

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. : HBM 146 OF 2014**

**BETWEEN** : **FEMALE ABC**

**Plaintiff**

**A N D** : **REGISTRAR OF BIRTHS, DEATHS & MARRIAGES**

**First Defendant**

**A N D** : **MINISTRY OF JUSTICE**

**Second Defendant**

**A N D** : **ATTORNEY GENERAL OF FIJI**

**Third Defendant**

**COUNSEL** : Mr. T. Tuitoga for the Plaintiff  
Ms. S. Ali for the Defendants

**Date of Hearing** : **6<sup>th</sup> October, 2015**

**Date of Judgment** : **10<sup>th</sup> November, 2015**

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**JUDGMENT**

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[1] The plaintiff instituted this action by way of originating summons praying for the following reliefs;

1. A declaration that the plaintiff is a female for all intents and purposes.
2. An order on the 1<sup>st</sup> defendant to forthwith change the plaintiff's sex designation from "Male" to "Female" in the plaintiff's birth registration and also in the birth certificate so that the plaintiff's sex is recorded as "female".
3. An order on the 1<sup>st</sup> defendant to issue the plaintiff's birth certificate to the plaintiff's lawyers, Haniff Tuitoga within 07 days.

4. Costs.

- [2] According to the birth certificate bearing No. 688859 issued by the Registrar General of Fiji The sex of the plaintiff at birth is given as "Male". The plaintiff who is now a citizen of New Zealand has on 27<sup>th</sup> November 2006 and 04<sup>th</sup> December 2006, at the age of 33 years, has undergone two male to female sex reassignment surgeries at Phuket International Hospital in Thailand.
- [3] The report of the doctor who performed the surgeries on the plaintiff in his report of 10<sup>th</sup> December 2006 makes inter alia, the following observations;
- "..... The surgery was successfully completed. All male genitals including gonads have been removed and now has female external genitals that include labia major, labia minor, clitoris and vaginal canal. She may now assume female gender."
- [4] After the surgery, the plaintiff's solicitor wrote to the first defendant requesting him to correct the gender of the plaintiff in the birth certificate and also in the relevant records maintained by the 1<sup>st</sup> defendant by deleting the word "Male" and inserting the word "Female".
- [5] The 1<sup>st</sup> defendant rejected the request of the solicitor of the plaintiff and informed him that since the plaintiff was born a natural male the request cannot be granted.
- [6] The main question for determination here is whether the 1<sup>st</sup> defendant is empowered by law to make such changes in a certificate of birth. The law governing the registration of births, deaths and marriages is found in Births, Deaths and Marriages Registration Act [Cap 49].
- [7] Section 11 of the said Act provides that the father of every child born alive or stillborn in Fiji, or, in case of the death, illness, absence, or inability of the father, the mother of such child, or in case of the death, illness, absence, or inability of both the father and mother, any person present at the birth, or where there is no such person, the occupier of the house in which such child has been born, shall, within two months after the day of such birth, give information to a registrar according to the best of his or her knowledge and belief, of the several particulars required to be registered, and shall, in the presence of such registrar sign the register.
- [8] In this case there is no dispute that the plaintiff was a male child at birth. The plaintiff is in anyway precluded in denying that position because it is the position of



the plaintiff that the sex reassignment surgery was done at the age of 33 years. It is thus clear that it is an admitted fact that the plaintiff was born a male child. Since the gender or the sex of the plaintiff is correctly stated in the birth certificate there is nothing for the 1<sup>st</sup> defendant to correct.

- [9] It is the submission of the learned counsel for the plaintiff that, what is stated in a birth certificate as sex whether "male" or "female" is a rebuttable presumption.
- [10] There are basically two kinds of presumptions; presumptions of law and presumptions of fact. The one the learned counsel speaks of here should necessarily be a presumption of fact. Presumptions of fact are drawn on certain factual positions, and if one can establish that the facts upon which a certain presumption is drawn, is incorrect the presumption can be said to be rebutted. In the instant case the fact that the plaintiff was born a male child is an admitted fact. It is also a well-established fact that the plaintiff underwent a surgery to have the female external genitalia created artificially. Therefore, the subsequent sex reassignment cannot in anyway establish that the entry in the birth certificate was based on incorrect facts.
- [11] It is also important to note that the information such as sex of a newly born child, provided for the registration of a birth is not based on assumptions but on hard facts which are certified by a qualified medical practitioner. Therefore, the argument of the learned counsel for the plaintiff that the gender of a person in a birth certificate is a rebuttable presumption has no merit.
- [12] The manner in which the correction of errors in the registers of births, deaths and marriages should be done is provided for in section 28 of the Births, Deaths and Marriages Registration Act [Cap 49].
- [13] Section 28(b) of the said section provides thus;

