

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	20/SUV/0007
[ORIGINAL CASE NUMBER]:	[12/SUV/0397]
BETWEEN:	PATRICK as Administratrix in the Estate of L.A a.k.a L.J
AND:	SUSANA
Appearances:	<i>Mr. Sututuraga. P for the Appellant</i> <i>No Appearance for the Respondent.</i>
Date/Place of Judgment:	<i>Friday 09 August 2024 at Suva.</i>
Judgment of:	<i>Hon. Madam Justice Anjala Wati</i>
Category:	<i>All identifying information in this ruling have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
Anonymized Case Citation:	PATRICK v SUSANA – Fiji Family High Court Case number: 20SUV0007

JUDGMENT

Catchwords:

FAMILY LAW – INJUNCTION – UNDERTAKING AS TO DAMAGES – *whether the undertaking as to damages should be enforced and damages arising out of the grant of injunction determined by court - application heard but not dealt with by the court below – appellant raises on appeal the error on the part of the court below in refusing to grant the orders- the application not heard at all- there was no refusal to grant the orders- the error of law lies in the failure to determine the application and not refusal to grant the orders- appellant at liberty to have his application put back on the cause list for hearing if she desires to have it determined.*

Cause

1. The appellant appeals the decision of the Family Division of the Magistrate's Court on the basis that it refused to grant the following orders:-

(1) That the undertaking as to damages given by the respondent through her affidavit in support of an injunction against the deceased and his agents/servants be enforced;

(2) That the court enquire and assess the damages payable to the Appellant.

2. The background to the proceedings is that the respondent was in a de-facto relationship with the deceased.
3. The deceased was a foreigner. When he was returning to his country, he had packed his belongings to be shipped. The appellant's position is that the deceased had asked the respondent to collect her belongings and she did not. As a result the deceased also packed her belongings in the container to be shipped.
4. The respondent then filed an application seeking for return of her belongings that were packed in the container. She also filed an application on an ex-parte basis, seeking injunctive orders to restrain the deceased from shipping the container out of Fiji.
5. The respondent had given an undertaking as to damages in her affidavit. She had stated that she was giving her undertaking as to damages arising out of the injunctive order.
6. On 3 August 2012, the court below made the following pertinent orders:-

(a) That a restraining order is granted against the man, his servants and agents from removing the matrimonial property of the parties from Fiji until final determination of the matter.

(b) The lady is to file her substantive application for property distribution within 5 days.

7. The respondent did not file an application for property distribution pursuant to the orders but filed a probate action instead.

8. In the probate action, she sought for the entire estate of the deceased. The application was dismissed. However, she was allowed to retrieve her possessions from the container waiting to be shipped.
9. The High Court had granted probate in favour of the appellant as executrix and beneficiary of the estate of the deceased.
10. The appellant then filed the proceedings seeking to be substituted in place of the deceased. She also sought the orders identified in paragraph 1 of this judgment which she claims was refused by the court below. In addition to that she sought that the restraining orders be cancelled.
11. On 25 November 2019, the court below dissolved the injunction and granted costs against the respondent in the sum of \$500.
12. The appellant says that the court failed to give reasons why it refused to grant the other orders I have identified in paragraph 1 of the judgment.

Analysis

13. I have carefully perused the ruling of the court below. It is clear from that ruling that the court only determined the application for dissolution of injunction when it had also heard the application surrounding the undertaking as to damages. It failed to deal with the remaining applications.
14. By not dealing with the application, the court neither allowed that application nor rejected it.
15. I do not find the appellant's contention that the application surrounding the undertaking as to the damages was refused. It was not. How can it be refused when it was not even dealt with? I reproduce the main part of the judgment of the court below:

“Determination

- [7] *The lawyer for the Applicant has filed written submissions in this matter and sought to rely on it.*
- [8] *It has been brought to the attention of the court that Probate matter was finalized in the High Court, being Probate Action No. 37 of 2012. The High Court had determined the issues regarding the estate and various personal items and property that were claimed by the Respondent.*
- [9] *The court finds that the Magistrate having granted an ex-parte injunction in favour of the Respondent ordered the Respondent to file substantive application for distribution of property after 5 days. This court finds that this was never pursued by the Respondent. There is no property distribution application on foot.*
- [10] *This court also noted that the Magistrate had noted that this was civil matter which could have been initiated in the civil courts.*
- [11] *Having noted that the Probate matter has dealt with the issues in dispute between the parties and no property distribution action is before this court. This court has no option but to dissolve the orders made by the court on 3rd August 2012. Injunction or restraining orders granted by a court cannot be for an indefinite term or without finality.*

Court Orders

- (a) *The orders made by the court on 3rd August 2012 is dissolved.*
- (b) *The Respondent is ordered to pay \$500.00 as costs to the Applicant. The costs have been summarily assessed.”*
16. When an application is filed and heard, it becomes the duty of the presiding officer to deal with it and make clear and cogent findings on whether the application is allowed or refused. It is an error on the part of the court to not deal with an application. The appellant was entitled to have all his applications determined.
17. I cannot say why the application was not dealt with. Since it was on foot, the court ought to have dealt with it. The lack of determination establishes that the court did not deal with the applications.

18. I can only find that it was an error on the part of the court for not having dealt with the application. It now needs to be dealt with by the court.

Final Orders

19. I find that the court below erred in not dealing with the application regarding enforcement of the undertaking as to damages.

20. The applications should be dealt with by the court below. If the appellant is interested in pursuing the applications, a note to that effect is to be provided to the Registrar to list the matter in court to deal with the remaining applications.

21. Each party is to bear their own costs of the appeal proceedings.

.....
Hon. Madam Justice Anjala Wati

09.08.2024

To:

1. ***Haniff Tuitoga Lawyers for the Appellant.***
2. ***Respondent.***
3. ***File: Family Appeal Case Number: 007 of 2020.***