

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

APPEAL ACTION NUMBER: 21/14
(Original Case Number: 11/Ltk/0453)

BETWEEN: SHARON
APPELLANT

AND: RONALD
RESPONDENT

Appearances: Ms. Choy for the Appellant.
Respondent in Person.

Date/Place of Written Judgment: Monday 5 December 2016 at Lautoka.

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: Sharon v. Ronald - Family Appeal number 21 of 2014

JUDGMENT

A. Catchwords:

FAMILY LAW - APPEAL -Alteration of interest in property - Definition of property includes property acquired in the marriage, contribution to pro pert y of the parties not restricted to financial contribution to its acquisition but also to its conservation and improvement and also non-financial contribution to its acquisition, conservation and improvement, a person's contribution to the welfare of the family and contribution as a homemaker parent is also contribution under the laws parties must also give evidence on their "future needs" as required by s. 162(3) of the FLA for an adjustment to be made in their shores to reflect a just and equitable distribution.

(i). Legislation:

1. The Family Law Act No. 18 of 2003 ("FLA"): ss. 2(J) ; 6i · 6.6_{1}.

(ii). Cases:

1. AK v. RC- [unreported] Fiji Family High Court Appeal Case Number: 08/Ltk/0498.

1. The wife appeals against the decision of the Family Division of the Magistrates' Court ("MC") of 08 September 2014 wherein it dismissed her application for distribution of the property of the parties to the marriage.

2. The decision arose out of the wife's application claiming for equal shares in the following properties:

- Monies sitting in the husbands account in Fiji National Provident Fund ("FNPF").
- Residential property situated at Bairam Road Saweni Lautoka.
- Household items:
 - 1 double bed with mattress (daughter's bed)
 - 1 brown coloured king size drawer.
 - 1 six seater settee with foot rest.
 - 1 metal TV rack
 - 1 flat screen TV with DVD player.
 - 1 table with 6 chairs.
 - 1 washing machine.
 - Buffet set (kitchen drawer)

3. The application for distribution of monies sitting in the husband's account was not pursued as monies in FNPF is no longer property of the parties to the marriage.

4. The parties were married on 25 February 2006. They separated on 24 September 2011. Their marriage was dissolved on 17 December 2012.

5. They have one child of the marriage, namely Taniya Tanisha Kumar, a female, born on 22 March 2007. Since separation, the child has been staying with the mother and the father was ordered to pay child maintenance in the sum of \$40.00 per week. There was an indication during the appeal hearing that the child now lives with the father. I do not know the veracity of the information provided to the Court.

6. The wife asserts that the Court did not properly take into account her evidence and her non-financial contribution in assessing the application for distribution.

7. In refusing the application for distribution of the property of the parties to the marriage, the Court found that the residential property which was leased to the husband by the i- Taukei land Trust Board was initially owned by the husband's father and therefore the wife cannot claim any share in it.

8. The Court also found that there was no material to support that the wife contributed towards the property of the parties to the marriage. It was found that the bank statements of the wife did not reveal any withdrawals or payments done through the bank for the household items or construction materials.

9. The first issue that I must deal with is the Court's finding that the residential property on the i-Taukei Land containing an area of 192 square meters is not property of the parties to the marriage. The basis of this finding was that this property was initially owned by the husband's father.

10. On 1 January 2013, the husband acquired a "tenancy at will" over the property. The term of the tenancy is one year. It is common knowledge that the term gets renewed every year. The husband's family had been occupying that property since 2000 until the date of judgment. It was therefore never an issue before the Court that there ought not to be any distribution due to the duration of the lease.

11. It was also never an issue before this Court that this property is a native grant and therefore can be alienated by an order of the Court. This land is not in the category of lands under s. 166(1) of the FLA that can be excluded from distribution of the property.

12. From the parties' perspective, this is a valuable property for them. The valuation report shows that the market value of the land as at 25 July 2013 was \$8,200 and the value of the improvements was \$24,000. The total value of the property was \$33,000.

13. It is therefore imperative that the question of whether or not this property is part of the property of the parties to the marriage be resolved. The definition of "property" in 2(1) of the FLA is "property within or outside the Fiji islands to which those parties are, or that party is, entitled, whether in possession or reversion".

