

PAUL V. PRAMITI - FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 14/Ltk/0007

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER: 14/Ltk/0007

(Original Case Number: 11/Nan/0295)

BETWEEN: PAUL

APPELLANT

AND: PRAMITI

RESPONDENT

Appearances: Mr. R. Singh for the Appellant.

Ms. Naidu for the Respondent.

Date/Place of Judgment: Friday 21 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 persons is purely coincidental.

Anonymised Case Citation: Paul v.Pramiti - Fiji Family High Court Appeal Case Number: 14/Ltk/0007.

JUDGMENT

Catchwords:

FAMILY LAW - EXCLUSIVE OCCUPATION OF MATRIMONIAL HOME - order is an injunctive relief - discretionary remedy- the discretion in granting the order will only be exercised if the situation of the parties is such that it would not be reasonable, sensible or practicable to expect the parties to continue to remain in the home together -factors to be considered: **m1;ans** and needs of parties; the needs of the children; the hardship to either party or the children; and where it is relevant, the conduct of the parties.

Cases:

1. MG & JGG [2004] FMCAfam 300.
2. Toomey & Toomey [2008] FMCAfam 654.

Legislation:

1. Family Law Act No.18 of 2003 ("FLA"): S. 202(1)(e)

Cause

1. The wife appeals against the orders of the Magistrates Court of 26 March 2014, made pursuant to the husband's application for the wife to give vacant possession of the parties' residential home.

2. The terms of the orders were:

1. The wife must vacate the subject premises after 60 clear days from the date of the order until the final determination of the application for property distribution.
2. The husband to fully mete out the costs incurred and incidental to the wife's relocation.
3. The wife to live in a rented apartment and the husband is to pay the monthly rental to a maximum of \$500 per month until the final outcome of the property division. This figure of \$500 was fixed taking into account the economic conditions of the country prevailing at the time of the order
4. The husband to also pay just and reasonable incidental costs of such renting such as rental advance, deposits for key, and reasonable cost of furnishing of the flat if it is not a furnished flat.

3. On 26 May 2014, on the wife's application, I had granted an interim stay of the orders of the Court pending the hearing and determination of the stay application. The application for stay was heard and before it could be determined, the main appeal was ready for hearing.

4. The parties were heard on the appeal and it was agreed that the decision on the main appeal will sufficient for the stay application.

5. The main cause in regards the property of the parties to the marriage is an application by the wife for distribution which was still pending at the time the appeal was heard.

Magistrates' Courts Findings

6. In arriving at its determination, the Court, based on two case authorities of **Toomey & Toomey [2008] FMCAfam 654** and **MG & JGG [2004] FMCAfam 300**, found that four principal factors guide the grant of an application for exclusive possession of matrimonial home;

1. The means and need of the parties.
2. The needs of the children.
3. The hardship of either party or the children.
4. Where it is relevant, the conduct of the parties.

7. The first aspect the Court ascertained was whether it should exercise its discretion in granting exclusive occupation of the home to one party and for that it considered whether it would not be reasonable or sensible or practicable to expect them to continue to remain in the home together. The Court stated that both the parties had submitted that it was not reasonable or sensible or practicable for them to live together and that one party had to move out of the house. The Court then identified that indeed there was tension and feud to an extent that an order for exclusive possession was warranted.

8. To consider who was to grant exclusive possession to the other, the four factors identified above were assessed.

9. On the question of the means and needs of the parties, the Court found that although the wife's financial situation is weaker than the husband's, the need for the husband to have the residential home was greater in that he was using the residential premises for use of business items and was maintaining the house and the expenses associated with it from the business monies which was controlled and managed by him.

10. The Court stated that it need not go into the factor of needs of children as the two children of the marriage were grown up and employed. Neither party had any issue that the children stay with them.

11. On the issue of hardship to either party, the Court remarked that since this is the residence of both parties, either of them would face the hardship of leaving the property but that appropriate orders could remedy the situation. It was necessary that the husband maintains the house by living in it and paying for the expenses of the same so that the value of the property is not depleted for the distribution purposes.

12. On the final factor of conduct of the parties, the Court found that there are allegations against each party for improper conduct. The allegations against the wife amongst many others include making threats to husband's life, removing business documents from the home which was found in the possession of the wife without a plausible reason how it went in her possession, and harassing the maids.

13. The allegations against the husband was of securing premises to deny or shut the wife from access to the home, and making the wife's life miserable by making numerous unfettered allegations against her.

14. Having assessed the factors the Court found that it was proper and just for the husband to occupy the home but since the wife had limited financial means, the husband was to cater for the new residence for the wife and its incidental expenses. The Court then arrived at the orders it did.

Grounds of Appeal

15. Aggrieved with the orders, the husband appealed on the grounds that the court erred in law and in fact:

1. In ordering the wife to vacate the property.
2. In making the orders for eviction against the wife when the husband owns and is in control of the majority of the property of the parties to the marriage including the business and the wealth from it which is solely controlled by him.
3. In holding that the orders for eviction will not render the wife homeless.

