

-

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA
APPELLATE JURISDICTION

CASE NUMBER: 14/Ltk/ 0009
(Original Case Number: 12/Ltk/0153)

BETWEEN: KALIVATI
APPELLANT

AND: PASEMACA
RESPONDENT

Appearances: Mr. Faktaufon for the Appellant.
Mr. Kumar for the Respondent.

Date/Place of Written Judgment: Wednesday 18 August 2015 at Suva.

Coram: Hon. Madam 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 person is purely coincidental.

-Anonymised Case Citation *Kalivati v Pasemaca*
Family Appeal Case 0014Suv 2009

JUDGMENT

Catchwords:

FAMILY LAW - APPEAL-TRANSFER OF PROCEEDINGS - Power of Court to transfer when proceedings are pending and where no proceedings are pending - no power to transfer cases from other court to its court - court can transfer its case to another court - factors to be considered when transferring cases to another court where there are no pending proceedings - a Magistrate does not have powers to make an order for transfer of its case to another court if the other court has already made an order for transfer to that Magistrate.

Legislation:

1. Family Law Act No. 18 of 2003 ("FLA"): s. 2 (1).
2. Family Law Rules 2005 ("FLR"): Rules 5.15 and 5.16.

1. The husband had applied for a transfer of his case to Nasinu Court on the basis there was a pending case in Nasinu regarding spousal maintenance. The application was made in 2014.

2. In May the Court refused the husband's application on the grounds that interest of justice demanded that the matter be heard in Lautoka Court. The Court found that the husband was working for the armed forces, had a vehicle, had Messrs Q.B. Bale & Associates as his counsel indicating that he had means to pay for his private lawyer and could travel to Lautoka from Nasinu. On the other hand the wife lived in Hart in the western division- and engaged in housekeeping duties. She could not afford a lawyer and had services of Legal Aid for assistance. She did not have means to travel to Nasinu.

3. In refusing the transfer the Court ordered that the Nasinu case be transferred to Lautoka Court.

4. Aggrieved with the orders, the husband appealed on the grounds that:

1. The court erred in fact and in law in refusing the application for transfer of the Lautoka Case to Family Division of the Magistrates' Court Nasinu without considering the evidence of the evidence of the parties that:

(i) The property of the parties to the marriage was located in Nasinu and within the jurisdiction of the Nasinu Magistrates' Court.

(ii) There was an already existing case that had dealt with the dissolution of marriage and a pending maintenance application.

(iii) The wife was residing within vicinity whilst the Nasinu case was on foot and she subsequently moved to Lautoka when the proceedings were on foot.

(iv) The husband resides in Nasinu.

2. The Court erred in fact and in law when he directed that the Nasinu case be transferred to Lautoka Court after taking into account irrelevant considerations.

3. The Court erred in law when it stated that it matters not that the property is located in Nasinu.

5. I will first of all deal with the issue of ordering transfer of Nasinu file to Lautoka Court.

6. Under s. 28(2) of the FLA, a court does not have powers to order transfer of cases in other court to its court. It only has powers to transfer its case to other courts. S. 28 (2) is very clear. It reads that:

28(2) If-

(a) there are pending in a court proceedings which have been instituted under this Act or

are being continued in accordance with section 4; and

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

7. There is a legal rationale behind the legal position. If a court was permitted to transfer other courts cases to its court then whilst a court is seized with a matter another court may interfere and get the matters transferred to its court. There will be chaos in case management and no particular court will have control of its proceedings as it will be open to interference by other court.

8. In that regard the Court had fallen in error of law when it misinterpreted s. 28 to be granting it powers to transfer cases from other court to its court. That order of transfer is to be set aside but the matter must not be sent back to Nasinu Court because on 24 September 2014 the Nasinu Court had, before this application for transfer was heard already transferred the matter to Lautoka Court and such there were no pending proceedings in Nasinu Court.

9. There is no appeal against the decision of the Nasinu Court challenging the transfer orders made by the Court so even if the appellant is successful in this appeal, the orders of the Nasinu Court will remain and will have to be complied with until turned on appeal.

10. The Lautoka court could exercise its powers to transfer its case to Nasinu Court prior to the Nasinu Court transferring its case to Lautoka Court. If the Lautoka Court transferred its case to Nasinu Court subsequent to the transfer by Nasinu Court then the second transfer would be in contradiction of the first transfer and amount to a setting aside of the first transfer which powers the Lautoka Magistrate did not have.

11. s. 29 of the FLA states that Courts having jurisdiction under the Act must severally act in aid of and be auxiliary to each other in all matters under this Act. If the Lautoka Court did not put in effect the order for transfer by the Nasinu Court and circumvented the same by ordering the case before it to Nasinu Court, it would be in breach of its powers and jurisdiction and s. 29 of the FLA.

12. On the basis that the Nasinu Court had already transferred the matter, I find that the Lautoka Court did not have powers to make a second order for transfer. It was for the appellant to have appealed the decision of the Nasinu Court.

13. The Court has powers to transfer its matter to another Court and in doing so it must have . That power is enshrined ins. 28(2) of the FLA and Rule 5.15 of the FLA. Rule 5.15 states that "a party who has filed an application or response in proceedings in a court exercising jurisdiction under the Act may, by an application in accordance with Form 12, filed in the filing registry, apply to have the proceedings heard in another court exercising jurisdiction under the Act".

14. Rule 5.16 sates what the court must have regard to in considering a transfer of the matter. The following must be considered:

- (a). the wishes of the parties;
- (b). whether proceedings in respect of an associated matter are pending in 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 proceedings is not transferred;
- (d). whether the 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.

15. The Court definitely considered the wishes of the parties and whether there were any pending cases in Nasinu. It stated that the parties had different positions in that each wanted the matter to be heard in the jurisdiction they lived in and that there was no evidence of what matter was pending in Nasinu Court.

16. The Court then went to consider the convenience of the parties and proceeded to make a determination that the appellant was in financially stronger position to be able to come to Lautoka whilst it would be difficult for the wife to attend to Nasinu Court. She was living in Hart and earning income in the lowest bracket. Her means was less stronger than the husband's.

17. The Court also found that the wife could not afford a private lawyer when the husband could and that itself was indication enough of the husband's ability financially to be able to travel to Lautoka. There was no evidence before the Court that the husband's lawyers had undertaken the brief for pro - bono.

18. Based on the limited facts presented to the Court by way of the affidavit evidence the Court came to a correct finding that it was convenient that the matter be heard in Lautoka Court as on the balance of convenience it was appropriate that such an order be made.

19. I do not find any facts that would justify me intervening with the orders of the Court.

20. I must also state that the husband's submission that the property which was the subject of dispute in Lautoka Court was located in Nasinu has no bearing in the transfer application.

21. Any Court can hear property claims of parties located in any jurisdiction. If that were not the case then parties with properties in various jurisdiction will have to file various applications in different jurisdiction to get a distribution or alteration of interest.

22. Apart from the ground of appeal challenging the decision of the Court transferring the Nasinu case to Lautoka Court, there are no merits in any one of the grounds raised and I shall dismiss the appeal.

23. The orders of the Court are affirmed except that the order transferring the Nasinu case to Lautoka Court is set aside. However, the matter must still be heard by the Lautoka Court based on the transfer orders of the Nasinu Court.

24. Each party must bear their own costs of e appeal.

Anjala Wati

Judge

18.08.2015

To:

1. Saumatua Bale & Faktaufon Lawyers for the Appellant .
2. Legal Aid Commission for the Respondent.
3. File:14/Ltk/0009.