

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 14/Suv/ 0008
(Original Case Number: 12/Nas/0300)

BETWEEN: BALA
APPELLANT

AND: PENINA
RESPONDENT

Appearances: Ms. S. Kunutuba for the Appellant.
Ms. B. Malimali for the Respondent.

Date/Place of Judgment: Monday 04 January 2016 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: BALA v. PENINA - Fiji Family High Court Appeal Case Number: 14/Suv/0008.

JUDGMENT

Catchwords:

FAMILY LAW - APPEAL - Alteration of interest in property- as a basic first step, property to be distributed not properly identified by Court- liabilities to be excluded not properly identified by Court - Registrar of court does not have powers to make findings of facts regarding pool of assets and proper liabilities to be excluded from the property- matter to be sent to Court for retrial on property distribution .

Legislation:

1. The Family Law Act No. 18 of 2003 ("FLA").
2. The Fiji National Provident Fund Decree 2011 (" FNPf Decree"); s 141 (2).

Cases:

AP v. NOH· [unreported] Fiji Family High Court Appeal Case Number: 13/Suv/0001.

Cause and Background

1. On 18 July 2013, on the wife's application, the Resident Magistrate ("RM") made the following orders for distribution of property:

(i) That all the matrimonial properties are to be valued separately and the valuation report to be obtained by the Deputy Registrar.

(ii) That all the liabilities and the debts on the property are to be settled before the distribution from the proceeds of the sale. Alternatively, one party can advance the payments for the settlement of the debts and this to be returned to the party from the proceeds.

(iii) The husband is then entitled to 70 % of the proceeds and the wife 30%.

(iv) The division of the moveable properties to be agreed by the parties and in absence of any agreement the same to be sold and divided as ordered by the Deputy Registrar ("DR").

(v) FNPF of the parties to be divided between them. The husband is entitled to 70% of the funds and the wife 30 %.

(vi) The matter to be referred to the DR to divide the property as ordered by the Court within 3 months.

2. Pursuant to the above orders, the DR undertook the exercise of division on 17 October 2013. She divided the property as follows:

(i) Household items to the husband and the hire purchase debts to be settled by the husband. This division was done by consent of the wife.

(ii) The husband and the wife were directed to return the taxi permits to the Land Transport Authority ("LTA") upon its expiry.

(iii) Vehicle 1 to be retained by the wife and the debt on the same in the sum of \$1,800 be paid by her. The taxi permit which was used on this vehicle being Taxi 1 is not to be distributed as the same had expired and was to be returned to the LTA.

(iv) Vehicle 2 to be retained by the wife. This property did not have any debts. The taxi permit which was used on this vehicle being Taxi 2 to be returned to the LTA as it had expired.

(v) Vehicle 3 which was to be purchased and a deposit of \$1,500 was paid by the wife was to be retained by the wife. The taxi permit on the said vehicle being Taxi 3 was to be returned to the LTA.

(vi) Taxi 4 was not registered under the wife's name so it was to be returned to the LTA.

(vii) Husband to retain Taxi 4.

(viii) Husband to retain Vehicle 4 and to pay the mechanical fees in the sum \$5,500.

(ix) The DR noted that since s. 141(2) of the FNPF Decree stated that FNPF is now not a property to be divided, the matter was to be referred to Court for further directions.

3. In effect, the four taxi permits were to be returned to the LTA. The husband was ordered by the DR to retain one taxi permit of Taxi 5.

4. During the appeal hearing it was agreed by Ms. Malimali that Taxi 5 is retained by the husband. The other permit being Taxi 6 was not given to any party by LTA and that the rest of the permits being Taxi 1, Taxi 2 and Taxi 3 had expired but the wife got it renewed in her name after paying for all the expenses for the renewal.

Appeal / Submissions

5. The husband appealed against the substantive decision of the RM and the subsequent distribution by the DR.

A. Decision of RM

(i) Distribution of FNPF

6. It was raised that the RM erred in law when it ordered that the FN PF of the husband be divided between the parties to the extent of 70% to the husband and 30% to the wife.

7. It was argued by Ms. Kunatuba that s. 142(2) of the FNPF Decree has amended s. 154 of the FLA and now excludes FNPF as property of the parties to the marriage. In that regard, the FNPF should not be included in the pool of assets.

8. Ms. Malimali agreed that FNPF monies of the husband in fact should not be included in the pool of assets. She stated that the husband can retain the FN PF.

(ii) Failure to identify the properties to be distributed and the liabilities to be excluded.

9. Ms. Kunatuba argued that properties to be distributed were not identified and the liabilities were also not identified.

10. It was further submitted by Ms. Kunatuba that the properties which should be subject to distribution must be all the taxi permits, the vehicles owned by parties, the household chattels including the children's jewellery and that the liabilities must be identified and shared equally.

11. Ms. Kunatuba also submitted that what also should have become part of the pool of assets is a sum of \$500. The wife purchased these items 4 months prior to the separation. The deposit and the payments were made by the husband. The balance payments have been settled by the husband and he is keeping the properties. However for the period the parties stayed together, he made payments of about \$500. This \$500 should be property that ought to be shared by the parties.

