

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

**CIVIL ACTION NO. HBA 5 OF 2023
FAMILY COURT ACTION NO. 21/NAN/0190**

BETWEEN : **MOUMENA SALIMA ROUANE** of Sarava, Ba **APPELLANT**

AND : **SAHEER MOHAMMED** OF 23 Goundar Road, Nadi **RESPONDENT**

BEFORE : Hon. Mr. Justice Mohamed Mackie.

APPEARANCES : Appellant appears in person
Mr. S. N. Chandra, for the Respondent

DATE OF HEARING : 13th September, 2023.

WRITTEN SUBMISSIONS : **Filed** by the both parties on 28th September 2023.

DATE OF JUDGMENT : On 6th October, 2023

JUDGMENT

A. Introduction:

1. This is an Appeal arising out of the Ruling pronounced by the learned Resident Magistrate of Nadi, on 16th September 2022, pursuant to the hearing held before her on 29th July 2022 in relation to 2 Applications that had been preferred by the Appellant MOUMENA SALIMA ROUANE, against her estranged husband SAHEER MOHAMED.
2. The Appellant lady is an Algerian Citizen, who met the Respondent man through a dating site, and later married him on 7th March 2019. The Respondent was already a resident of New Zealand, and after the Marriage in Algeria both of them came to Fiji, and then proceeded to New Zealand, where he worked as a Bus Driver earning NZ\$ 20.00 per hour. Later they came to Fiji in January 2021 and resided at Respondent's Family House in Nadi. As she was and is on a Tourist Visa, she cannot engage in any income earning activities in Fiji.
3. Due to issues, she left the Respondent's Family House on 8th March 2022 and found her shelter at a Care Centre in Lautoka, where she was and is provided with food, while she was assisted by the Fiji Women's Crisis Centre in her Magistrate Court proceedings. The Legal Aid Commission, which initially appeared for her in this Court, later prior to the hearing, withdrew the legal aid, with the leave of the Court, as she had failed in her reassessment.

4. Initially , the Appellant on 06th October 2021, had filed forms 5,12 & 23 against the Respondent seeking spousal maintenance in a sum of \$100,00 per week and , subsequently , on 28th April 2022 filed her amended forms claiming the following reliefs;
- i. Spousal maintenance in a sum of \$300.00 per week.*
 - ii. Payment for air ticket from Fiji to Oram, Algeria preferably transits through New Zealand.*
 - iii. Payment of any relevant transit Visa application;*
 - iv. Payment of US\$ 500 for transit allowance for meal and travel expenses;*
 - v. Payment of any required overnight hotel stay in transit;*
 - vi. In the alternative, that the Respondent assist the Applicant with payment of her Visa application here in Fiji*
 - vii. Any other order(s) the Court deems fair and just in the circumstances of the case.*
5. At the hearing before the learned Magistrate on 29th July 2022, the Appellant had given evidence on her behalf, being represented by a Counsel. The Respondent too had given evidence for and on his behalf, with the representation of his Counsel. No further witnesses were called by either of them.
6. Accordingly, the learned Magistrate by her impugned Ruling dated 16th September 2022, made the following orders against the Respondent.
- i. To provide the Applicant an economy class Air Ticket enabling the applicant to return to her Country within 60 days from the date of judgment.*
 - ii. The Respondent shall incur the expenses for transit Visa*
 - iii. The Respondent to pay US \$ 250 for the Applicant lady to cover her expenses in transit,*
 - iv. The Respondent to pay \$50 per week for 8 weeks as spousal maintenance.*
7. Being aggrieved of the above orders , the Appellant has on 14th October 2022 preferred this Appeal on the following 3 grounds of Appeal ;

B. Grounds of Appeal

- 1. The learned Magistrate erred in law and in fact in not making a retrospective order for Spousal maintenance,*
- 2. The learned Magistrate erred in law and in fact when she ordered the time frame of 60 days of her departure from Fiji to return home,*
- 3. The learned Magistrate erred in fact when she failed to consider that the sum of \$80 .00 was insufficient for spousal maintenance.*

C. Hearing Of Appeal:

8. The Respondent, in the meantime, had made an Application to this Court seeking to expedite the hearing of the Appeal, as the Air Ticket he had purchased on 26th October 2022 in terms of the Magistrate's order for the Appellant to get back to her Country will expire if it is not utilized before 26th of October 2023, and no refund will be done. Accordingly, the hearing was expedited wherein the Appellant appeared on her own, while the Respondent was represented by his Counsel.

9. The Appellant, in order to substantiate her grounds of Appeal 1 and 3 above, in her oral and in written submissions, has pointed out that the learned Magistrate, having erred by failing to order the spousal maintenance retrospectively, has also erred by failing to consider that the sum of \$80 .00 was insufficient for spousal maintenance. However, she has not convinced this Court on her Appeal ground 2, which is on the Magistrate's order setting a time frame of 60 days for her to leave Fiji.
10. Conversely, learned counsel for the Respondent in his oral and written submissions, while alluding to the Respondent's immediate compliance of the Magistrate's order No-(i) by purchasing an Air Ticket spending \$13,500.00 (Thirteen thousand five hundred Fijian dollars), has submitted that her travel expenses also would be provided, as per the order, once she is ready for her return to Algeria.
11. However, Respondent's Counsel has expressed concern that **if** the Air Ticket, purchased on 26th October 2022 at the expense of such a colossal amount, is not used prior to 26th October 2023, it will expire and no refund will be made, which may compel the Respondent to purchase another Ticket, which he cannot afford to.

D. Discussion:

Ground-1.