4. In holding that the husband would face hardships in managing and maintaining the premises if he is ordered to vacate the home when no evidence was fed of this fact.

5. In taking into account disputed conduct of the parties.

Submissions

16. Mr. Singh, counsel for the appellant correctly outlined the law that must be given regard to when considering an application for exclusive possession of matrimonial home.

17. Grounds 1 and 2 were argued together. Mr. Singh averred that it was very clear from the finding of the Court that it was the wife who did not have any financial means except for the \$200 per week maintenance that she was getting and to deprive her from the use and occupancy of the matrimonial home was unfair in all the circumstances. The husband had control of the family business and had sufficient wealth to be able to buy a vehicle worth of \$125,000. With this kind of wealth it was the husband who ought to have moved out of the house.

18. The wife was denied employment by the husband at the family business which employment she held before the acrimony between the parties. She did not have access to business and the home as the husband has changed the security locks of the house. She was deprived from the business assets and now the matrimonial home.

19. In respect of ground 3, Mr. Singh argued that the husband was found to have the means to provide a different flat for the wife to rent at a maximum of \$500 a month. If the husband has the means, he could have used the same money to find a flat for himself. In this way the wife will not be deprived of any safety and security too. The husband will not be rendered homeless as he will be arranging for a flat that is suitable to his needs and wants.

20. In respect of ground 4, the Court did not explain how the husband would face difficulty in maintaining the matrimonial home if he is asked to move out. If the matter is in respect of payment of the debt on the house, he will simply have to do it from the business monies that he has control of. He need not remain on the property to pay the monies. If there is physical maintenance that needs to be done to the property then it can be done by servants and agents. The husband need not physically carry out the maintenance.

21. Mr. Singh argued that the order was not justified in the circumstances of the case.

22. In opposition, Ms. Naidu argued that ground 1 is an incomplete ground of appeal. It is not stated as to what is the error of law of fact that the Court made. Specific arguments cannot be entertained under this ground as there will be prejudice to the respondent.

23. In respect of ground 21 Ms. Naidu argued that there is no error in granting eviction orders against the wife as she is the recipient of weekly maintenance of \$200. The husband is a sole trader and all his expenses are met from his business. The husband also carried out mortgage repayments. The husband does not have substantial wealth as claimed as he has liabilities as well to manage.

24. On ground 3, it was argued that there was sufficient evidence to show why the husband wanted the wife out of the property and that was sufficient evidence before the court to make a finding in his favour.

25. On Ground 4 and 5 it was submitted that the Court did not take into account the disputed conduct of the parties. It relied on the affidavit evidence and where the evidence was contested the Court did not give any weight to it. In that regard only the undisputed evidence was relied on and a finding made. Factually therefore there is no error. The facts were then analysed in light of the legal principles before an answer was arrived at and so the finding is justified on the facts and the law.

Law and Analysis

26. The statutory powers and provisions to grant an order for exclusive possession of a matrimonial home is enshrined in s. 202(1)(e) of the FLA.

27. An order for exclusive possession of a matrimonial home is an injunctive relief and therefore discretionary. For an order for exclusive possession to be made, it has to be shown that it would not be reasonable or sensible or practicable to expect the parties to continue to remain in the home together: **Toomey & Toomey [2008] FMCAfam 654**.

28. In order to determine which person is to get the exclusive possession of the home, the Court normally considers four principal factors. The principles are outlined in many authorities, one of which is **MG & JGG [2004] FMCAfam 300**: At paragraph 18 it was said:

"... it seems that there are four factors that a court would usually have regard to when determining applications for exclusive occupation. These include the means and needs of the parties, the needs of the children, the hardship of either party or the children and, where it is relevant, the conduct of the parties. Depending on the circumstances of the family, different factors will weigh different weight. There is therefore no onus on an applicant for an order for exclusive occupation to demonstrate irrational; or awful behavior by the party who it is sought to exclude. The court will examine the entire families' circumstances and determine, whether on the facts of the particular case an order is warranted. Essentially, the court must ensure that any order is proper and that in each case it delivers individual justice".

29. I will first deal with the aspect of the necessity of an order for exclusive possession before I deal with the main grounds of appeal. There was an order made on 16 May 2012 restraining each from interfering with the peaceful enjoyment and occupation of the matrimonial home of the other party. That was the first step that the Court invoked so that each party could have the benefit of the matrimonial home.

30. Despite the grant of restraining orders, the feud between the parties continues. It has come to a stage that the husband allegedly fears for his safety and the wife is allegedly denied access to the premises. With all that there is alleged constant interference and mental anguish to both at the hands of the other. Each claims that they have lost the peace and security of quiet enjoyment. Who is to be blamed for all this is not the issue to be decided. What needs to be established is that the situation between the parties is such that it is not reasonable or sensible or practicable to expect them to continue to remain in the home together.

31. There was no dispute by the parties that exclusive possession was warranted and that the Court had to determine who was to give possession.