12. Ms. Malimali stated that the matrimonial properties identified in paragraph 11 of the judgment are taxi permits, household chattels and FNPF funds.

13. It was further argued that there is no error of law when the court ordered that all the properties be valued and the debts to be settled from the proceeds of the same.

B. Distribution by DR

(i) Failure to identify value of property

14. Ms. Kunatuba argued that it was the duty of the DR to identify the value of the property that was given to the parties. The debt should have been paid first as per the order of the Court.

15. Ms. Kunatuba argued that the parties had obtained debt from family members to build up their taxi business and that amounted to \$32,000. The sum of \$24,000 belonged to the mother and \$4,000 belonged to the brother. All these were identified in the hearing.

16. Ms. Malimali stated that there was no evidence of the \$32,000 debt from the family incurred by the parties so this cannot be raised in appeal for that to be deducted from the value.

(ii) Taxi Permits

a. Permits Taxi 5 and Taxi 1

17. Ms. Kunatuba argued that the DR clearly stated that Taxi 5 be given to the husband. She also gave Taxi 1 to the wife but does not say that in her distribution report. She stated that the permit be given back to LTA.

b. Permits Taxi 2, Taxi 3, and Taxi 4

18. If the DR distributed these two permits being Taxi 5 to the husband and Taxi 1 to the wife, why were the others to be returned to the LTA? There was no basis on which these permits were ordered to be returned to the LTA. These permits were obtained during the course of the marriage and remain the property of the parties to the marriage.

19. It was also argued that in one of its earlier orders the Court had ordered that \$200 per month from the income derived by Taxi 2 be given to the husband for children's expenses. This has not eventuated. With effect from July 2012 the wife ought to pay this back to the husband.

20. The Court can always order return of these properties. The wife is now holding these permits in her name and using it to derive income when the husband has been deprived of the same.

21. Ms. Malimali argued that the husband does not only have Taxi 5 but also Taxi 2. He is personally using Taxi 5 and Taxi 2 is given to another driver. The husband is retaining the income from the business.

22. All that the wife has is one car. At the trial she agreed that all the vehicles can go to the husband. She would like to only retain the car and the permit on it being Taxi 1.

(iii). Motor Vehicles

a. Vehicle 4

23. Ms. Kunatuba argued that this vehicle was distributed to the husband but transfer was not signed in his favour by the wife. The money borrowed to buy this vehicle was \$6,000. The parties had been paying \$100 per fortnight towards the payment of the loan and in the last two years the payments made calculate to \$4,800. This vehicle is a 1995 model and has been parked at Nasinu for the last five years. If the husband was given the transfer document, he would have repaired the vehicle and made it operational.

24. The DR has stated that the husband pays off the mechanical cost in the sum of \$5,500. How was this debt incurred? It should not have been as the husband is a mechanic himself. The mechanical cost has not been substantiated by any documents.

25. Ms. Malimali argued that this vehicle had been parked in the husband's garage for a few years. After the wife left, he took the vehicle from the garage at Nadera. He did this in 2012.

26 . Ms. Malimali stated that the wife gave evidence in Court that she purchased that vehicle for \$6,500 and only a sum of \$1,000 was paid. The balance of \$5,500 is left. That is the balance purchase price and not the mechanical fees. This amount remains owing on the loan. This evidence was not disputed in court.

b. Vehicle 1

27. Ms. Kunatuba argued that parties never owned this vehicle. The property should never have been included in the pool of assets. A debt of \$1,800 is shown on this vehicle. How can that be possible? There is no need for the husband to pay this debt as it is not properly incurred over a property owned by a party to the marriage.

28. Ms. Malimali argued that the number may be incorrect but there was a debt of \$1,800. This is the vehicle which uses permit Taxi 1. The evidence was not disputed that there is a debt of \$1,800.

c. Vehicle 2 and Vehicle 3

29. Ms. Kunatuba argued that these vehicles were not operational and in use at the time of separation. Both were defunct when the marriage subsisted so it should not be part of the pool.

d. Vehicle 5

30. Ms. Kunatuba argued that this vehicle was bought during the marriage. The wife traded this in and got two second hand vehicles. The two second hand vehicles must form part of the pool of assets to be divided.

Law and Analysis

31. It is not very difficult for anyone analyzing the final orders of the court to find it extremely incomprehensible as to what the final rights of the parties are and whether it is just and equitable.

32. Before I delve into the errors of law and fact made by the RM, I must make two procedural remarks.

33. First, it is not the duty of the Registrar or the Deputy Registrar to undertake the task of distributing the properties. Since the RM had heard the case, it was the duty of the Court to make final orders for distribution which were precise and capable of being enforced.

34. The orders, as it is, is meaningless, and by sending the matter to the DR, there was an implied direction that the DR was to make findings of fact like the properties that were to form part of the pool of assets and the actual liabilities on the said property. The DR does not possess any such jurisdiction under the FLA.

35. The second procedural remark that I must make is that this Court can only hear an appeal from the orders of the RM and not the DR. Since the DR acted pursuant to the directions of the RM, any party aggrieved with the final distribution of the DR should file a review to the RM.

