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| **IN THE FAMILY DIVISION OF THE HIGH COURT OF FIJI AT LAUTOKA**<br><br>**ORIGINAL JURISDICTION** | |
| **ACTION NUMBER:** | **FAMILY APPEAL NO. 8 OF 2022**<br><br>**MAGISTRATE'S COURT FILE NO. 21/LTK/0059** |
| **BETWEEN:** | **DANIYA**<br>**APPELLANT** |
| **AND:** | **NAAGESH**<br><br>**RESPONDENT** |
| **APPEARANCES:** | *Ms. J. Tunikula (Lal Patel Bale Lawyers) for Appellant*<br><br>*Ms. Nisha S & Mr Prasad R for Respondent* |
| **DATE OF HEARING:** | *Wednesday 30 August 2023* |
| **DATE OF JUDGMENT:** | *Thursday 31 August 2023* |
| **CORAM:** | *Hon. Mr. Justice Chaitanya Lakshman* |
| **CATEGORY:** | *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.* |

# JUDGMENT

## A. Introduction

1. The Appellant filed a **Notice of Appeal (Form 26)** appealing the Ruling of the Learned Magistrate delivered on 7th July 2022 where the Learned Magistrate dissolved the marriage between the parties.

## B. The Grounds of Appeal

2. The grounds of appeal are as follows:

"***1. The Learned Magistrate erred in law and in fact in holding that the Applicant Man [Name] met the requirement of section 30 (1) and section 30 (2) of the Family Law Act specifically that the marriage had irretrievably broken down and that the parties had lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage.***

***2. The Learned Magistrate failed to consider the evidence of the Original Respondent / Appellant that she and the Original Applicant / Respondent continued to reside together.***

***3. The Learned Magistrate failed to consider the evidence of the original Respondent / Appellant that she continued to do all the chores in the house and that the Original Applicant / Respondent moved out of the matrimonial bedroom to try to meet the criteria for divorce.***

***4. The Learned Magistrate wrongly granted the Decree Nisi in breach of s. 36 (1) (b) (1) where no proper arrangements in all circumstances have been made for the care welfare and development of the children."***

## C. Analysis

***5.*** The Family Law Act 2003 brought in the no fault philosophy in dissolution of marriage (divorce) proceedings. It is so designed that, upon proof of 12 months' separation, irretrievable breakdown would be prima facie presumed to exist. An order for dissolution of marriage (divorce) would then be made as a matter of entitlement. These are set out in Section 30 of the Family Law Act 2003, as follows –

"*(1) An application under this Act by a party to a marriage for an order for dissolution of the marriage must be based on the ground that the marriage has broken down* irretrievably.

*(2) Subject to subsection (3), in a proceeding instituted by an application, the ground will be held to have been established, and*

*an order for dissolution of the marriage must be made, if, and only if, the court is satisfied that the parties have separated and have thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage.*

*(3) an order for dissolution of marriage will not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed."*

***6.*** The parties were married on 28th November 2008. On 19th February 2021 the Respondent (Man) filed Form 1 for dissolution of marriage (Divorce). In the application the Respondent/Man gave the date of separation as 1st January 2020. The Form 1 was served on the Appellant/Lady. The Appellant/Lady on 7th December 2021 filed a Response (Marital Status Proceedings) – Form 4. (*This Court has noted that the fees were paid on 7th December 2021 while the date filed is written in as 7/12/22. Further noting that the next court date is marked as 10/12/21 @ 9.00am this Court takes the filing to be on 7th December 2021*.) The response and the reasons the Appellant/Lady gave in the Form 4 seeking to dismiss the Form 1 was as follows:

" *1. I know and firmly believe that we can work things out.*

*2. My children are refusing to stay with any of us but they want to stay together as a family*."

***7.*** From the Response (Form 4) of the Appellant/Lady it is clear that at no stage she challenged the date of separation that was provided by the Respondent/Man. In his evidence before the Learned Magistrate, the Respondent/Man gave evidence that they separated in 2020. This was not challenged. The Respondent/Man's evidence was not discredited. On the evidence before him the Learned Magistrate found "that the parties were separated for more than 1 year when the divorce application was filed." The evidence before the Learned Magistrate was that the parties were separated under the same roof.

***8.*** When parties continue living under the same roof during a period that is relied on to establish separation within the meaning of Section 30 (2) of the Family Law Act 2003 other evidence may be necessary to establish whether what is known as the *consortium vitae (also called 'consortium')* has broken down. Unless it has, separation cannot be

established. Consortium or 'partnership for life' is the marital relationship, consisting of the various incidents that go to make up such a relationship. In **Tulk v. Tulk [1907] VLR 64** at 65, Cussen J referred to "*marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation, making up as a whole the consortium vitae... The weight of each of these elements varies with the health, position in life, and all the other circumstances of the parties"*. The list is neither exhaustive nor exclusive.

***9.*** While the evidence of physical separation was not before the Learned Magistrate. The evidence he had was that the parties lived in separate rooms. The Appellant/Lady informed the Learned Magistrate that she continued to do the house chores and look after the children. While the evidence of the Respondent/Man was that his mother cooked for him and the children. The Respondent/Man's commitment to the marriage did not exist for some time. There was rejection by the Respondent/Man of the Appellant/Lady as his wife. It takes two people to be married. One was breaking it. For the Respondent/Man the marriage had reached a point where the marriage had broken down for him, then the fact that the Appellant/Lady did not share that point of view cannot negate the breakdown.

***10.*** It should be noted that divorce have been granted in circumstances where the couple slept separately but the wife cooked and washed for the husband. In **In the Marriage of Hodges (1977) 2 Fam LR 11, 524**, Pawley SJ held that the provision of some household services by the wife for the husband did not alter the fact that the parties had separated. In the matter before the Learned Magistrate the Respondent/Man had his mother cooking and washing for him, not the Appellant/Lady. The separate rooms, cooking and washing being done by some else clearly showed that the consortium had broken. The Learned Magistrate was correct in granting the dissolution of the marriage (Divorce).

***11.*** The evidence before the Learned Magistrate in relation to the children was that the children lived in the matrimonial home. The mother and grandmother lived in the same house. The Respondent/Man was supporting the children and he had had filed for the residence of the children. Based on this information the Learned Magistrate should have declared that proper arrangements were in place for the care, welfare and development of the children of the parties.

## D. Conclusion

***12.*** For the reasons given the appeal is dismissed. The parties are to bear their own costs.

## E. Court Orders

(a) Appeal dismissed.

(b) Parties are to bear their own costs.

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Chaitanya Lakshman

**Acting Puisne Judge**