

## The Appeal

1. This is an appeal against the judgment of the lower court of the 31<sup>st</sup> day of October, 2008 whereby his

<b>IN THE FAMILY DIVISION OF THE HIGH COURT APPELLATE JURISDICTION</b>	
<b>CASE NUMBER:</b>	09/SUV/0005
<b>BETWEEN:</b>	SHAYAL
<b>AND:</b>	NITA
<b>Appearances:</b>	Mr. Samad for the Appellant.  Ms. Savou of LAC for the Respondent.
<b>Date/Place of judgment:</b>	Tuesday, 25 <sup>th</sup> January, 2011 at Suva.
<b>Judgment of:</b>	The Hon. Justice Anjala Wati.
<b>Category:</b>	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are purely coincidental.</i>
<b>Anonymised Case Citation:</b>	Shayal v Nita - Fiji Family High Court Case Number: 09/SUV/0005
<b>JUDGMENT OF THE COURT</b>	
<b>Catchwords:</b> <i>APPEAL-ALTERATION OF PROPERTY INTERESTS - Initially application by wife against husband for alteration of property interests-husband died before the proceedings were completed-step daughter of the applicant wife used to represent her father; the husband; when he was alive because father was a cancer patient and very sickly-step daughter also appeared in court after death of father and participated in court proceedings by attending court before the resident magistrate, the deputy registrars and corresponding by writing letters to court-after death of father, daughter joined as second respondent and participated in trial proceedings-daughter was the occupant of the house, as well as the purported purchaser of the subject property-order made declaring that the wife was entitled to possession of the house and for the daughter to give vacant possession of the said property to the wife and for the daughter to dismantle all her extensions to the original house and remove the materials within 14 days-aggrieved at the order the daughter appealed -orders of lower court affirmed with further order declaring interest of the wife in the property-misconduct on part of daughter in efficiently dealing with the matter in the lower court-costs ordered against her in the sum of \$750.00 to be paid within 21 days.</i>	
<u>Legislation</u>  Family Law Act No. 18 of 2003.  Family Law Rules 2005.  Family Law Regulations 2005.  High Court Rules 1988.	
<u>Cases/Texts Referred To</u>  Jones v. Skinner (1835) 5 L.J Ch. 87.    Dickey, A, "Family Law" 4 <sup>th</sup> Edition (2002) Lawbook Co; Sydney.	

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Nausori.

- I hereby order that the Second Respondent Shayal give vacant possession of the aforesaid property within 14 days from receipt of the Court Judgment.
- I hereby order that the Second Respondent Shayal dismantle all extensions to the original house and remove the materials within 14 days.
- Copy of the sealed judgment to be served on Shayal.
- Police Officers from Nausori Police station/Court Bailiff to assist the Applicant in obtaining vacant possession of the matrimonial property.
- FICAC to investigate into the First Respondent's Bank Account at Nausori for alleged withdrawal of funds prior and after his death, possible abuse of funds and to determine Applicant's share, if any".

### The Grounds of Appeal

2. The grounds of appeal appear in the Notice of Appeal as follows:-

#### Ground 1

That the respondent did not own any property at the time of the dissolution of marriage

#### Ground 2

That the respondent did not make any proper application by filing form 9 for the final orders, only form 19 was filed as was confirmed by the trial magistrate at paragraph 2 of the said ruling.

#### Ground 3

That the learned trial magistrate erred in law and in fact by making an order on a property that was not lawfully the matrimonial property.

#### Ground 4

That the learned trial magistrate erred in law and in fact by making an order on a property without first verifying the lawful ownership and specific identity, such as the land title number, lease or the lot number.

#### Ground 5

That the learned trial magistrate erred in fact and in law by arbitrarily and unlawfully including the appellant as the respondent in the original proceedings without following the due process of law.

#### Ground 6

That further there was no application by the appellant or the respondent to be included as a party to the proceedings.

#### Ground 7

That the learned trial magistrate erred in law and in fact by taking into consideration irrelevant factors and based the findings on hearsay evidence.

#### Ground 8

That the learned trial magistrate erred in law and in fact in not properly considering the issues of will of the original respondent Binesh the deceased.

#### Ground 9

That the learned trial magistrate erred in law and in fact by failing to consider the sale and purchase agreement between the deceased and the appellant dated the 8<sup>th</sup> September, 2005.

#### Ground 10

That the Learned Trial Magistrates' decision is unfair and unreasonable in all the circumstances.

