

IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER: 13/LTK/0005

BETWEEN: SUDESH
APPELLANT

AND: RITESHNA
RESPONDENT

Appearances: Ms. Vasantika Patel for the Appellant.
Respondent in Person.

Date/Place of Judgment: Thursday 31 July 2014 at Laoka

Judgment of: The Hon. 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: Sudesh v. Riteshna – Fiji Family High Court Appeal Case Number: 13/Ltk/0005.

JUDGMENT

Catchwords:

FAMILY LAW – PROPERTY - Property capable of alteration- distinguish between matrimonial property and term used in Fiji Islands being property of the parties to the marriage or either of them which is subject to alteration- does not have to be matrimonial property- making declaration of interest in the property using the definition of matrimonial property and the effects of the same- prejudice caused to party as a result.

Legislation:

Family Law Act No.18 of 2003 (“FLA’): ss. 161; 162.

The Appeal

1. The appellant appeals against the orders of the Resident Magistrate (“**RM**”) of 2013 in respect of certain orders made against the motor vehicle A. These orders were made in isolation and not pursuant to an application for alteration of property interests in the property of the parties to the marriage or either of them pursuant to s. 161 of the FLA.
2. The material orders made by the Court were as follows:
 - a. *The Divisional Police Commander Western and/or Officer in Charge Lautoka Police Station is ordered to facilitate the immediate release of vehicle described as Toyota AE100 with registration number A in the custody of the Lautoka Police Station to Court by 4pm of the date of the order.*
 - b. *The LTA to forthwith cancel the transfer of the said vehicle from the applicant to the respondent and the LTA is ordered to transfer and register the said vehicle in the applicant’s name.*
 - c. *The respondent, by his servants or agents are ordered not to interfere with the applicant or her servants or agents in removal of the said vehicle from the Lautoka Police Station.*
 - d. *The respondent, by his servants or agents are ordered not to interfere with the officers of the Land Transport Authority-Lautoka office from cancelling the transfer and registration of the said vehicle and transferring and registering it in the name of the applicant.*

In the order the wife is referred to as the applicant and the husband is referred to as the respondent.
3. The husband says that the Court erred in transferring the vehicle to the wife only as the same was purchased by him. The wife did not have any dealings about the car with the previous owner. The husband says that the parties are living together since 2006 and had also bought a house in the year 2005.

4. The husband also raised that he had been maintaining the vehicle and providing services to it.
5. The husband seeks an order that the vehicle be returned to him or otherwise distributed between them as per their contributions.

The Applications in the Magistrates' Court

6. There were several applications filed by the wife regarding the same vehicle wherein she sought the same orders over and over again. I do not understand why so many applications regarding the same subject were filed so many times. One application was enough to deal with the concerns of the wife.
7. The first application was filed by Form 9 in 2010. The wife sought an order that the LTA forthwith retransfer the vehicle in her name and that the Lautoka Police Station releases the vehicle to her. The second application was filed by way of an interim application of Form 12 and 23 in 2011. The third application was again filed in 2011 by an application for final orders via Form 9 again.
8. Such applications should not have been allowed by the Registrar to have been filed in Court. One reason is that the matter is sub judice and the second is that by raising many applications of the same nature the other party is put to response and incurs legal expense. It is fortunate that the husband raised only one response finally replying to all applications.
9. The grounds for all applications were more or less the same. The wife stated that she was married to the husband in 2008 and started staying together with him in 2008. In 2010 she found out that her husband was committing adultery with one of her workmates for the past one year. The parties had an argument in 2010. The husband assaulted her and left her at her parents place. In 2010, she made a search at the LTA office regarding her vehicle. She found out that in 2010, the husband had transferred the said vehicle in his name without her consent. She complained the matter to the police but they wrote to her and said that since the matter was a family court dispute

they would not deal with the same. The vehicle is at the Lautoka Police Station. She stated that the third party insurance and wheel tax in respect of the vehicle had expired and the condition was deteriorating. She sought an order that she be allowed to take the vehicle home.