With regard to the correction of errors in registers of births, deaths or marriages-

an error of fact or substance in any register may be corrected by an entry in the margin (without any alteration of the original entry) by the Registrar on payment of the prescribed fee and on production to him by the person requiring such error to be corrected of a declaration in the prescribed form setting forth the nature of the error and the true facts of the case, and, in the case of a birth or a death, made by two persons required by this Act to give information concerning the birth or death with reference to which the

error has been made and in the case of a marriage, by the parties to the marriage with reference to which the error has been made, or, in the absence of any such persons, then by two credible persons to the satisfaction of the Registrar having knowledge of the truth of the case, and the Registrar shall sign such marginal entry and shall add thereto the day and month and year when such correction is made;

[14] In view of these provisions only an error in the registers of birth, death and marriages can be corrected. Subsequent reassignment of sex is not an error within the meaning of these provisions.

[15] The next question that arises for determination is whether this Court has power to direct the 1<sup>st</sup> defendant to do certain things which are not provided for by the legislation. The submission of the learned counsel for the plaintiff was that this Court has such powers.

[16] The Births, Deaths and Marriages Registration Act [Cap 49] was enacted long before the present Constitution of the Republic of Fiji was brought into effect. However, section 173(1) of the Constitution provides as follows;

Subject to subsection (2), all written laws in force immediately before the date of commencement of this Constitution (other than laws referred to in Part C of this Chapter) shall continue in force as if they had been made under or pursuant to this Constitution, and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

[17] The Births, Deaths and Marriages Registration Act has not been referred to in Part C of this Chapter.

[18] Section 46(1) of the Constitution provides that the authority and the power to make laws for the State is vested in the Parliament consisting of the members of the Parliament and the President and is exercised through the enactment of Bills passed by Parliament and assented to by the President.

[19] Section 46(2) provides that no person or body other than Parliament has any authority to make any law in Fiji except under authority conferred by this Constitution or by a written law.



- [20] The Constitution which is the supreme law of the country confers power to make laws only on the Parliament. The Court or the officers of the government have no power to make laws as submitted by the learned counsel for the plaintiff.
- [21] The learned counsel for the defendants submitted that issue of transgender has never been brought to the attention of the Parliament.
- [22] One would argue that in certain instances the Court is empowered to grant reliefs in the interest of justice in the exercise of its inherent jurisdiction. Inherent power of the Court has to be exercised judicially and having regard to the existing laws of the country. It is also important to mention that the Courts cannot override the existing provisions of the statutes in the guise of exercising its inherent powers.
- [23] The learned counsel for the plaintiff submitted that one cannot be discriminated on the basis of sex, gender, sexual orientation and cited authorities on this question from various jurisdictions. The issue here is not discrimination against sexual orientation but whether the 1<sup>st</sup> defendant had the power and authority to grant the request of the plaintiff. I have already discussed the power of the Court in this regard and that of the Registrar of Births, Deaths and Marriages and in my view the 1<sup>st</sup> defendant had no power or authority to grant the request of the plaintiff and he was correct in refusing it.
- [24] The other relief prayed for in the summons is for a declaration that the plaintiff is a female for all intents and purposes. It is an admitted fact that the plaintiff was born a male child and underwent sex reassignment surgeries. The question then arises whether a male who undergoes a sex reassignment surgery becomes a female for all intents and purposes.
- [25] The learned counsel for the plaintiff submitted that in the case of **W v The Registrar of Marriages [2013] HKCFA 39** Dr. Albert Yuen Wai Cheung has thoroughly explained the nature of transsexual surgeries. I will quote below the paragraph in which he has explained the outcome of such a surgery.

For male-to-female transsexual surgery, breast augmentation is done for patients whom the breast enlargement after hormone treatment is not sufficient for comfort in the social gender role. Genital surgery includes at least orchidectomy (removal of both testes), penectomy (removal of penis), creation of a new vagina. The new vagina enables penetration of penis during sexual intercourse. There is preservation of erotic sexual sensation. However, surgery cannot remove the prostrate organ or

provide a functional uterus or ovaries, or otherwise establish fertility or child bearing ability. Neither can it change the sex chromosomes of the person, which remains that of a male.

[26] It is thus clear that by a male-to-female transsexual surgery all what the doctors can do is to artificially create certain female organs in a male's body but that person does not become a female for all intents and purposes.

[27] For the reasons aforementioned I make the following orders.

**ORDERS**

1. The Originating Summons of the plaintiff is dismissed.
2. Taking all the circumstances of this case into consideration I make no order for costs.

  
Lyone Seneviratne  
**JUDGE**

