

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

**ORIGINAL JURISDICTION**

<b><u>ACTION NUMBER:</u></b>	<b>CASE NUMBER 2017/SUV/0461</b>
<b><u>BETWEEN:</u></b>	<b>MANISHA</b>  <b>APPLICANT</b>
<b><u>AND:</u></b>	<b>DHARMA</b>  <b>RESPONDENT</b>
<b><u>Appearances:</u></b>	<i>Mr. Amrit Sen for the Applicant.</i>  <i>Mr. P. Kumar for the Respondent.</i>
<b><u>Date/Place of Judgment:</u></b>	<i>Thursday 12 December 2024 at Suva.</i>
<b><u>Coram:</u></b>	<i>Hon. Madam Justice Anjala Wati.</i>
<b><u>Category:</u></b>	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>

**RULING**

**A. Catchwords:**

***FAMILY LAW – PROPERTY DISTRIBUTION – APPLICATION FOR ENFORCEMENT OF ORDERS – non-compliance of orders by the husband for 5 years post trial judgment – there is no appeal pending against the trial judgment – it is unfair and unjust to allow the orders to lay dormant – the wife has been precluded from enjoying the fruits of the judgment - enforcement orders granted.***

**B. Legislation:**

- 1. *Family Law Act 2003 (“FLA”): s. 194(1).***

**Cause**

1. After a trial proper, on the wife's application for property distribution, I had made the following final orders:-

- “(a). That the husband shall pay to the wife her share in the residential home in the sum of \$97,000 within 3 months of the date of the order. Upon payment of these sums, the wife shall transfer the property in the husband's name exclusively.*
- (b). If any extension of time is needed for payment of the monies in paragraph (a) above, then the husband is entitled to one extension of one month upon a satisfactory application to the Court. No such extension shall be granted unless the Court is satisfied that proper financial arrangements are being made by the husband.*
- (c). If no such payments are made within the time limits prescribed by para. (a) above or any extension granted under para. (b) above, the wife is at liberty to sell the property to a purchaser at a price not below \$195,000.*
- (d). If the property is to be sold, then the costs of the sale not exceeding the sum of \$3,000 is to be deducted from the sale price. Any further sums incurred for selling of the house is to be borne by the parties equally and not to be deducted from the sale price. In this regard, I have already taken account of the fact that a sum of \$500 has been discounted from the wife's share in the residential home as realization costs.*
- (e). If the sale is on foot and the husband refuses to sign any documents including transfer of the property and any statutory requirements like consent then the same should be signed by the Registrar or the Assistant Registrar of the Family Court.*
- (f). Any statutory liability arising from the sale of the property which falls under the responsibility of the vendors is to be paid from the proceeds of the sale.*
- (g). The husband is to pay to the wife \$1,500 as her share in the vehicle. If the same is not paid within a month then the husband is to sell the same within 14 days after the time for payment of \$1,500 has lapsed, at a price not less than \$3,000, and divide the proceeds equally between the parties.*

- (h). *If the husband does not pay to the wife her share of \$1,500 within a month of the order or the proceeds of the sale within 14 days of the expiration of a month from the date of this order, the wife is at liberty to have the vehicle transferred in her name in order to be able to sell the same at the market value and divide the same equally between the parties. The Registrar of the Court is to sign the order for transfer of the vehicle in the wife's name.*
- (i). *The husband is ordered to pay to the wife \$3,500 for her share in the household items. These monies are to be paid within 3 months of the date of the order. If the monies are not paid then the wife is at liberty to enforce the same through the standard enforcement procedures.*
- (j). *The husband is to pay to the wife a further sum of \$6,500 being her share of the rental proceeds for the two years post separation. These sums are to be paid within 3 months. Standard enforcement procedures may apply for recovery of any such monies."*
2. The trial judgment was delivered on 11 September 2019. The husband has since then failed to comply with the orders of the Court. It is now 5 years that he has neglected and refused to comply with the said orders.
3. The wife therefore filed an application seeking that:-
- (a) *The husband transfers his undivided half share in the property to the wife in the sum of \$97,500.*
- (b) *The wife be entitled to deduct a sum of \$19,500 from the \$97,500 being her share of the rental proceeds post the trial judgment.*
- (c) *The wife be entitled to deduct all rent rates and utility costs incurred by the husband on the said property.*
- (d) *The wife be at liberty to uplift the original title from the BSP Bank and obtain the discharge of the mortgage.*

(e) *The husband be ordered to execute all transfer documents of the property to the wife and if he refuses, the Registrar or the Deputy Registrar of the Family Division of the High Court to execute the said documents.*

(f) *The wife be entitled to obtain a discharge of the FNPF charge on the said lease and for the husband to pay all the discharge costs.*

(g) *The Registrar or the Deputy Registrar execute all the documents necessary to obtain consent for transfer and all incidental documents thereto for transfer of the husband's undivided share.*

(h) *The husband to give vacant possession of the lease to the wife.*

### ***The Response***

4. The husband's position is:-

(1) *That he be allowed to purchase the wife's share for the sum of \$97,000.*

(2) *That the original judgment does not order for payment of \$19,500 as rental monies to the wife or for the husband to pay all arrears of rent, rates and utility costs incurred by the husband for the past 5 years or for the wife to be able to uplift the original lease from the bank. This court is therefore functus and cannot grant the orders sought.*

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

5. I will turn to each orders sought by the wife. The first one is that the husband transfers his undivided half share in the property to the wife in the sum of \$97,500.