10. The husband filed a response and sought an order that the vehicle remains registered in his name. He stated that he was married in 2008 and started living with the wife since 2008. The allegation of adultery against him is false. The allegations by the wife led to an inquiry against him by the Fiji Police Force. The findings were in his favour. He denied transferring the vehicle in his name without the knowledge and consent of the appellant. He says that the transfer was done in a lawful manner. The police had also carried out investigations against him on the wife's allegation of forgery. No charges were laid against him. He purchased the vehicle and he is the lawful owner of the same. He was willing to sell the vehicle and distribute the proceeds amongst both the wife and him according to each party's contribution. The vehicle was bought during the relationship and thus it is property of the parties to the marriage.
11. The wife responded to the application and stated that the vehicle was purchased before the marriage. She gave the husband \$4500 from the bank to purchase the vehicle. The vehicle is thus hers and cannot be shared between the parties.

The Evidence at the Magistrates' Court

12. The evidence of the parties was well summarised by the Court. I will repeat the evidence for the sake of completeness. The wife, in her evidence in chief, stated that she got married in 2008 but is now divorced. She bought a vehicle A for \$5000. Initially she paid only \$4400. She withdrew the money from her bank account in Bank of Baroda in 2008. The passbook was tendered in evidence. She also tendered in Court a LTA vehicle owner history extract. The husband did not pay any monies for the car. She stated that the reason she transferred the vehicle in her name after 2 years was because it was her first vehicle. The owner was a good friend of the husband. The vehicle insurance was still valid under previous owner of the Vehicle A

and she wanted to use that insurance and change it to her name when it expired. She signed the transfer form from Previous owner to her name but she did not sign any transfer to the respondent in 2010. The transfer to the husband was done without her knowledge and consent. The transfer in 2010 does not have her signature. A Justice of Peace has witnessed a signature which the husband says is hers but she did not appear before any Justice of Peace on that day to sign the transfer form or at all.

13. During the marriage, she gave the car to the husband to use it. There were two sets of keys. She separated from the husband 2010 when she found out that he was having extramarital affairs with her colleague. She found text messages on his mobile. She told him that she will leave. The husband assaulted her and dropped her off at her parents place. He refused to give the car and took off despite being called to return the car. In 2010 she discovered from the LTA that the vehicle had been transferred to the husband. She reported the matter to the police. The police later told her that after an inquiry they could not charge the husband because the matter was a family one and that it ought to be resolved in Court.
14. In cross-examination she stated that she met the husband in 2005 but it was not safe to say that she was in a de-facto relationship before she got married to him. She testified that when she mentioned to the husband about her interest in a car, he said he knows a friend who wants to sell. Although the vehicle was bought before marriage, it was registered in her name when she was still married to the husband. She stated that she reported the matter regarding the fraudulent transfer to the police in 2010.
15. The husband testified that from 2004 or 2005, he was in a de-facto relationship with the wife. He lived with her at her parent's house. He considered themselves as husband and wife since then. They were supposed to get married in 2005 but his mother died and the marriage could not take place then. He paid for the car bought from previous owner of the vehicle A. He tendered a receipt under his name in 2008. The registration of the vehicle was done in the wife's name in 2010.
16. The husband stated that the delay in the transfer was because the vehicle was subject to bill of sale to Merchant Finance. The owner used the \$4400 to clear the

charge on the motor vehicle. Another transfer was signed by the wife to him in 2010. In 2010 he said that he informed the wife that he had transferred the vehicle to her name. The transfer of 2010 was signed by the wife to him. He cannot recall the exact date the transfer was signed. The wife was staying with him at the time she signed the transfer and he cannot recall who all were at home at the time the transfer document was signed.

17. The wife had made complaints against him. He was interdicted from the duties. The interdiction letter was tendered in evidence. He was cleared after the investigations and he has resumed duties. The vehicle has been in Lautoka Police Station since 2010. He did not force or threaten the wife to sign the transfer documents.