#### The Orders Sought

3. The appellant seeks the following orders from this court:-
  - That the judgment of the learned magistrate be set aside.
  - That there be costs in favour of the appellant.

#### The Case Background

4. The original application was between the husband and the wife. In the original application for alteration of property interest by wife the case number was 06/Nau/0156.
5. The parties were married in 1997.
6. Both were divorcees when they married each other. The husband had a daughter from his first marriage and the wife had no issues from the first marriage.

7. The daughter is the appellant in the appeal.
8. The parties separated in, 2006 and an order dissolving their marriage was granted on the 13<sup>th</sup> day of July.
9. The purported application for property distribution was filed in October, 2006.
10. The property in question is a residential home on property described as CT 9409 part of Lot 1 on DP 2229 (subject to survey).
11. The husband was a cancer patient and he died in July, 2009, before the application by the wife for property distribution was completed.
12. The daughter used to appear in court when the father was alive. When the father passed away she was added as a second respondent.
13. Notice of Adjourned hearing was served on the daughter in August, 2008. The Notice of adjourned hearing was dated August, 2008.
14. On the 12<sup>th</sup> day of August the daughter wrote to the Senior Court Officer, Family Court, Nausori court and stated that her father is deceased and all the application is null and void. She also stated in the letter that she does not have any interest in the matter and after the death of the father, the family court does not have any jurisdiction to pursue with the matter. She said that the settlement of any property was a matter for the public trustee.
15. The presiding resident magistrate wrote to the daughter and stated the law that allows the court to proceed with the matter albeit the death of a party. The magistrate also stated in the letter that it was in the interest of the daughter to attend court as she occupies the property which is the subject of the claim and she had been appearing in court when her father was alive, after his death and that she appeared at the hearing and cross examined the wife's witnesses. She also appeared before the Deputy Registrar on the subject property issues. The court indicated that the proceedings would continue.
16. The daughter wrote back on the 21<sup>st</sup> day of August, 2008 and stated that she does not understand why she had been served with a notice of adjourned hearing when she is not a party to the case. She was only appearing in the case on behalf of the father. Now that the father is deceased, she will not attend court. She was made a party to the proceeding in case 06/NAU/0156. The property that she is in occupation of is a property of her marriage which she bought on 8<sup>th</sup> September, 2005 from her father. She did not wish to attend the court any further.
17. The reason for adding the daughter as a party was that she occupied the house and there was a purported sale and purchase agreement between the father and the daughter dated the 8<sup>th</sup> day of

September, 2005 which indicates that the daughter had bought the property upon payment of \$5,000.

The agreement was witnessed by a Real estate Agency, Nausori.

18. There is a receipt evidencing payment by the daughter. The receipt is dated the 29<sup>th</sup> day of September, 2009 and appears to have been issued by the Real Estate and Travel Agency.
19. After the daughter was made a party to the proceedings, she appeared in court and took part in the court proceedings by appearing before the magistrate, the deputy registrars and by writing correspondences to court. She also appeared in trial and cross-examined the witnesses. However she stopped appearing in the middle. The trial was completed in her absence.
20. After the matter was heard, the daughter sought leave to appeal the decision out of time which was granted. The daughter then filed this appeal
21. The magistrate had also in December, 2008 granted stay of the execution of the judgment. The stay was granted in December, 2008.

#### The Appellants Submission

22. The Appellant's counsel Mr Samad only made submissions to the effect that the husband did not own any property because it was sold to the daughter. The receipt evidences payment of the property and the sale and purchase was stamped in September, 2005 with the Commissioner of Stamp Duties Stamp. Therefore no application for property distribution should have been made.
23. In respect of ground 8, the counsel submitted that the appellant was the full beneficiary under the will and she should have the property as that was the testators' last will. It would be wrong for the court not to implement the testators' last will.

#### The Respondent's Submission.

24. The Respondent's counsel submitted that the court had made findings that the property was lawfully the property of the parties to the marriage and the sale and purchase between the father and daughter was a transaction to defeat the wife's claim. The filing of the form 19 applications shows the intention to have the property divided. The wife was unrepresented and she was not aware of the correct forms. The application was accepted and matter was heard. She should not be prejudiced now. The description of the property appears in the sale and purchase agreement and the parties are fully aware as to the subject property which the orders refer to. The daughter also took part in the

proceedings and was made a party to the proceedings. The matter could be continued despite the death of the husband pursuant to s. 162(4) of the Family Law Act. The evidence that was relied on to come to the orders that his worship did was not hearsay evidence.

