

IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

APPELLATE JURISDICTION

ACTION NUMBER:	<i>FAMILY APPEAL # 2 OF 2023 (Magistrate's Court File # 10/NAN/0200)</i>
BETWEEN:	<i>CALVIN</i> <i>APPLICANT</i>
AND:	<i>ALICE</i> <i>RESPONDENT</i>
APPEARANCES:	<i><u>Applicant</u> –Mr D. Patel (Samuel Ram Lawyers). <u>Respondent</u> –Mr Z. S Mohammed (Zoyab Shafi Mohammed Legal).</i>
DATE/PLACE OF RULING:	<i>Wednesday 25 October 2023</i>
DATE OF HEARING:	<i>Thursday 31 August 2023</i>
CORAM:	<i>Hon. Mr. Justice Chaitanya Lakshman</i>
CATEGORY:	<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. Introduction

[1] On 13th January 2023 the Applicant/Man filed an Application (Form 12) seeking the following orders:

- “1. That leave be granted to appeal the decision of the Honourable Magistrate delivered on the 21st August 2020 to the High Court of Lautoka, Fiji notwithstanding that the time for appealing has expired.
2. That execution upon the orders made on the 21st August 2020 be stayed pending the determination of appeal in the High Court.
3. Time for service of this form 12 application be abridged.
4. Any other orders that the Honourable Court deems fit and just.
5. Costs of this application be in the cause.”

The Application was filed with an Affidavit (Form 23) of the Applicant/Man.

- [2] When the matter was first called on 21st February 2023 before Justice Wati. Her Ladyship noted as follows “*Form 12 and 23 is seeking leave to appeal out of time the decision of 2020. I do not have jurisdiction to hear this under Rule 11. Magistrate Court has already refused leave to appeal out of time. The proper cause is to appeal the August 2022 decision. Stay is refused as there is no proper appeal before me.*” She then set the application for hearing on procedure and jurisdiction.

B. Brief History of the Matters

- [3] The Parties divorced on 3rd January 2014. On 15th October 2018 the Respondent/Lady filed Form 9 seeking distribution of matrimonial property. On 21st August 2020 the Learned Magistrate delivered a Judgment on the Form 9 Application. On 16th December 2021 the Applicant’s Lawyers filed an application in the Magistrate Court seeking leave to appeal the decision of 21st August 2020 and that the orders of the even date be stayed pending the determination of the appeal. On 16th August 2020 the Learned Magistrate delivered a Judgement and dismissed the application seeking leave to appeal and stay pending appeal.

C. Determination

- [4] The starting point in determining the relevant issues before us is **Section 19** of the **Family Law Act 2003** (hereafter “FLA 2003”) which provides that “*an appeal from the Family Division of the Magistrates’ Court lies as of right to the Family Division of the High Court.*” This in simple terms means that a person who is aggrieved with a decision of a Magistrate does not require permission of the Magistrate or the appellate court (High Court) as a prerequisite to initiating an appeal. This right to appeal however must be exercised within a certain timeframe. According to **Section 184 (1) FLA 2003** “*an appeal under section 19 must be instituted within the time prescribed by the Rules of the Division or within such further time as is allowed in accordance with the Rules of the Division.*” This then takes us to **Rule 11.01 of the Family Law Rules 2005** which provides that “*an appeal under the Act shall be instituted by filing a notice of appeal in accordance with Form 26 in the court appealed from within – (a) one month after the day on which the order appealed from was made; or (b) such further time as that court orders.*”
- [5] Rule 11.01 of the Family Law Rules 2005 sets the timeframe for an appeal. It is to be filed within one month after the day on which the orders appealed from was made. The same rule also states that the appeal shall be instituted by filing a notice of appeal (Form 26) in the court which provided the decision that is being appealed. Rule 11.01 (b) gives the court that gave the decision that is subject of appeal the power to grant

further time to appeal. The law is explicit. There should be no confusion as to the right to appeal and leave to appeal out of time.

[6] Now let us relate the law to the matter before me, I find that the Applicant/Man was correct in seeking leave to appeal from the Magistrate who granted the initial orders. Having made that application in the Magistrate Court and being refused leave to appeal. The Applicant should have appealed the decision refusing leave to appeal. It was their right under Section 19 of the Family Law Act 2003 to appeal that decision within one month after the day on which the leave was refused. They did not do that. They have filed an application before me seeking that I deal with leave to appeal the decision of the Learned Magistrate delivered on 21st August 2020. The 21st August 2020 decision of the Learned Magistrate was a decision of the alteration of interest of party's matrimonial property. Rule 11.01 of the Family Law Rules does not give this Court, the High Court powers to grant leave to appeal of a decision of the Magistrate Court. Leave to appeal is dealt with by the same court (Magistrate Court). My argument is enforced by Judge Wati's sentiments in **JT v. EH - Family Appeal Case # 11/SUV/0007** where she stated "5. **Rule 11.01 (b)** makes it equivocal that the power to grant leave to appeal out of time is reserved with the Court granting the order. In this case the Magistrates' Court should have been sought leave from. The power to grant leave to appeal out of time is not within the jurisdiction of the High Court. 6. I do not wish to exercise jurisdiction over an application in which I do not have any."

[7] For the reasons given herein the application is struck out. Having noted Sections 205 and 207 of the Family Law Act 2003 this Court orders that the Applicant pay \$1000.00 as costs to the Respondent within 30 days of this Ruling. The costs have been summarily assessed.

D. Court Orders

(a) The Application is struck out.

(b) The Applicant/Man to pay the Respondent/Lady \$1000.00 as costs within 30 days of this Ruling.

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Chaitanya Lakshman

Acting Puisne Judge