Magistrates' Courts Verdict

18. The Court in arriving at the conclusion found that the vehicle was purchased by the wife well before the marriage as she had provided passbook to substantiate her evidence that she paid the monies for the vehicle. The Court found that the evidence showed that the wife had withdrawn \$4500 to deposit for the vehicle and the receipt corresponds with the date of the withdrawal which is before the marriage. The purported transfer which the husband says is lawful being that of 2010 is after the parties' separation. The husband admits having separated in 2010. The claim by the husband that the wife consented to the transfer was thus improper and not founded on facts.
19. The Court also remarked that the husband's reliance on the police clearance was not in fact evidence of lawful transfer as the police had given him the clearance on the grounds that the nature of the case was civil and not criminal.
20. The Court remarked that the issue before the Court was whether the property was matrimonial property and not a question of forgery before him. The Court compared the wife's signature on all Court documents to that of the transfer document and came to a conclusion that the signature on the transfer document in 2010 was not hers.

21. On the question of credibility, the Court believed the wife in that she was forthright in her testimony, never shaken during cross-examination and had eye contact with the Court when compared to the husband who appeared evasive when answering questions, attempted to mislead the court, lacked confidence in testimony, stuttering when testifying and lacked eye contact with Court. The Court remarked that the husband's demeanour reflected an obvious intention to conceal the truth from the Court. His testimony could not be believed.

Declaration of Interest and Title in Vehicle.

22. The Court thus declared that the vehicle was bought before the marriage and not part of the matrimonial property. The husband did not have any interest in the same and that the wife had the full right and title to the same.

23. I find that the effect of this declaration is prejudicial to the husband's claim for alteration of interest in the vehicle. I will discuss this later in my judgment.

The Submissions

24. Ms. Vasantika Patel submitted that the husband's sworn evidence was that before he got married to the respondent, he was in a de-facto relationship with her. They were living together since 2004 or 2005. They even bought a house together before the marriage. The Court ought then not to have casted its mind to the fact of the transfer of vehicle but whether the property belonged to them or one of them and subject to division. If the Court had cast its mind to the proper question the answer would be definitely in the affirmative as the vehicle was purchased just a month before the marriage and irrespective of who owned it became property of one of the parties to the marriage and capable of alteration. The presumption would have applied in that both parties are deemed to have equally contributed to the property and unless the presumption was disputed and rebutted, it was only proper that the husband was allowed to keep the vehicle with an order that the same not be disposed or

deteriorated or that the same should have been transferred to both parties until final determination of the action for alteration. S. 154 of the FLA recognises de-facto relationship and it outlines the factors which need to be considered in determining whether a de-facto relationship exists or not. In this case the husband had given sufficient facts from which the Court should have deduced that a de-facto relationship existed for example that they lived together since 2004, that they bought a house together before marriage and that the vehicle was purchased a month before the marriage. If the factors were properly analysed, de-facto relationship would have been established and the husband still entitled to a share from the property being the vehicle.

25. The vehicle was transferred in the name of the respondent in 2010. On that date the parties were married and living together so either the date of purchase or the transfer is used, the question to be determined was whether it was a property that belonged to a party to the marriage and capable of being distributed.
26. Ms. Patel further argued that even if the property belonged to the respondent alone, that simply does not make it her property. It is for the Court to work out the contributions of each party and then divide the same as it is just and equitable.
27. Further, Ms. Patel argued that s. 162(5) requires that a Court must not make an order altering the interest in the property without the parties to the matter having attended a conference with the Registrar unless the Court is satisfied that having regard to the need to make an order urgently, or for any other special circumstances, it is appropriate to make the order notwithstanding that the parties have not attended the conference. The Court makes no mention of why the conference should be dispensed with or had been dispensed with.
28. The Court had not adverted to the evidence relating to the usage and the purchase of the car. Both the parties used the car. They had two sets of keys. The natural question is that if the car belonged to the wife, why did she not take the same with her when she went away? There is therefore some substance in what the appellant says that the car belongs to him.