6. At the time of the trial judgment, I had considered whether the husband should pay the wife her share of \$97,500 by selling the residential home or by buying her share. I had given him the opportunity to buy the wife's share and for him to live on the property. I had sound reasons to give him that benefit. I said at paragraphs 78 to 80 of the trial judgment:

“(78) *For me to make a finding on whether the proposed orders are just and equitable, I have to identify generally the orders that are proposed to be made in the matter. I find that since the wife had gone away and earning a living in New Zealand, it is best for her to get her*

*shares in terms of monetary value from the properties. It is convenient that she be given her share then be asked to buy out the husband's share in the properties.*

(79) *It would be Draconian at this stage to order sale of the residential property since the wife's shares can be adequately compensated for by an order for payment of the monies. If her share is not paid, then only it is appropriate to order sale of the residential property.*

(80) *Since the property is worth \$195,000, I find that the wife's share in the same amounts to \$97,500. I will discount this to \$97,000. The \$500 is to be used as her share for raising loan for the property. There will be documentation costs involved in raising the loan for the house."*

7. The husband has not taken advantage of the benefit of protecting his right to continue to have a home for himself. It is now 5 years that the orders have not been complied with. The husband is also not able to show me that he has filed an appeal and that his appeal is progressing in the system.
8. 5 years is a very long time for the wife to wait for her share of the monies. The husband has refused and neglected to comply with the orders without any reasonable excuse.
9. I acknowledge that the husband had applied in my Court for a stay of execution of the orders. He was unsuccessful. After his application for stay of the execution of the orders were refused, the counsel for the wife wrote to the husband's counsel twice asking him to comply with the orders. The letters are dated 10 May 2023 and 17 May 2023.
10. Then on 23 May 2023, the husband offered to settle the judgment at a much lower rate which the wife rightfully refused. The wife counter offered to purchase the property which was not accepted.
11. Then the counsel for the wife advertised sale of the property in the Fiji Sun and Fiji Times.
12. Subsequently, on 16 June 2023, the counsel for the wife wrote to the counsel for the husband and stated that a person wanted to tender for the property but needed to inspect the property. It was indicated that the potential buyer and others will be inspecting the property on 17 June 2023 between 10am to 12pm. It was requested that the husband co-operate with the request.

13. The husband did not acknowledge or respond to the letter requesting inspection of the property.
14. It is the wife's position that without proper inspection of the property, the buyers will not tender for the property. The husband says that no one came to inspect the property. I find that if the husband wanted to co-operate, he would have written back to the wife's counsel and assured that he would allow the inspection and that there would not be any hindrance to the inspection of the property. He did not respond to the request for inspection. His omission indicates that he was not willing to co-operate. That is the safest conclusion that I can arrive at.
15. I do not have any doubt in my mind that the husband did not have any intention of executing the orders of the Court. He has only started making an effort when he was faced with the enforcement proceedings. He has provided evidence in his affidavit that he and his daughter have approached the bank to raise the loan to pay the wife her shares. He has also written another letter post the hearing of the enforcement proceedings indicating that he is willing to pay the wife her shares in the property together with an additional sum of \$19,500 being 50% of her share as rent derived on the property post the judgment date. I will take his co-operation as a position change in his difficult attitude.
16. In the original judgment, I had given the wife an opportunity to sell the property and take her shares. Her affidavit evidence clearly establishes that she attempted to sell the same as per the orders of the Court but she obviously faced difficulties. The husband is occupying the property and any potential buyer will not want to have occupiers on the property. It would be an additional expense for the new buyer to seek in Court an order for vacant possession. This discourages a lot of buyers. The new buyer would also want to inspect the property before buying it. With the husband currently occupying it, it is difficult to let any buyer examine and inspect the property to agree to buying it. These practical difficulties are created by the husband's presence on the property.
17. Since I had given the wife liberty to sell the property and she is not able to sell the same to any outsider, she can buy it herself. Buying the property herself amounts to selling the same under the original order. The husband is entitled to his share of \$97,500. From this amount, he is liable to pay an equal sum for the transfer costs.
18. It is only fair that if there are any unpaid utilities on the property then it should be paid by the husband. He should also be responsible for all outgoings such as rates and lease premium (if any) as at the date of transfer to the wife. He is occupying the property. If he had given the wife her share of the property

on time, he would have had the benefit of the house. He would still be liable to the payment of the utility bills and the outgoings on the property.