14. Irrespective of the fact that the husband may have acquired that property from his father, he is in possession of that property by being the registered proprietor of the same. By virtue of the definition of "property" in s. 2(1) of the FLA, the property acquired in the marriage is to be included in the pool of assets to be distributed.

15. I am not insinuating that the evidence that the property was given to the husband by his father has no probative value but not in the circumstances in deciding whether it should be included in the pool for distribution. The material stage where this evidence would be relevant will be in trying to ascertain what contribution each party has made to the property.

16. The Court erred in law and in fact in excluding this property from the pool of assets to be distributed. This has deprived the wife of her right to make a claim in the same.

17. The other limb on which the wife's claim was refused was the lack of evidence to show her contribution in acquisition of the property. The Court overlooked the important requirement of s. 162(1) (a) and (b) which does not only require that one has to show evidence of financial and non-financial contribution to the acquisition of the property but also to its conservation or improvement.

18. There was clear evidence from the valuation report and one of the witnesses being the brother of the husband that the extension and improvement to the property was done after the marriage. The MC found that the wife did not provide any evidence to show that she bought the construction materials. In absence of any documentary evidence, the wife's claim does not fail automatically. There was on oath her oral evidence of her contribution. It may not have been substantiated but whether the wife's evidence on her financial contribution was accepted and the extent to which it was ought to have been considered. This was material to make a finding on whether or not the wife contributed financially towards the acquisition, conservation and improvement of the property.

19. Apart from the financial contribution, the Court was also to make a finding on the wife's non-financial contribution to the property in the acquisition, conservation and improvement of the same.

Her undisputed evidence of cleaning the house, maintaining the house, helping in with the household expenses ought to have been given a value. It was also agreed by the husband that the wife was contributing towards the expenses of the house and contributed towards the welfare of the house by cooking, cleaning, and looking after the child and him. If that is the evidence then the wife not only contributed financially but also towards the welfare of the family. All this contribution of the wife was ignored by the Court which has caused miscarriage of justice.

20. Even in respect of the household items, the Court found that the items were brought under the name of the husband. That should not be conclusive evidence of contribution. If the husband admitted in his evidence that the wife had contributed towards the expenses of the house, then she should be entitled to some share in the properties. Her contribution to the family allowed the husband to work and free up part of his income to buy all these items in his name. The contribution of the wife therefore cannot be ignored.

21. The findings of the Court on contribution of the parties to the marriage were not properly made as required by s. 162 of the FLA. The Court ought to have also analysed the future needs of the parties pursuant to s. 162(3) of the FLA and made a finding as to whether any party was entitled to an adjustment in his or her percentage distribution. This could not be done since the Court did not work out the proper contribution that each party made.

22. The parties were married for 6 years and the wife has a child of the marriage who she looked after even after the separation. These are her contribution during the marriage and even post separation. It is incorrect not to attach any value to her contribution.

23. It is not proper that the wife's application be dismissed given the evidence of her contribution. Definitely there has to be evidence on the "future needs" factors enshrined in s. 162(3) of the FLA as well. Since the complete evidence is not before the Court, it is proper that a re-trial on the application for distributed be conducted by another RM. I also note that the parties had not filed their financial statements as mandated by the law. I wonder how the trial progressed in absence of the material information.

24. I have previously in many case authorities set out the step by step procedure that needs to be followed in undertaking the exercise of property distribution. I need not repeat the procedure again save to say that one such authority which spells out the procedure is **AK v. RC - [unreported] Fiji Family High Court Appeal Case Number: 08/Ltk/0498**. A copy of the decision is in the original file. This will assist the Court in determining the application afresh.

25. In the final analysis, I allow the appeal and make the following orders:

- (a). The Registrar of the Family Division of the High Court is to list the matter before her and attempt mediation on the issue of property distribution.
- (b). If mediation is not successful, the matter is to be allocated to the MC for re-trial on the issue of property distribution. The Registrar must, before allocating the matter to another RM, give directions on the filing of the financial statements.
- (c). Each party to bear their own costs of the appeal proceedings.

Anjala Wati

Judge

05.12.2016

To:

1. Legal Aid Commission for the Appellant.

2. Respondent.

3. File: 21/14 (11/Ltk/0453).