### The Law and the Determination

25. The first ground states that the respondent did not own any property at the time of the dissolution of marriage. The parties were married in 1997, finally separated in 2006 and had their marriage dissolved in 2007. The property was acquired by the husband from one Satish Chand in the sum of \$5,000 through a sale purchase agreement dated the 07<sup>th</sup> day of January, 2002. There is a receipt dated the 7<sup>th</sup> day of January, 2001 evidencing payment of the monies.
26. The application for property distribution was filed in 2006 when the wife filed a financial statement. The property is purportedly sold to the daughter before the parties' separation and the dissolution of marriage. The application for property distribution was filed before the dissolution of marriage.
27. The definition of property pursuant to s. 2 of the Family Law Act 2003 is "property within or outside the marriage to which those parties are, or that party is, entitled, whether in possession or reversion".
28. The definition clearly catches the subject property as it was the property of the parties to the marriage and purportedly sold before the separation, before the dissolution of marriage and before the date the application was filed. There was enough evidence before the court that the wife did not know about the property being sold and that she lived happily on this property until she was chased out by the appellant in 2006. The daughter did this because in March, 2006 the father got sick and admitted to the hospital. He was later discharged on 16<sup>th</sup> April, 2006 when the saga happened.
29. The wife clearly is entitled to bring her claim to this property and have the issue of her interest tried in court. The definition is indicative and descriptive of every possible interest which a party can have: Jones v. Skinner (1835) 5 LJ Ch. 87.
30. The second ground states that form 9 application was not filed for property distribution. It is correct that form 9 application was not filed but that does not invalidate the proceedings. All the parties had knowledge that the case was about property distribution. The numerous letters by the daughter and father also indicates that they knew about the dispute regarding the property. The father and daughter also appeared in court and numerous times they were told that the matter was regarding the property in which the father lived. There is no miscarriage of justice or prejudice that was caused to the appellant. She had access to justice and she also did not take objection to the issue when she

appeared in court as a party to the proceedings.

31. Regulation 7(1) of the Family Law Rules states that "Non-compliance with these Regulations, or with a rule of practice or procedure in a court exercising jurisdiction under the Act, does not render proceedings in that court void unless the court so directs". Regulation 7(2) states that "in exercising discretion under this regulation, the court shall have regard to the real merits of the case, the minimizing of expense, and whether any party to the proceedings has suffered injustice or has been prejudicially affected by non-compliance with these Regulations".
32. Ground 2 holds no merit and must be dismissed.
33. The third ground states that the property in question was not matrimonial property. I have dealt with this in ground 1. There is no notion of matrimonial property under the Family Law Act 2003. The ground is totally oblivious to the new property law that has been introduced via the Family Law Act. The ground has no merit and must be dismissed.
34. Ground 4 states that the learned trial magistrate erred in law and in fact by making an order on a property without first verifying the lawful ownership and specific identity, such as the land title number, lease or the lot number. In paragraphs 14-40 of his judgment, his worship deals with issue of property and concludes that the husband and the wife are the lawful owners of the property. He also identified the subject property to be situated at Nausori. Moreover there is no doubt that the parties know what property is being referred to. It is non-sensical to state that the property was not identified by lease numbers or lot numbers. There is no specific description but the sale and purchase identifies the property as land contained in CT 9409 being Lot 1 on DP No. 2229. Ground 4 is lack of merits and must be dismissed.
35. I will deal with Grounds 5 and 6 together. Ground 5 states that the learned trial magistrate erred in fact and in law by arbitrarily and unlawfully including the appellant as the respondent in the original proceedings without following the due process of law and ground 6 states there was no application by the appellant or the respondent to be included as a party to the proceedings.
36. The subject property was occupied by the daughter and she and the father had indicated to the court that the property had been sold to the daughter. The daughter's interest would be affected if she did not attend proceedings and so the court joined her as second respondent in the proceedings. That was in fact done to properly try the issue before the court. The court has powers to join a party who is not a party to the proceedings if it thinks that the party ought to be joined to properly determine the matter at hand. There are no merits in grounds 5 and 6 and it must be dismissed.
37. Order 15 Rule 8 of the High Court Rules 1988 and Order 162 (4) of the Family Law Act is pertinent. Order 15 Rule 8 states that:-

"(1) where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.

(2) where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute may effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted or the first mentioned party".

