

CANADA / JUDGMENT

Olenga v. British Columbia

2018 BCSC 1931

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1931 Olenga v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Olenga v. British Columbia,

2018 BCSC 1931

Date: 20181106

Docket: S161748

Registry: Vancouver

Between:

Aime Olenga

Petitioner

And:

Her Majesty the Queen in Right of British Columbia as Represented by the Province of British Columbia MCFD

Respondent

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

In Chambers

The Petitioner, acting on his own behalf:

A. Olenga

Counsel for the Respondent:

T. Parbhakar

Place and Date of Hearing:

Vancouver, B.C.

July 13, 2017

May 10, 2018

Place and Date of Judgment:

Vancouver, B.C.

November 6, 2018

I. INTRODUCTION

- [1] In a decision dated June 27, 2017, Master Harper dismissed Mr. Aime Olenga's application to have his court fees waived pursuant to Rule 20-5 of the Supreme Court Civil Rules. This is an appeal of that decision. Mr. Olenga seeks waiver of the fees associated with his petition, dated February 19, 2016, wherein he alleges, among other things, that his right to parent his three children has been egregiously violated by the respondent ("Petition").
- [2] Master Harper dismissed Mr. Olenga's application on the basis that his Petition lacks merit. Mr. Olenga asserts that Master Harper erred in law and fact by: not considering the evidence before her, misconstruing the evidence, and misapplying the law, all of which resulted in a miscarriage of justice and undue hardship. Further, while Mr. Olenga submits this matter is interlocutory in nature, he also argues that this court ought to rehear his application before Master Harper de novo, on the merits of whether his court fees ought to be waived under Rule 20-5.
- [3] This hearing proceeded over the course of two days; the first hearing date was in July 2017; the matter was not completed on the first day and was adjourned. The parties then set the matter to be heard on May 10, 2018. At the end of the day on May 10, 2018, Mr. Olenga requested that he be permitted to make further written submissions and the Court accommodated Mr. Olenga's request. He agreed to provide his additional written submissions, within a 5-page limit, by May 25, 2018. Counsel for the respondent was provided an opportunity to provide a 5-page response by June 1, 2018 if she wished. Mr. Olenga was also provided with a further opportunity to provide a 5-page reply by no later than June 8, 2018. Mr. Olenga did not provide any further written materials by the agreed dates. Nonetheless, I am of the view that he has been provided with ample opportunity to be heard on this application both orally and in writing.
- [4] Having carefully reviewed the submissions and materials of both Mr. Olenga and the respondent, I am of the view that this appeal ought to be dismissed.

II. BACKGROUND FACTS AND OVERVIEW

[5] Mr. Olenga describes his case as follows in his written submissions, reproduced in part below:

This is the case where a civil matter is amalgamated with protection and FLA matters by malice, falsehood, deceit and bad intents of some provincial civil servants. That has been covered up from many decades now. The appellate filed a petition on February 19, 2016 to have his violated rights respected, but once again the petition was denied thought to be a pleading, view that differs from the BCSC RULES. The chronology of this appeal would be considered as the frame of the issues at bar

- [6] The procedural history in this case provides necessary context that may be gleaned from several judgments: the judgment of Baird J., indexed at 2015 BCSC 2050; the judgment of Burke J., indexed at 2015 BCSC 2119; the judgment of Hinkson C.J.S.C., indexed at 2016 BCSC 400; and two judgments of our Court of Appeal, indexed at 2017 BCCA 415 and 2017 BCCA 188.
- [7] Baird J.'s decision (at paras. 4, 8,18) provides helpful context regarding the facts giving rise to this application:
- [4] The claimant is no stranger to our court system. He has represented himself in a number of reported cases He has also been a participant in family litigation and multiple Provincial Court child protection proceedings involving his three daughters, who are named as co-plaintiffs in the present lawsuit and identified by their initials A O' A, AZO and KLO
- [8] The claimant's pleadings in the case before me are focussed on these past events involving his children, and, as discussed below, involve sweeping allegations of conspiracy, collusion, racism, and other forms of misconduct against a host of defendants.
- [18] In my view it is plain and obvious and beyond any doubt that the pleadings in this case disclose no reasonable cause of action against any of the defendants. The Notice of Civil Claim is more a disjointed polemic than a legal document. The claimant rails incandescently against the government, the courts, the police, hospitals and others involved in child protection . care.
- [8] Baird J. struck the pleadings before him in their entirety with no leave to amend. He ordered that Mr. Olenga be prohibited from filing further pleadings in the proceeding before him or "in any other proceeding against the same defendants without leave of the court" ("Baird Order"). The respondents in the Petition were among the defendants in the action before Baird J.
- [9] The reasons of Burke J. (at paras. 2-8) provide further context. The central issue before her was whether she had jurisdiction to hear an application filed by Mr. Olenga in the same action that was the subject to the Baird Order. In the course of her reasons, she states:

- [2] Mr. Olenga filed a claim on December 22, 2014, against numerous defendants, including lawyers, healthcare defendants, the Ministry of Justice, the Province of British Columbia, and others, in a matter involving his three daughters who are named as co-plaintiffs and identified by their initials. Each of the daughters has been apprehended or dealt with, at various times, by government social workers acting on the authority of the Child, Family and Community Service Act, R.S.B.C. 1996, c. 46.
- [3] The claim relates to and includes allegations of conspiracy and collusion, in part because of these removals.
- [4] On June 18, 2015, however, Mr. Justice Baird granted an order striking these pleadings and prohibiting Mr. Olenga from filing pleadings in the same action: *Olenga v. British Columbia*, 2015 BCSC 1050. He also ordered that Mr. Olenga be prevented from filing any further pleadings against any of the same defendants in any action without leave of the court.
- [5] On August 5, 2015, Mr. Olenga filed documents in this same action entitled "Notice of Constitutional Question" and "Notice of Application for Leave for a Notice of Constitutional Question."
- [6] Meanwhile, on July 22, 2015, Mr. Olenga filed a notice of motion, applying for an extension of time to file a notice of application for leave to appeal the order prohibiting him from filing further pleadings in the same action. On August 7, 2015, Mr. Justice Groberman of the British Columbia Court of Appeal dismissed the application for an extension of time to appeal Mr. Justice Baird's order striking his pleadings without leave to amend, the order prohibiting him from filing further pleadings in the same action, and the order for costs.
- [7] Mr. Justice Groberman, however, granted Mr. Olenga an extension of time with respect to filing a notice of appeal of Mr. Justice Baird's order prohibiting him from filing further pleadings against any of the same defendants in any action without leave of the court.
- [10] Burke J. concluded she was without jurisdiction to hear Mr. Olenga's application. She did not accept his argument that the matters in the Provincial Court are different than the proceedings in Supreme Court; specifically, she rejected his argument that the Supreme Court proceedings dealt with claims of tort law, while the matter in the Provincial Court dealt with his claims of entitlement to his children.
- [11] In the course of her reasons, Burke J. stated (at paras. 17-20):
- [17] In seeking relief, Mr. Olenga appears to rely on the same allegations in both the Provincial and Supreme Court. While he seeks to differentiate these matters, that difference is not apparent, involving as it does, many of the same parties and alleged events.
- [18] Furthermore, as noted in at least two previous proceedings in which oral judgments were pronounced, one of July 15, 2015, by Mr. Justice Myers of the Supreme Court and one of August 25, 2015, by Mr. Justice Bakan of the Provincial Court, the matter cannot proceed until Mr. Justice Baird clarifies the order and/or the British Columbia Court of Appeal deals

with the appeal. Transcripts of the proceedings in each matter reflect that both judges noted the matters were interrelated, as they involved the same events, and the order of Mr. Justice Baird did not limit proceedings to civil or criminal proceedings or Provincial or Supreme Court but, rather, court proceedings in general.