32. On the evidence that was presented to the Court, I do not find that the Court erred in deciding that exclusive possession was warranted. The alleged conduct of the parties indicates that their living together is not reasonable.

33. I find that the Court applied the correct legal guidelines in determining the application. It is for me to however find on the appeal whether the Court applied the facts correctly to arrive at a just and fair result. In that regard, I will deal with the grounds of appeal generally.

34. The factor which influenced the decision of the Court was the means and needs of the parties. Whilst it was found that the wife did not have the means to find a house of her own because she was dependent on the spousal maintenance of \$200 per week, the husband needed the house to maintain it, pay the utility bills and keep the business documents and items in the same.

35. The wife was all the time employed at the family business. When the acrimony between the parties developed, she was terminated from the employment and deprived of income from employment. She then did not have any employment from where she could survive. Her only hope became the maintenance that she received in the sum of \$200 per week and a safe and secure home. There is no order to guarantee automatic deductions for maintenance. There have been instances of default in payment of maintenance. The Court record shows issuance of judgment debtor summons as well. The wife had to basically get her lawyers to write and remind the husband about his obligation and debt and request for the money to be paid. The husband says that at times he defaulted because income from his business was not good to keep up with the payments.

36. Having deprived the wife of any employment, the husband now seeks to exclude her from the home. It is crystal clear on the facts of the case that she does not have the ability to find a rented apartment for herself and if she complies with the order to rent a flat out, the cogency of the order is under scrutiny. The initial movement of the wife as per the order is guaranteed but she does not have the continuous flow of money in the form of income to sustain the rental apartments. There is definitely an order for the husband to pay the rent and the incidental expenses but there is no certainty that this order will ensure her a continued uninterrupted accommodation given his previous defaults.

37. There is likelihood that there will not be a proper accommodation to the standard of living that the wife has enjoyed so far at the rate of \$500 and a continued sustenance from the husband without default. One default in payment would see the wife lose the rented apartment and by the time she brings the enforcement proceedings, damage would have already been caused.

38. The husband claims that his business income is not so well and that he is paying a lot of debt. On his own evidence, he created a probability that there could be defaults in payment of the rental monies. The wife cannot then negotiate a continued occupation of the house from the landlord as the degree of certainty of the time for payment of the rental arrears cannot be guaranteed by her.

39. The order in its current form does not secure the position of the wife until the determination of the property distribution case.

40. I find that the Court had improperly attached a lot of weight for the need of the husband to maintain the property. It said that the husband needed the property for use of business documents and for its maintenance and payment of bills. I must say that payment of debt and bills of the house does not require a person to be physically present in the house. The house can still be paid for its debt even though the husband does not occupy the same. He can pay the utility bills even though the husband does not occupy the same. He can use his new premises to store the business documents.

41. If the husband rents out, he will have the control of income to guarantee his accommodation and not allow it to collapse. The same cannot be assured by the current order if the wife is to rent the premises and the husband is to pay.

42. The husband says that he needs a safe home to live in as he brings income from his business and keeps at home. He needs a place in the vicinity of his business.

43. The need for safety and security is equally there for the wife as well. She also needs a safe place for accommodation. Whether the rented apartment will give her the same security and safety that she has enjoyed so far is not guaranteed. However the husband can always, with his means, find an equally safe and close accommodation for himself. He may well have to pay something beyond \$500 if he needs a secured home. and I find that he is financially better off to ensure that for himself than do it for the wife on the terms of the current order.

44. Indisputably, the husband can give away sums like \$125,000 in charity. He has offshore accounts where he keeps money generated from the business. He has control of the family business. With his means from various shops he has, he can also secure the amenities that he likes in the new accommodation. The same cannot be said for the wife.

45. The husband has the ability to pay the house debt and the expenses of the house. If he needs to maintain the house to avoid the asset from depleting, he is always at liberty to do so but all that can be done even if he does not occupy the property.

46. On the facts of the case, I find an order to exclude the wife from the matrimonial home was irrational and not justified.

Final Analysis

47. In the final analysis I find that the facts of the case does not support that the husband should have exclusive possession of the home but that the wife must have exclusive possession of the home.

48. I therefore allow the appeal and make the following orders in lieu:

(a). The wife to have exclusive occupation of the property and the children are permitted to occupy the same as well if they so wish.

(b). The husband is to find a suitable accommodation for himself within 2 months from the date of the order. He should vacate the premises by 1 November 2015.

(c). The debt on the subject house and other charges on the house like rates and taxes must be paid by the husband.

(d). The husband is at liberty to remove his personal and business items from the house.

(e). The furniture and fixtures and the improvements on the land must not be interfered with by any party.

(f). These orders are until the determination of the final property application claim.

49. Each party must bear their own costs of the appeal proceedings.

Anjala Wati

Judge

21.08.2015

To:

1. Messrs Patel & Sharma for the Appellant.

2. Messrs Sherani & Company for the Respondent.

3. File: 14/ Ltk/0007.