

**IN THE FAMILY DIVISION OF THE HIGH COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** 12/SUV/0014  
(Appeal from 11/NAS/0035)

**BETWEEN:** LALITA APPELLANT

**AND:** RITESH  
RESPONDENT

*Appearances:* Mr. D. Sharma for the appellant.  
No appearance of the respondent.

*Date/Place of Judgment:* Tuesday, 16 September, 2014 at Suva.

*Judgment of:* The Hon. Justice Anjala Wati.

*Category:* 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 is purely coincidental.

*Anonymised Case Citation:* Lalita v. Ritesh – Fiji Family High Court Appeal Case Number 12/Suv/0014.

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## **JUDGMENT**

**Catchwords:**

**FAMILY LAW – transfer of cases by Magistrates within a division- law governing grant- factors to be considered- whether transfer was correct in the circumstances.**

**Legislation:**

**The Family Law Act No. 18 of 2003 (“FLA”): s. 28.**

**The Family Law Rules 2005 (“FLR”): Rules 5.14; 5.15; 5.16; 11.01.**

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### **The Appeal**

1. The appellant appeals against the decision of the Resident Magistrate Ms. Ratakele of 2012 in transferring the case to Nadi Court.
2. Mr. Devanesh Sharma informed the Court that irrespective of the outcome of the appeal they are content that the Nadi Court tries the matter but that this appeal is important from a procedural point of view in that it will set a precedence and guidance to future matters.

### **The Grounds of Appeal**

3. The appellant raised the following grounds of appeal:
  1. ***That the Learned Magistrate erred in law and in fact in transferring the case to Nadi Magistrate's Court on the following grounds:***
    - (a). ***There was no application made by the parties to transfer the case.***
    - (b). ***The appellant was not heard on the issue of transfer.***
    - (c). ***The appellant was not asked about any prejudice that she would suffer as a result of the transfer.***
    - (d). ***The decision under appeal was delivered by the Family Division of the Nasinu Magistrates Court and as such the rightful appellate Court is the Family Division of the High Court Suva.***
    - (e). ***The Learned Magistrate had no statutory powers to transfer the case to Nadi.***

### ***The Orders of the Court***

4. In 2012 the Court made the orders for transfer on its own motion without hearing the parties. There was no application for transfer before the Court. The transfer was sanctioned by the Chief Magistrate (“**CM**”) on the memorandum of RM Ratakele who wrote to the CM to the effect that the applicant in the case had indicated that an application for transfer would be made and that the parties were from Nadi.
5. The Court did not provide any ruling or reasons for the transfer.

### ***The Submissions***

6. Mr. Sharma stated that there was no application for transfer before the Magistrate in 2012. The case was transferred and no reasons were given as to why the matter was being transferred to the Nadi Court.
7. The order for transfer was sealed in 2012. It states that both parties were heard on the transfer but in reality the Court refused to listen to anyone.
8. It later transpired that RM Ratakele had on her own accord written to the CM in 2012. The RM’s memorandum is rather economical because she informed the CM that the applicant had indicated that an application for transfer will be made in due course. No such application or intention had been expressed about the proposed transfer. The CM thinking that the parties wanted the matter transferred to Nadi Court endorsed the transfer on the grounds that all parties resided in Nadi.
9. Mr. Sharma emphasised that the RM was not informed of any intentions to transfer the case to Nadi. There are powers to transfer cases but these powers must be exercised properly. S. 28 of the FLA deals with transfer of cases. Mr. Sharma stated that s. 28 (2) of the FLA gives the Magistrates’ Court powers to transfer cases to another division of the Magistrates’ Court if it is in the interest of

justice or of convenience to parties. There was no need to consult the Chief Magistrate to transfer the cases.

10. A transfer cannot be in the interest of justice and convenience to parties if no views on transfer are sought by the parties. The RM acted on her own accord without consulting the parties.
11. Both parties were caught by surprise at the decision of the RM.
12. Since there are specific legislative provisions under the FLA for transfer of cases, the Court could not have borrowed the rules of transfer from the civil or criminal law.
13. The transfer was wrongly done and the appeal ought to be allowed. Even if the appeal is allowed the matter can remain in Nadi Court as they do not wish to have the files transferred from one Court to the other. It will be very inconvenient. The appeal is more or less academic in nature.

### ***The Law and Analysis***

14. The first issue that I need to clarify is the role of the Chief Magistrate in sanctioning transfer of a Family Court file from one division to the other.
15. Before I do that I must recite the substantive legal provision which relates to transfer of cases.
16. The substantive legal provision is s. 28(2) of the FLA. It reads:

***“(2) If –***

***(a) there are pending in a court proceedings that have been instituted under this Act or are being continued...; and***

- (b) it appears to the court that it is in the interests of justice, or of convenience to the parties, that the proceedings be dealt with in another court having jurisdiction under this Act,**

**The court may transfer the proceedings to the other court.**

- (3) the judge of the Family Division may of his or her own motion or on the application of a party at any time order that any proceedings be transferred from the Family Division of the High Court to the Family Division of the Magistrates' Court or from the Magistrates' Court to the Family Division of the High Court.**

- (4) No appeal lies from an order of the judge made under subsection (3)".**

- 17. The rules governing the grant of the transfer is outlined in Rules 5.14 to 5.16 of the FLR. It is important that I recite the rules in full:

#### **Application of Division**

**" 5.14. This Division applies to and in relation to the transfer of proceedings under section 28 of the Act –**

- (a) between registries of the same Family Division-**

- (i) on the motion of a judge or magistrate of that Division; or**

- (ii) on application, in accordance with this order;**

**(b) from the Family Division of the Magistrates' Court to the Family Division of the High Court-**

**(i) on the motion of a judge of the Family Division of the High Court; or**

**(ii) on application, in accordance with this Order; or**

**(c) from the Family Division of the High Court to the Family Division of the Magistrates' Court-**

**(i) on the motion of a judge of the Family Division of the High Court; or**

**(ii) on application, in accordance with this Order.**

#### **Applications by parties**

**5.15. A party who has filed an application or response in proceedings in a court exercising jurisdiction under the Act may, by application in accordance with Form 12, filed in the filing registry, apply to have the proceedings heard-**

**(a) in another registry of that court; or**

**(b) in another court exercising jurisdiction under the Act.**

#### **Matters to be considered**

**5.16- (1) In considering a transfer under this Order, the court shall have regard to-**

- (a) *wishes of the parties;*
  - (b) *whether proceedings in respect of an associated matter are pending in the other court; and*
  - (c) *whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding is not transferred;*
  - (d) *whether proceeding is likely to be heard and determined earlier in the other court;*
  - (e) *the availability of particular procedures appropriate for the class of proceeding; and*
  - (f) *the interests of the administration of justice.*
- (2) *In addition to the factors set out in subrule (1), the Family Division of the High Court must, when considering whether to transfer a proceeding to the Family Division of the Magistrates' Court, take into account –*
- (a) *whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Family Division of the Court on one or more of the points in issue; and*
  - (b) *whether the resources of the Magistrates' Court are sufficient to hear and determine the proceeding.*
- (3) *In making an order under rule 5.15, the court may impose such terms and conditions as it thinks fit”.*

18. Neither the Act nor the Rules requires that the Chief Magistrate sanctions the transfer of files from one Division to the other. The Chief Magistrate thus has no

powers to order or direct or sanction transfer of files. The Magistrates presiding in the Family Division must remember two matters: that there is a specific legal provision for transfer of files in Family Division which needs to be adhered to and the civil rules on transfer does not apply. There is no need for Magistrates' to ask the Chief Magistrate to sanction a transfer.

19. A Magistrate has powers to transfer files in his court to another court. That can be done on the Court's own motion or on the application of the parties. In any given situation, the Court has to consider the matters set out in Rule 5.16 of the FLR before transferring the matter. If one looks at the factors set out in Rule 5.16, it becomes apparent that it was incumbent on the Court to hear the parties to ascertain the outcome of assessment of each factor.
20. In this case, The RM did not discuss the issue of transfer with the parties or hear them at all. She wrote a letter to the Chief Magistrate that the applicant had proposed to make an application for transfer. The Chief Magistrate endorsed the transfer on that basis and that the parties were from Nadi. The procedure invoked by the RM was in contravention of law and not justified on the facts as the parties were not heard.
21. If the Court wanted to have the matter transferred on its own motion, it was bound by the law to consider the factors. Those factors would have determined whether it was in the interest of justice and for the convenience of the parties to transfer the case thus satisfying the test outlined in s. 28 to justify the transfer.
22. Before I leave the matter I must comment on the appropriate jurisdiction where the appeal should have been filed as the Family Division of the Nasinu Magistrates' Court was not permitting the appeal to be filed in Nasinu Court to be heard by the Suva High Court.
23. Appeals in Family Division of the High Court is initiated by filing a Form 26 in the Court which made the order. The appeal form together with the records is then sent to High Court for allocation of dates and hearing in the High Court. Sometimes the Family Division of the Magistrates Court assigns a High Court date



on Form 26 which is also acceptable provided that a proper date is assigned after assessing the commitments of the Court.

24. The purpose of filing the appeal in the lower Court is to indicate to the presiding officer and the Registry that an appeal has been lodged. That enables the Officer in Charge to organise the Court record which includes transcript of the proceedings which has to be finalised by the presiding officer.
25. Once the Process of compilation of the record is complete then the file is sent to the High Court. Once the matter is in the High Court there is no need to wait for the records and the process in the High Court operates smoothly.
26. If Form 26 was to be filed in High Court, the Family Division of the Magistrates' Court would not be aware of the appeal until a memorandum for records is sent. By that time the parties would only be appearing in High Court and nothing constructive will take place as the Court and the parties will be waiting for records. Unnecessary Court fixtures in High Court would be clogging dates.
27. In this case, the Nasinu Court did not want to accept the appeal. This was an error on their part. The file may have been sent to Nadi Court but the proper jurisdiction to file the appeal was the Court which made the order. Since Nasinu Court made the order, it was Nasinu Court in which the appeal must be accepted. The proper Court to hear the appeal would be Family Division of the High Court Suva.
28. Rule 11.01 states that ***“an appeal under the Act shall be instituted by filing a notice of appeal in accordance with Form 26 in the court appealed from...”***

***Underlining is mine for emphasis***

The Court Registry should familiarise itself with the procedures so that the lawyers and parties are not made to run around and waste their resources. By a copy of this judgment all the Senior Court Officers of each family division would be made aware of the legal provision which must be observed.

## **Final Orders**

29. In the final analysis I find that the Court erred in law and in fact transferring the case to Nadi:
- a. on the sanction of the Chief Magistrate;**
  - b. without hearing the parties; and**
  - c. without considering the statutory factors mandated by the law in determining the application for transfer.**
30. The appeal is allowed but I direct that the matter be continued in Nadi Court.
31. Each party must bear their own costs of the proceedings.

ANJALA WATI

Judge

16.09.2014

**To:**

- 1. Mr. D. Sharma, counsel for the appellant.**
- 2. Respondent.**
- 3. All Seniors Court Officers of each Family Division of the Magistrates' Court.**
- 4. File Number: 12/SUV/0014.**