IN THE FAMILY DIVISION OF THE HIGH COURT	
CASE NUMBER:	**19/Lab/ 0004**
BETWEEN:	**ANITA**
AND:	**STEVEN**
Appearances:	Mr. R. Raj for the Appellant. Mr. A. Sen for the Respondent.
Date/Place of judgment:	Wednesday 23 October 2020 at Labasa
Judgment of:	Hon. Mr. Justice Javed Mansoor.
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:	ANITA v. STEVEN - Fiji Family High Court Appeal Case Number: 19/Lab/0004

JUDGMENT OF THE COURT

Catchwords

Legislation

1. *Family Law Act No. 18 of 2003 ("FLA"):ss, 86(1), 91 (1) (b).*

FAMILY LAW: APPEAL Distribution of property – Factors to be considered by court – Relevance of child maintenance to property distribution – Native lease – Burden of proof – Sections 154, 161, 162, 163 & 166 of the Family Law Act 2003

The following cases are referred to in this judgment:

a. *Mohini Lata v Davendra Prasad 17/ Suv/ 0416*
b. *Akshay v Romika [2012] FJHCFD 3; Family Appeal 0498/ Ltk/ 2008 (17 February 2012)*
c. *Kesaia v Mukthar [2012] FJHCFD 3; Family Appeal 0498/ Ba/ 2008 (17 February 2012)*
d. *Salesh v Zoe Family Appeal 15/Suv/0015 (anonymised)*

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1. The appellant and the respondent were married and have two teenage children who are attending school. They separated in May 2016 ostensibly after the respondent, the husband, was issued with a domestic violence restraining order (DVRO). Subsequently, the marriage was dissolved. The children, a boy and a girl, are in the custody of their mother, the appellant.

2. The proceeding under consideration began on 7 June 2016, when the respondent filed an application seeking custody and access of the children and an order for the distribution of property. He also sought to restrain the appellant from disposing the property. By order dated 10 June 2016, the hon. resident magistrate ("the magistrate") granted an interim injunction directing the respondent to refrain from disposing the matrimonial property listed in form 9 until the determination of the matters before the court.

3. On 17 July 2017, the magistrate granted custody of the two children to the appellant with reasonable access given to the respondent. By an interim order of the same date the respondent was ordered to make payment of $25.00 per week for both children. Both those orders – on access and payment of maintenance – were by consent.

4. The current contention concerns the distribution of property, relating to which the Magistrate Court of Labasa made an order on 15 April 2019, which is under appeal.

5. In this regard an order made previously by the magistrate merits mention. On 15 June 2017, the magistrate ruled that the native lease No. ***** of Lot Y of the 123 Division was part of the property acquired by the parties during the marriage. In the course of his ruling on that day, the magistrate stated that the

matter of the native lease would be covered in the judgment. He made a fleeting reference to this in his judgment of 15 April 2019 stating that the court had ruled that the native lease is part of the matrimonial properties.

6. The respondent, in his application, estimated the value of the native lease at $90,000.00, but this was not supported by a proper valuation. The rest of the properties listed by the respondent were valued at $32,384.00. The appellant also did not provide a valuation of those properties. There is no dispute that the properties listed by the respondent were acquired during their marriage. The lease was registered with the registrar of titles in favour of the respondent on 4 August 2005, as were the mortgage in favour of the housing authority and the charge on the respondent's funds in the Fiji National Provident Fund Board (FNPF). Collectively, these properties are referred to as "matrimonial properties" by the magistrate in his judgment (a reference presumably to what is referred to as the "property of the parties to a marriage" in sections 161, 162 & 163 of the Family Law Act).

7. When the case was mentioned on 19 February 2020, and the parties were asked to tender submissions on a clarification sought by this court in regard to the native lease in view of sections 154 and 166 of the Family Law Act, the appellant filed submissions. The term "property of a party" in section 154 does not include any interest of the party in real or leasehold property that is inalienable. Section 166 provides that nothing in the Family Law Act allows a court to make an order alienating iTaukei land[1] or any legal or equitable interest in it.

8. When this matter was mentioned on 11 March 2020, Mr. Sen appeared on behalf of the respondent and submitted that the magistrate after correctly considering the legal status of the native lease had justly and equitably decided the manner of distribution of the property. Having considered the matter, it appears to me that the magistrate's ruling in adding the native lease to the pool of assets seems to be correctly made.