12. Firstly, the argument advance by the Counsel for the Respondent, as per paragraph 6 of his written submissions, pursuant to section 184 of the Family Law Act, need not be considered at this point as this Court has not acted under sub section (2) of the Act.
13. Further, Counsel's argument in paragraph 7 of his written submission is not supported by any provision of the law or decided authorities on the subject. Counsel has failed to convince this Court as to why a retrospective order for spousal maintenance should not be made.
14. However, on careful perusal of the record, this Court finds that the Appellant's first Application for maintenance was made on 06th October 2021, while the Appellant was still living and was maintained at the Respondent's Family House. Admittedly, she has left the place only on 8th March 2022 and her evidence before the learned Magistrate does not disclose that she was not maintained at the Respondent's place while she was there. It is her evidence that she left the house as she was not allowed to sleep in a particular room there.
15. She had not given any evidence before the Magistrate that when she was at the Respondent's place there was any compelling reason or necessity for her to be paid as per her claim in her first Application. However, with the filing of the 2nd Application, she appears to have waived her right to receive maintenance as per the 1st Application for the period she spent at the Respondent's Family House. Thus, her claim for retrospective spousal maintenance for the said period should necessarily fail, as she was, admittedly, sheltered, fed and taken care of at the Respondent's place. Further, it was when she was living at Respondent's Place, she had obtained a Stop Departure Order against him on 6th October 2021, but for the reason best known to her she did not have it served it on him.

16. It was after leaving the Respondent's Family Home on 8th March 2021, she has made her subsequent Application on 28th April 2022 moving for reliefs, inter alia, for an enhanced sum of \$300.00 for her weekly maintenance, and for the substantial relief of obtaining an Air Ticket for her return journey to Algeria. No evidence provided before Magistrate for such a sudden increase.
17. However, her argument that she is entitled for retrospective maintenance from the date of her 2nd Application made on 28th April 2022 cannot be disregarded. This seems to have escaped the attention of the Magistrate. Counsel for the Respondent has not substantiated his position that the Appellant is not entitled for retrospective payment for the said period.
18. In view of the above, and the fact that her maintenance receivable period has been limited to 8 weeks from the date of the Magistrate's Ruling on 16th September 2022, this Court is of the view that her maintenance ordered by the Magistrate should be payable from 28th April 2022, which is the date of the 2nd Application.
19. Accordingly, the total period for the retrospective payment of spousal maintenance to the Appellant shall be calculated from 28th April 2022, being the date of Application, till 16th September 2022, being the date of Magistrate's Ruling, which period consists 20 weeks. Therefore, the total arrears for the said 20 weeks shall be 20 weeks X \$50.00 = \$1,000.00 (One thousand Fijian Dollars).

Ground -2

20. The learned Magistrate by her impugned Ruling has limited the period of her entitlement to receive maintenance only for 8 weeks from the date of Ruling.
21. The substantial relief sought by the Appellant was for the provision of an Air Ticket for her to go back to her Country. This relief has been granted, and the Respondent has already purchased the Ticket on 26th October 2022 spending 13,500.00 Fijian Dollars. Her expenses on transit also has been granted and the Respondent is ready to pay it when she is ready leave. The Appellant, after leaving the Respondent's place and before filing the 2nd Application, had in fact requested the Respondent to provide her with an Air Ticket for her to leave for her Country. She came to Fiji on a tourist Visa, sponsored by the Respondent. Thus, she cannot work in Fiji for her to earn her living. The subsistence of the Marriage is not the only criterion to receive or continue to receive maintenance. The Appellant said to have served as a teacher in Algeria. She is currently at a temporary shelter in Lautoka where she is fed.
22. If she does not make use of the Air Ticket already purchased, before 26th October 2023, it will stand cancelled and the Money spent on it will not be refunded. She does not dispute this. Had she intimated that she intend to Appeal or does not intent to leave, the Respondent would not have proceeded to purchase the Ticket immediately after the Ruling.

23. Having considered overall circumstances in this case, in the light of the facts stated in paragraphs 20 and 21 above, I am of the view that this Court should not interfere with the decision of the learned Magistrate in this regard.

Ground 3

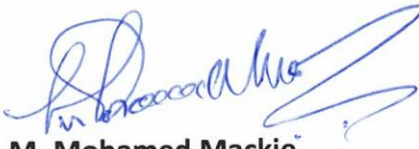
24. In order to substantiate this ground, the Appellant argues that the weekly maintenance ordered at the rate of \$80.00 is insufficient. The amount she states is wrong. The actual amount ordered was \$50.00 per week. No evidence adduced before the Magistrate to prove that the Respondent is engaged in any job and earning or he receives income from some other source/s.

25. The Respondent did not go back to New Zealand as he had commitments in Fiji, including taking care of his father, who is said to be sick. On top of it there was a Stop Departure Order obtained by the Appellant. So he could not proceed to New Zealand in order to engage in his driving job. The Appellant for the time being is looked after by a charity. She has not proved her expenses by adducing any tangible evidence. Prime consideration is the Respondent's own earnings and/or income. Therefore, I am of the view that the sum of \$50.00 per week ordered by the Magistrate was reasonable.

E. Final Orders:

- a. The Appeal is partly allowed.
- b. The Appellant is also entitled to receive maintenance (retrospectively) from 28th April 2022 till the date of the Ruling by the Magistrate on 16th September 2022.
- c. The period of such entitlement is 20 weeks and the total amount on it shall be $20 \times \$50.00 = \$1,000.00$.
- d. Subject to the above, the Ruling of the Magistrate dated 16th September 2022 is hereby affirmed.
- e. No costs ordered.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 6th day of October, 2023.

SOLICITORS:

For the Appellant: In Person

For the Respondent: Messrs. Legal Lines – Barristers & Solicitors.