36. Having said that, I must deal with the appeal against the orders of the RM.

37. The first error of law is when the court did not identify what properties were going to be in the pool to be distributed. It is vaguely said that the taxi permits, the household items and the FNPF were to be distributed.

38. There were at least 4 to 5 taxi permits that were being discussed for distribution. Which ones were caught under the pool of assets ought to have been identified by the RM. This was not identified and so the DR in her discretion excluded some permits. She stated that except for Taxi 5 which was to be given to the husband, all were to be returned to the LTA because the permits had expired.

39. It was the duty of the RM to unequivocally find as to which permits were to be included in the pool to be distributed and if the permits were expired or about to be expired, then whether any party had the obligation to renew it and not deplete the assets for distribution. In light of the dispute on what permits should be included, the pool of assets were to be identified.

40. If the pool of assets were correctly identified, it would not have been difficult for the DR to value the assets. What the DR did was allegedly included some vehicles in the pool and excluded the rest. She obviously did that because there was an onerous burden on her to ascertain the correct pool of assets but whilst she carried out the directives, she overlooked that it is a matter of evidence to decide what ought to be included in the pool and what needs to be excluded. She obviously did not have the powers to hear the evidence or even analyse the same and make findings. It was a matter for the RM to undertake that task which he failed to do.

41. There is also argument that some vehicles ought to be in the pool and some ought not to be. This is a matter of finding of fact and the obligation was on the RM to undertake that task since he heard the evidence of the parties.

42. Secondly, it was the duty of the RM to have identified the exact liabilities on the properties. Since the liability is contested, there ought to have been a finding instead of directing the DR to undertake that task. Each party has a different version of what the debt is on the property. The Court ought to have made final findings in that regard.

43. If the liability was correctly identified than the parties would know exactly how much there is to be paid.

44. After hearing the evidence the Court erred in not completing the task of working out the proper liabilities on the properties. It once again left it to the DR to hear this issue or analyse the same from the trial notes. Whatever the DR was meant to do, in light of the dispute on the issue of proper liability, it was the duty of the Court to make a finding of fact in that regard as well.

45. Succinctly, since there was a dispute on what assets and liabilities should be included, the DR had no jurisdiction to make that finding. There was error of law in having to ask the DR to carry that task.

46. I also agree with the parties that FPNF is now not to be included in the pool of assets and that is pursuant to s. 141(2) of the FPNF Decree. For clarity I repeat what I have said in one of my earlier judgments of AP v. NOH- [unreported] Fiji Family High Court Appeal Case Number: 13/Suv/0001:

"Under the FLA, property included the money standing to the credit of a party in the Fiji National Provident Fund: s. 154. That section was amended by the FPNF Decree 2011 - Decree No. 52 which came into force on 25 November 2011(except for certain provisions mentioned ins. 3). The amending section is 141(1) (a) which states that s. 154 of the Family law is amended to exclude FPNF as property.

What s. 136 states is that if there is an existing title or right in respect of property or an entitlement in maintenance or property then the FPNF funds of one party can be used to pay of that existing title or right and entitlement of the other party. The entitlement could be a past, present, or future entitlement but must be an entitlement in maintenance or in property.

The FPNF monies cannot be included in the pool of assets to be distributed. That is clear by s. 141(2) (a) of the FPNF Decree. However, under s. 136, the Court can use FPNF monies to pay off a person's entitlement in a property or maintenance claim".

47. What is to be included in the pool is a matter of evidence and what liabilities are to be excluded is also a matter of evidence. It is for the court hearing the case to accept or reject on evidence as to what is the proper value of the properties to be included. There were no valuation reports of these properties obtained and no proper liabilities worked out.

48. It is thus in the interest of justice that this matter be referred back to the Court for a re-trial on what is the pool of assets and the value of each asset. I could have sent this matter back for the Court to work out the parties entitlements on the existing evidence but the RM who had handled this matter in Nasinu is no longer on the bench to undertake that task.

49. Any new RM may not find the evidence given in this case sufficient to work out a just and equitable distribution for the parties. Having said that, the RM handling the matter is at liberty to work out the entitlements of the parties based on the evidence already tendered in Court.

Final Orders

50. Due to the anomaly that the pool of assets to be distributed has not been identified and the proper liabilities to be excluded from the pool, the parties are subject to inchoate and unenforceable orders.

51. I therefore make the following directions:

(a). That there be re-trial in respect of the application for distribution of property and the pool of assets to be distributed be identified or alternatively fresh and precise orders for distribution be made on the existing evidence.

(b). The Court must make a finding of the value of each asset.

(c). The parties' entitlements to be worked out afresh in view of the husband retaining the inalienable asset of the FNPF monies in his account.

(d). I order the Registrar Suva to attempt one conciliation conference in this matter and if the parties fail to settle the same, to fix the matter for hearing/directions in the respective court.

(e). Each party to bear their own cost of the proceeding.

Anajala Wati

Judge

04.01.2016

To:

1. *Law Solutions for the Appellant.*
2. *Pacific Chambers for the Respondent.*
3. *File: 14/Suv/0008 .*
4. *File: 12/Nas/0300.*