[1] "iTukei land" has the meaning given to it by section 2 of the iTaukei Lands Act 1905 and includes land administered or regulated under the Banaban Lands Act 1965 and the Rotuma Lands Act 1959.

9. The respondent relied on the decision of Wati, J in *Mohini Lata v Davendra Prasad*[2].

10. In terms of the magistrate's decision dated 15 April 2019 concerning the distribution of property, the appellant would be allowed to keep all the "matrimonial properties" (the native lease was ruled as part of the matrimonial properties on 15 June 2017) and pay half share of the value of the property to the respondent within two months from the date of the judgment, and the respondent was to sign the necessary documents if the arrangement was acceptable to the appellant; if the appellant was unable to do so within the given time frame, the matrimonial properties – as the magistrate calls them – were to be sold through auction or tender and the proceeds of the sale would be made available to the parties within a month of the sale. The reasoning of the magistrate is that in terms of section 162 (2), the parties to a marriage were presumed to have equally contributed and that such presumption was not rebutted in this instance. His finding was that there was no clear evidence on each party's contribution to the purchase of the matrimonial properties. He concluded that "justice requires the equal distribution of the matrimonial properties".

11. The appellant contended that the magistrate erred in coming to a finding that the respondent had equal right over the matrimonial property as she had contributed more than 50% towards such property. The appellant also complained that the magistrate had failed to consider that she was looking after the two children, and the respondent was paying only $25 a week as child maintenance. Moreover, the magistrate had failed to consider her difficulties in looking after the children in view of the order for equal distribution of the properties. The second and third grounds of appeal, which are not clearly formulated, seem to suggest that the magistrate failed to consider the low weekly maintenance payment in deciding the division of property. These were the three matters that constituted her grounds of appeal. The appellant sought a re-hearing before another magistrate.

12. The appellant argued that she contributed much more towards the acquisition and maintenance of the matrimonial property and, therefore, she was entitled to a larger share of the sale proceeds than the half share ordered by the

[2] 17/ Suv /0416; 11 September 2019

magistrate. It was contended that payment for the mortgage of the house was in arrears, and that the settlement of those sums imposed an additional burden on the appellant. The appellant pointed out that she was meeting all expenses related to her children, while the respondent was making a weekly payment of only $ 25 working out to $1.80 per day per child, and that this inadequate payment should have been considered when making the order on the distribution of property.

13. It is convenient to deal with the appellant's claim that the respondent's inadequate payment of child maintenance should have constituted a ground for consideration in the distribution of property, before considering the magistrate's order relating to property distribution.

14. The appellant made it clear at the hearing that she was dissatisfied with the weekly sum of $25 ordered as child maintenance on 17 July 2017. The appellant's counsel repeatedly emphasised that the payment was insufficient to maintain the children. That was understandable as section 162 (3) provides that the court must consider the maintenance orders that have been made when deciding on the question of property division.

15. However, it transpired at the inquiry that the magistrate had made a final order for enhanced maintenance. This was unexpectedly revealed after the respondent disclosed in court that there was such an order. Neither counsel seemed aware of this development until this disclosure because the order dated 24 June 2019 was made a few weeks after this appeal was ledged on 9 May 2019. The appellant, who was present in court, confirmed the existence of the enhancement order. It must be said that the appellant was obliged to have brought the enhancement order to the notice of the court through her counsel, as much was made of the lesser interim payment. As the final maintenance order was not available for the court's perusal at the hearing, the parties were directed to tender it to the registry, and I have perused the order.

16. In the order dated 24 June 2019 for child maintenance, the resident magistrate observed that one child had turned 18 and the interim payment in respect of that child lapsed on 11 June 2019. The magistrate ordered the respondent to pay the appellant a sum of $240 a month in child maintenance for the second

child, who was 11 years at the time the magistrate made the final order of maintenance.

17. With this revelation, the appellant's second and third grounds of appeal that the magistrate had not considered the relatively small payment of child maintenance when making the property distribution order weakens. The lesser sum was an interim payment which was made final after an upward revision. This must ease somewhat the appellant's financial burden. It is not clear as to why it took nearly two years for the interim payment to be made final. As the appeal does not directly relate to the orders on child maintenance and there being finality to the interim maintenance order by an enhancement after the filing of the appeal, no further comment needs to be made on the matter.