19. The husband's position is that the Court had not given these orders in the first instance and so it cannot modify the orders. I am not modifying the orders. The proceedings before me concerns enforcement of my earlier orders. An order for the husband to pay the outgoings on the property if the wife is to buy it, is an ancillary order to aid enforcement. It would not be any different if the same was sold to any outsider.
20. I find that since the husband has now shown a change in his attitude, he should be given some time to pay the wife her share in the property. I intend to allocate a very short time for this. It is fair that he be allocated time until 1 February 2025 to pay the wife her share. If he fails once again, the wife should then buy the property by transferring the same in her name exclusively and paying the husband his share of \$97,500 less 50% costs of the transfer and less all the unpaid outgoings on the property until the date of the transfer.
21. The next issue is that of the original lease. The lease is with the BSP Bank. Unless the original lease is given to the wife, the transfer process cannot be effected. If the husband fails to comply with the order on or before 1 February 2025, the wife should be at liberty to uplift the original lease from the BSP Bank. She should also at liberty to discharge the bank mortgage and the FNPF charge and the costs of both the discharges are to be shared equally by the parties.
22. The order for uplifting of the original lease and discharge of the mortgage and the FNPF charge are orders in aid of the enforcement orders. I am not functus in my powers. The proceedings before me is enforcement proceedings and the trial court has the powers to grant enforcement of its orders: *s. 194(1) of the FLA*.
23. The next issue is for the payment of the rental from the date of the judgment until date. In my trial judgment I had ordered the husband to pay to the wife \$6,500 being 50% rent for 2 years as at the trial date. I had ordered that standard enforcement procedures will apply for recovery of these monies.
24. The counsel for the wife is asking for another \$19,500 as the wife's share of rent for 5 years post trial judgment. It's now 5 years 3 months post trial judgment. At the time of the judgment, I had found that the minimum the property earned in rent was \$600 per month.

25. It is the husband who has delayed the settlement. He has to pay the wife rent at the rate of 50% which is \$300 per month. In his letter to the court, the husband agrees to pay this sum to the wife.
26. The wife's request for \$19,500 is not plucked out of air. She has a genuine basis to claim for a sum of \$19,500 in rent. This order is necessary in addition to the original orders as the husband refused to execute the orders and reduce his liability. He has chosen to incur on himself and the wife financial losses. He should be responsible for satisfying that loss.
27. The husband has chosen to blame the wife for executing the orders late. It is he who had filed for a stay of the judgment without proceeding with his appeal. After the stay application was refused, he still had not enforced the orders. It is over 1 ½ years since the stay was refused.
28. He is conveniently blaming the wife without admitting his fault. He says that he was sick and could not enforce the order. His medical sick sheet is only regarding his cataract surgery. That should not have precluded him from enforcing the orders for 1 ½ years post the stay judgment declining his application.
29. I find that the wife is entitled to the orders she is seeking to enforce her rights under the trial judgment but before that the husband should be given one last opportunity to show his genuineness in complying with the order.

***Final Enforcement Orders***

30. In the final analysis, I make the following orders:

*(1) The husband is to pay to the wife the following sums on or before 1 February 2025:*

- a. \$97,000 as her share in the residential home.*
- b. \$19,500 as 50% of her share in the rental income post the trial judgment until the date of this judgment.*



c. \$3,000 as costs of this proceedings.

(2) *The other orders in the trial judgment remains in effect and enforceable as prescribed.*

(3) *If the husband fails to comply with the orders in para. 30 (1) above by 1 February 2025, the following orders to then take effect on 2 February 2025:*

a. *The wife to buy the husband's share in the residential property at a sum of \$97,500.*

b. *The parties are to pay the costs of the transfer equally. The wife is to deduct the husband's share of costs from his entitlement of \$97,500.*

c. *The wife to deduct all the outstanding utility bills and other outgoings such as rates and lease as at the date of transfer from the husband's share of \$97,500.*

d. *The wife to deduct a further sum of \$19,500 as her share of rent collected by the husband from 11. 09. 2019 to 12. 12. 2024 from the husband's share of \$97,500.*

e. *The wife to uplift the original lease from the BSP Bank or from any other Bank, institution or person in possession of the said lease in respect of the property and have the Bank mortgage and FNPF charge discharged. The costs of both discharges (if any) is to be paid by the parties equally. The husband's share of costs is to be deducted from his entitlement of \$97,500.*

f. *If the husband, his counsel and or their agents have in their possession the original lease, then the same is to be deposited with the Registrar of the Family Court on 2 February 2025.*

g. *The Registrar or the Deputy Registrar of the Family Division of the High Court is to sign the transfer and any other documents necessary to enable transfer of the property to the wife exclusively.*

h. *The husband is to give to the wife vacant possession of the property immediately upon payment of his share.*

- i. *Any caveats registered on the property after the trial judgment on 11. 09. 2019 is to be removed by the Registrar of Titles.*
- j. *The wife shall have costs of this proceedings in the sum of \$3,000 to be paid within 14 days in absence of which the sum is to be deducted from the husband's share of \$97,500.*

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***Hon. Madam Justice Anjala Wati***

***12.12.2024***

**To:**

1. *Sen Lawyers for the Applicant.*
2. *Patrick Kumar Lawyers for the Respondent.*
3. *File: Family Case Number: 17/SUV/0416.*