38. Section 162(4) (b) of the Family Law Act states that if before proceedings with respect to the property of the parties to a marriage or either of them are completed, either party to the proceedings dies and the court is of the opinion that it would have made an order with respect to property if the deceased party had not died; and that it is still appropriate to make an order with respect to that property, the court may make such order as it considers appropriate with respect to any of the property of the parties to the marriage or either of them; and an order made may be enforced against the estate of the deceased party.
39. There is no need for an application to be made by a party to join the daughter. The court was correct to do that on its own motion to determine the real issue in the proceedings. The wife was unrepresented and she is not educated as well. She will not know the procedures and it is of no harm or prejudice to the daughter if she was joined as a party because she claims that the property is hers. She should be thankful to the justice system that has joined her to hear her side of the story. I find the daughters qualms astonishing.
40. Ground 7 states that the learned trial magistrate erred in law and in fact by taking into consideration irrelevant factors and based the findings on hearsay evidence. There is no indication of what irrelevant factors were taken into account. The court had properly considered the ownership of the property and the wife's contribution as a home maker before making the orders. The evidence before the court was direct evidence on contribution according to the knowledge of those who testified and investigated the history of the parties and the acquisition of the property. The evidence was not hearsay and even if it was, the court is bound to admit it and it is then the prerogative of the court to place the relevant weight it deems just. Ground 7 is dismissed.
41. Ground 8 states that the learned trial magistrate erred in law and in fact in not properly considering the issues of the will of the original respondent Bhinesh the deceased. The will provisions will not override the wife's statutory right to continue with her claim for property distribution. She made the application before the husband died and she was entitled to continue her case: S. 162 (4) of the Family Law Act.



42. Ground 9 states that the learned trial magistrate erred in law and in fact by failing to consider the sale and purchase agreement between the deceased and the appellant dated the 8<sup>th</sup> September, 2005. Once again his worship had given consideration to the agreement at paragraphs 27, 28, 30 to 39 of his judgment. After giving it due consideration he then did not place any weight on it and made findings that the lawful owner was the husband and wife and that the sale and purchase between the father and the daughter was to defeat the claim of the wife. Ground 9 has no merits and must be dismissed.
43. Ground 10 states that the Learned Trial Magistrates' decision is unfair and unreasonable in all the circumstances. I have gone through the entire evidence in the matter and I am satisfied that there was sufficient evidence for his worship to come to a conclusion that the husband and the wife are the owners of the subject property and that the wife must occupy the same. He had no contrary evidence before him to rule otherwise except the sale and purchase agreement which was not given any weight.
44. I have found no error as to law or fact committed by his worship.
45. The appeal must be dismissed and I do so now.
46. The conduct of the appellant calls for costs in this matter. She was joined as a party and informed by court that the property proceedings would continue. Her interest was affected but after appearing in court before and her father's death, and after having taken part in the proceedings as a party to the action by attending conciliation, procedural hearing and pre-trial conferences before the Deputy Registrar and after taking part in the hearing failed to complete the trial and give the necessary evidence to protect her interest. Now on the appeal she is raising issues that are only technical in nature and those that she should have raised in the lower court like challenging her being added as a party, challenging the evidence, presenting her evidence and giving her submissions. She grossly failed and neglected to protect her interest and when the evidence was overwhelming that the property belonged to the husband and the wife and based on that evidence the orders were made, she then appeals to this court for relief to set aside the orders of the magistrate. All the grounds are so very frivolous and this is all because of the misconduct in the proceedings by the appellant. She must pay the costs of this appeal which I summarily assess at \$750.00.
47. His worship declared that the wife is to have permanent possession of the property. In fact a declaration should be first made declaring the wife's interest in the property before making consequential orders. S. 160 (1) states that "in proceedings between the parties to a marriage with

respect to existing title or rights in respect of property, the court may declare the title or rights, if any, that a party has in respect of the property". S. 160(2) states that "where a court makes declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession".

48. On hearing this appeal I have the powers to make an order which the lower court ought to have made: Order 55 Rule 7 (5) of the High Court Rules 1988. I shall make that declaration.

#### The Final Orders

49. The appeal is dismissed.

50. I declare that the wife has 100% interest in the subject property situated at -Nausori described the property in issue.

51. The remaining orders of the lower court are affirmed.

52. The stay of execution of the orders of the lower court is uplifted with effect from today.

53. The appellant is to pay the cost of this appeal in the sum of \$750.00 to the respondent within 21 days.

**ANJALA WATI**

**Judge**

**25.01.2011**

To;

1. *Mr. Snuiadfor the appellant.*

2. *Ms. Savon for the respondent.*

3. *File Number. 09/SU V/0005*