- [19] While counsel for one of the defendants advised Mr. Justice Baird has decided he is functus in this matter, the appeal is pending before the British Columbia Court of Appeal.
- [20] It was also pointed out to me that recently, on October 23, 2015, Mr. Justice Betton of this Court, after hearing a similar preliminary objection from the same defendants, dismissed another application by Mr. Olenga for indigent status and/or to waive fees on the basis this court was without jurisdiction. An entered order to that effect was provided to the court.
- [12] The appeal of the Baird Order was eventually dismissed by the Court of Appeal as abandoned: *Olenga v. British Columbia*, 2017 BCCA 188.
- [13] On March 9, 2016, Mr. Olenga sought leave to file the Petition wherein he seeks the following orders:
1. The petitioner applies for an order granting the leave to re-argue his BCPC FLA and protection pursuant BCSC ACT, c. 443 s. 18 from the June 18, 2015 decision of Mr. Justice Baird which preclude the petitioner(s) to file further pleadings in that matter or in any other proceeding against the same defendants; the FLA and the Protection matters at the Vancouver Provincial court
 2. The petitioner applies for an order granting the leave to re-argue his British Columbia family and protection matters. Which they are unrelated to the issue of the order issued by Mr. Justice Baird dated June 18, 2015, respecting the prohibiting the petitioner from filing against any of the same Defendants in any action without leave.
 3. The matters at the BCPC were two stand alone cases that were in BCPC before the case in the BCSC and were about family and protection issues unrelated to the issue of the Supreme Court.
 4. Petitioner applies granting the leave to re-argue the British Columbia family and protection matters. They are unrelated to the matter of the issue in the order of Mr. Justice Baird and the Judge of Appeal Court decision February 4th, 2016 pursuant to the BCSC Act sec. 18 granted the leave to re-argue to the notice of application for leave filed by the petitioner in August 5, 2015.
 5. Appeal Judge granted the petitioner a leave to reargue his BCPC matters and allowing him to pursue his FLA and Protection matters at the British Columbia Provincial Court, on February 4, 2016.
 6. Costs.
 7. Such other orders the court deems just.

- [14] Hinkson C.J.S.C. heard the matter and refused to grant leave: see *Olenga v. British Columbia*, 2016 BCSC 400. In his reasons, Hinkson C.J.S.C. stated (at paras. 12-15):
- [12] I note that the assertions in paras. 4 and 5 of the orders sought mischaracterise the order of Mr. Justice Groberman in the Court of Appeal, as he only granted Mr. Olenga an extension of time with respect to filing a notice of appeal of Mr. Justice Baird's order prohibiting him from filing further pleadings against any of the same defendants in any action without leave of the court.
- [13] In any case, I regard Mr. Olenga's effort to reargue the various matters as improper while his appeal from the order of Baird J. remains outstanding in the Court of Appeal.
- [14] The impropriety of his petition is further evident given the finding of Burke J. that "Mr. Olenga appears to rely on the same allegations in both the Provincial and Supreme Court".
- [15] I therefore refuse to grant Mr. Olenga leave to file his petition, affidavit or notice of hearing of his petition.
- [15] Mr. Olenga successfully appealed Hinkson C.J.S.C.'s decision on the basis that the Baird Order specifically prohibited the filing of further "pleadings" but did not prohibit "proceedings" initiated by petition: see *Olenga v. British Columbia*, 2017 BCCA 145. Accordingly, as the language of the Baird Order did not prohibit Mr. Olenga from filing a proceeding without leave, and a petition is a proceeding, the Court of Appeal held that Mr. Olenga did not require leave to file the Petition.
- [16] During the course of its reasons, the Court of Appeal stated:
- [2] In the main, Mr. Olenga's petition seeks an order permitting him to re-argue matters were he has sought and been denied relief and which are in large measure the subject of outstanding appeals. The Chief Justice said (2016 BCSC 400):
- [13] I regard Mr. Olenga's effort to reargue the various matters as improper while his appeal from the order of Baird J. remains outstanding in the Court of Appeal.
- [3] The respondent contends the appeal should be dismissed essentially on the basis the petition constitutes an abuse of the court's process. While it may be difficult to see why Mr. Olenga's petition does not constitute such an abuse, he has not had the opportunity of being heard in the trial court in response to an application to dismiss the petition for that reason. Given that leave was not required to file the petition, his appeal must be allowed. In the event that it is now filed, the respondents will of course have such recourse as they may wish to pursue in the trial court.
- [17] When the Court of Appeal rendered the above decision, the Baird Order was still under appeal.