18. The manner of distributing property is provided by sections 161, 162 and 163 of the Family Law Act. The Court must identify the relevant properties, ensure their proper valuation and exercise the court's discretion in terms of the statutory provisions. The factors to be taken into account by court in making an order with respect to the property of the parties is set out by section 162 of the Family Law Act[3]. Section 162 (2) of the Act states that the contribution of the parties to a marriage is presumed to be equal, but the presumption may be rebutted if a court considers a finding of equal contribution is on the facts of the case repugnant to justice (a marriage of short duration is the example provided by the legislature). The assets brought into the marriage as well as the income earned during the subsistence of the marriage are relevant factors to be considered. It is possible that such income is used to acquire, maintain or improve the properties that should be brought into the common pool of assets.

19. The respondent submitted that the house was purchased for $30,000 and that he had paid a sum of $7,544 towards settlement of the mortgage. The native lease was registered under the names of both, the respondent and the appellant. This is confirmed by the extract from the registrar of titles which shows that the transfer to the parties, the mortgage and the charge created in favour of the Fiji National Provident Fund were registered on 4 August 2005. The respondent stated that he had been making payments for the property from 2005 until he was issued with the DVRO in July 2015. According to the

[3] Family Law Act 2003

respondent that as at 30 June 2017, there were arrears of $375.38 and a balance due of $16,660.45 on the mortgage. These sums are not disputed.

20. The appellant, in her evidence, did not deny the payment made through the respondent's FNPF account. However, the respondent refused to concede that the appellant contributed either through her FNPF account or through a loan taken from her employer. When cross examined on these matters the appellant asked for more time to furnish proof. She didn't help her cause by that omission, and the magistrate cannot be faulted for not considering those claimed contributions. The burden of producing evidence to substantiate her claims was upon the appellant.

21. The respondent, in his testimony to the magistrate, stated that all expenses for the house and the children were continued to be borne by him. He stated that the appellant was taking care of the food and living expenses at a certain time when he was making the mortgage payments. By taking care of such expenses the appellant facilitated mortgage payments to be made by the respondent. That is a relevant indirect contribution by the appellant for the purpose of making a property distribution order.

22. Financial contributions are not the only means of contribution approved by law. The appellant testified that she looked after and maintained the house. The respondent did not seriously challenge this claim. The appellant's contribution to the welfare of the family, by looking after the children, was not denied. The presumption of equal contribution takes into account the impact that a woman could make to the welfare of a family even though that cannot be quantified. The court must also pay heed to possible future events.

23. The approach to be taken in the distribution of property has been laid down in several judgments of Wati, J. *Chetty v Desley*[4], *Rajshri v Mahir*[5], *Mohini Lata v Davendra Prasad*[6]are all instructive in understanding, interpreting and giving effect to the statutory prescription on the distribution of property acquired during the marriage. These authorities have detailed the steps that need to be followed in order to make a proper assessment of the financial, non- financial,

[4] [2020] FJHCFD 10; Family Appeal 0015 Suv of 2015 (19 May 2020)
[5] [2020] FJHCFD 26; Family Appeal 0017 Suv of 2017 (31 July 2020)
[6] 17/ Suv/ 0416 (11 September 2019)

direct and indirect contributions of the parties. The judgment of the magistrate makes no reference to these principles, possibly due to insufficient material before court. A reference to the applicable statutory provisions and the principles, however, sheds clarity to the process of property division.

24. The original court is best positioned to hear the evidence of the parties, identify the property of the parties of the marriage, ascribe values to such property and assess the contributions of the parties in accordance with the statutory provisions of the Act. It is common ground that the property in question was acquired during the marriage of the parties and thus qualifies to be included in the pool of assets to be distributed. The dispute relates to the proportion of distribution. As pointed out by the magistrate the evidence does not provide the clearest picture as to the respective financial contributions, and the limitation in the evidence has hampered the magistrate in making his findings.

25. I have come to the conclusion, in view of the paucity of evidence, the appellant must be considered to have not discharged the burden of proving her case before the magistrate. Consequently, the appeal must be dismissed.

ORDER

A. The appeal is dismissed.

B. The appellant is directed to pay the respondent $1000 costs summarily assessed within 14 days of this judgment.

Delivered at **Labasa** this **23rd** day of **October, 2020**

M. Javed Mansoor
Judge