mr. Nicholson, for the trustee, cited *Wiens v. Vancouver (City)* (1992), 74 B.C.L.R. (2d) 154 (C.A.) as authority for the inherent jurisdiction of the Court to quash. Gibbs J.A., speaking for the Court, said at para. 3: There is ample authority for the principle that this Court has inherent jurisdiction to quash an appeal which is so devoid of merit or substance as to constitute an abuse of the Court's own procedure. See, for example, *Singh (Banns) v. Bank of Montreal* (1979), [1980] 3 W.W.R. 403, 18 B.C.L.R. 149, 15 C.P.C. 89, 109 D.L.R. (3d) 117 (C.A.), and this passage from *National Life Assurance Co. v. McCoubrey*, [1926] S.C.R. 277, [1926] 2 D.L.R. 550 quoted therein [p. 118 D.L.R.]: "Every Court of Justice has an inherent jurisdiction to prevent such an abuse of its own procedure (*Reichel v. Magrath* (1889), 14 App. Cas. 665, at p. 668). If an appeal, though within its jurisdiction, be manifestly entirely devoid of merit or substance, this Court will entertain favourably a motion to quash it, as it does in cases where costs only are involved as a convenient way of disposing of the appeal before further costs have been incurred."
- [16] But this is a power of the Court constituted as a division. The Act does not give the power to a single justice in chambers.
- [14] During the hearing, Mr. Milani raised an issue concerning an alleged debt to a company, MIG Group Ltd, of \$81,000 plus interest. We are advised that an appeal of an order that subsequently addressed that issue is scheduled to be heard on October 30, 2019.
- [15] In the result, I would grant Ms. Rirash's application and order the appeal be quashed.
- [16] Ms. Rirash requests special costs of the appeal. I would dismiss that request, but grant her ordinary costs of the appeal.
- [17] FITCH J.A.: I agree.
- [18] GRIFFIN J.A.: I agree. "The Honourable Madam Justice D. Smith"

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Prepared on 25 October 2026 · Esheria