- [18] Mr. Olenga argues that in overturning Hinkson C.J.S.C.'s decision on appeal, the Court of Appeal validated the merits of his petition. That, however, is not the case. The Court of Appeal left open the question of whether the Petition constituted an abuse of process, leaving this question to be determined at another time.
- [19] I should note that the application before me is not one where the respondent is seeking to strike Mr. Olenga's petition, or portions of it, as an abuse of process or for other reasons. The only issue before me is the application for a waiver of fees pursuant to Rule 20-5.

III. ANALYSIS

[20] Rule 20-5 of the Supreme Court Civil Rules provides that a court may order that an applicant is not required to pay fees if certain statutory criteria are met, as delineated below:

- (1) If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person
 - (a) receives benefits under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act, or
 - (b) cannot, without undue hardship, afford to pay the fees under Schedule 1 of Appendix C in relation to the proceeding,

the court may order that no fees are payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence

- (c) discloses no reasonable claim or defence, as the case may be,
- (d) is scandalous, frivolous or vexatious, or
- (e) is otherwise an abuse of the process of the court.

[21] The transcript of the proceedings reveal that Master Harper's decision to dismiss Mr. Olenga's application for waiver of court fees was based on her finding that the Petition lacked sufficient merit. Nevertheless, she underscored that Mr. Olenga was free to proceed with the Petition so long as he paid the applicable court fees.

[22] Master Harper reasoned specifically as follows:

So, I have looked through the materials and, on an application to waive fees, the court needs to be satisfied that the underlying action has sufficient merit, and I've determined that it does not.

Well, I appreciate your submissions, Mr. Olenga, but, on my review of the materials that you provided, I am not able to exercise my discretion in order that the fees be waived. So I have dismissed your application for a fee waiver. If you wish to file your materials, you'll have to pay the usual fees.

A. Standard of Review

- [23] The standard of review for an appeal from a Master's order will depend on the nature of the decision. An appeal from a purely interlocutory matter should not be entertained unless the order is "clearly wrong". Where a Master's decision raises questions which are vital to the final issue in the case or results in a final order, the appeal should proceed as a hearing de novo: *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.); *Sidhu v. Hothi*, 2014 BCCA 510; *Kondori v. New Country Appliances Inc.*, 2017 BCCA 164.
- [24] In his written submissions, Mr. Olenga concedes that his application for indigent status pursuant to Rule 20-5 is interlocutory. However, during oral submissions, Mr. Olenga also argued that Master Harper's decision raised questions that are vital to the final issue in this case and therefore a rehearing is the appropriate form of appeal. He cites a number of authorities including: *Abermin*; *Marleen Investment Ltd. v. McBride* (1979), 23 O.R. (2d) 125 (O.H.C.J.); and *Josenhans v. Adam*, 1991 CanLII 2383.
- [25] I find that Master Harper's decision was interlocutory in nature; therefore, the "clearly wrong" standard of review is applicable. I do not accept Mr. Olenga's submission that the application under appeal raises questions which are vital to a final issue in this case. The decision of Master Harper was restricted to, and turned on, the question of whether it was appropriate in the circumstances to waive Mr. Olenga's court fees. As expressly acknowledged by Master Harper, Mr. Olenga may file his petition and supporting materials, and proceed with his day in court in light of the claims and grounds set out in his petition, once he pays the usual court fees.

B. Was the Master clearly wrong?

- [26] I have considered each of Mr. Olenga's submissions but find that they do not support the conclusion that Master Harper was clearly wrong in dismissing his application to waive court fees.
- [27] Mr. Olenga submits that Master Harper erred in law since the objective of Rule 20-5 is to allow a party in his situation to pursue their case in court without undue hardship. I must respectfully underscore that the express language of Rule 20-5 contemplates that the adjudicator is to go further than simply considering an applicant's financial circumstances by also considering whether the claim or defence discloses "no reasonable claim or defence, as the case may be," or is "scandalous, frivolous or vexatious," or "is otherwise an abuse of the process of the court." The point here is that the express language of Rule 20-5 makes it clear that a Master's discretion is not limited to a consideration of the applicant's financial circumstances or the question of undue hardship. The purpose of Rule 20-5 is to allow parties to pursue their claims in court, unless the claim is unreasonable; scandalous, frivolous or vexatious; or otherwise an abuse of process.

- [28] Mr. Olenga also submits that Master Harper failed to consider the fact that the Court of Appeal reversed the ruling of Hinkson C.J.S.C. As previously mentioned, Mr. Olenga argues that the Court of Appeal's reversal informs and supports the merits of the Petition. That is not the case. In allowing Mr. Olenga's appeal, the Court of Appeal found that while the Baird Order prohibited Mr. Olenga from filing further pleadings without leave of the Court, the prohibition did not apply to proceedings initiated by petition. Very clearly, the Court of Appeal ruled on a matter of procedure and not on the merits of Mr. Olenga's petition; the court allowed Mr. Olenga's appeal on the narrow point of whether he was required to seek leave to file his petition. Accordingly, I cannot accept Mr. Olenga's submission in this regard.
- [29] I also cannot accept Mr. Olenga's submissions that Master Harper did not review the material before her or that she had made her decision without stating how she reached her conclusion. The transcript of her decision indicates that she did review the materials and she provided an explanation for her conclusion.
- [30] I am also not persuaded by Mr. Olenga's argument that Master Harper misconstrued the evidence before her or that she misapplied the law in a manner that resulted in a miscarriage of justice. I note that Master Harper did not take issue with the question of whether Mr. Olenga met the requirement of Rule 20-5(1)(a) or (b). Rather, she denied the application to waive fees on the basis that the Petition lacked sufficient merit. This conclusion is consistent with the language of Rule 20-5 which mandates consideration of whether a claim should be denied on the basis that it discloses no reasonable claim; is scandalous, frivolous or vexatious; or is otherwise an abuse of the process of the court. I do not see how Master Harper was clearly wrong in this regard, particularly on a plain reading of the Petition itself.
- [31] In the Petition, Mr. Olenga seeks orders to "re-argue" unidentified and amorphous "family and protection" matters. The Petition states that these matters are "unrelated" to the matters that he previously asserted before the Provincial Court; however, these differences or "unrelated matters" are not articulated in the Petition and are not at all apparent. Furthermore, the legal grounds set out in the Petition refer to matters argued in previous proceedings and effectively contradict Mr. Olenga's claim that the matters in the petition are unrelated to previous proceedings. The legal grounds are stated as follows in the Petition:
- (a) The first British Columbia Supreme Court Chamber Justice exceeded his jurisdiction and failed to act fairly by making a decision based on estoppels and res judicata evidence that was fraudulently concealed to the court and the petitioner. As a result the court did not know how to deal with that evidence and opted to go with the court agent's suggestion.
 - (b) The 2nd Justice did err in finding that the BCSC had no jurisdiction over a leave to re-argue a matter pursuant to the BCSC Act, chap. 443.

- (c) By doing so, both British Columbia Supreme Court justices made reviewable errors and breach the BCSC ACT, RSBC 1996, C. 443, BCSC RULES and breached the rules of procedural fairness.
- [32] In summary, the Petition is difficult to comprehend and fails to set out a reasonable claim or an arguably meritorious case. In addition, it seems Mr. Olenga is elevating form over substance by seeking to re-argue a case he previously advanced within the artifice of his current Petition. In this light, I am unable to conclude that Master Harper was clearly wrong in dismissing Mr. Olenga's application for a waiver of court fees on the basis that his petition lacks sufficient merit.
- [33] Finally, while I have concluded that the appropriate standard of review in this case is the "clearly wrong" standard, had I determined otherwise and applied a hearing de novo standard, I would nevertheless have dismissed Mr. Olenga's appeal. Having carefully examined his Petition, and reviewed all of Mr. Olenga's submission on the merits of his Rule 20-5 application, I come to the same conclusion as Master Harper. The claims in Mr. Olenga's petition disclose no reasonable cause of action such that a waiver of court fees is in order.

IV. DISPOSITION

- [34] This appeal is dismissed, with costs in the cause.

"MORELLATO J."

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