29. On the question of who purchased the car, the Resident Magistrate gave too much weight to the respondent's evidence from her passbook showing withdrawal of monies from her account. The money belonged to both the parties. The wife kept the monies. She had some \$18,000 in her account when she only earned \$270 per week. Where did she collect the money from? The money definitely belonged to both. The issue thus was not properly investigated.
30. The husband's evidence that the receipt of payment was made in the name of the husband was not satisfactorily dealt with.
31. Ms. Patel also argued that the Court ordered LTA to transfer the vehicle back to the wife when the order should have been made against the husband.
32. The Court failed to take into account the factors that are necessary to be dealt with before altering property interests. Those factors are outlined in s. 162(1) of the FLA.
33. The respondent submitted that she knows the appellant from 2004. She was not in a de-facto relationship. They bought a house in 2005 in four shares. Then she did not have a relationship with the appellant. In 2008 she got married to the appellant. She did not stay with him since 2004. He stayed separately.
34. The \$18,000 is solely her money. In 2007 she won a car registration FI 247. She opted for money in lieu and that money came to her account. From that money she paid Mr. Rup Deo, the vendor of the vehicle.
35. The question before the Court was that of forgery. She separated from the husband in 2010 and the property was transferred to his name in 2010. He had forged her signature and that is what all the Court properly considered.
36. The receipt was made in the appellant's name as he was to become her husband and at that time it did not matter to her as to whose name the receipt was made.

The Law and Analysis

37. The Court stated that the issue before the Court was to find whether the property was matrimonial property. In Fiji the term matrimonial property is no longer used like in New Zealand as the term denotes the property bought during the marriage. In Fiji the legislature has used the term ***property of the parties to the marriage or either of them*** for purposes of alteration which means the property of either party whether bought before the marriage or acquired in the marriage or during the marriage can subject to alteration. The term indicates that all such property owned by each party must be included in the pool. Whether there has to be division of that asset and to what extent if any depends on whether the party claiming an alteration has made any contribution directly, indirectly or as a homemaker parent to ask for an alteration.
38. There is enough evidence to suggest that the property was bought before marriage and owned by one of the parties to the marriage. Whoever is the real owner of the property does not preclude the subject vehicle from being brought in the pool for consideration of alteration of it.
39. In order to decide whether the property ought to be divided, the proper questions that the Court ought to have addressed its mind to were the s. 162(1) factors and not whether it is a matrimonial property or not as that consideration precluded the Court from considering the s. 162(1) factors which is not permitted by law.
40. Irrespective of whether the Court uses an asset to asset approach in considering alteration of interest in the property or the global approach, the question of contribution is equally important. The husband is entitled to give evidence of what his contributions are that should be considered for alteration in the asset for example if he did not contribute to buy the asset, did he contribute otherwise by negotiating a good buy for the wife and did he contribute in the upkeep and maintenance of the vehicle or otherwise as a homemaker or in meeting other expenses thereby freeing the income of the wife to pay for this vehicle. All these are pertinent questions that the Court ought to have considered.
41. The vehicle was definitely bought before the marriage. Even if it was bought by the wife and ought to remain registered in her name, by virtue of the marriage, she cannot say that she is the person who is solely entitled to the same.

42. There was a property alteration application regarding the house pending in Court. By declaring that the husband does not have any interest in the vehicle without properly considering s. 162(1) factors, the husband has been unjustly deprived of seeking an alteration in the vehicle in the pending cause.
43. I am not aware whether the wife still has the vehicle or sold it to someone else but irrespective of the position, I find that the husband ought not to be deprived of his share in the vehicle if any. In the circumstances it is only proper if the lower Court considers the vehicle in the pool of assets or if the vehicle is sold the valuation of the same at the time of disposition in the final property distribution application.

Final Orders.

44. I allow the appeal in that the Court erred in declaring that the wife bought the property before the marriage and thus is not matrimonial property as a result of which the husband does not have interest in the vehicle to make any claim against it.
45. I order that the vehicle is property of one of the parties to the marriage irrespective of whoever is the rightful owner and is capable of alteration of interest under s. 161 of the FLA to the extent of each party's contribution under s. 162(1) of the FLA which needs to be heard and assessed by the Court. This can take place in the pending action for the alteration of interests in the house but if the same has already been heard and disposed then a separate hearing be conducted in respect of the vehicle and the parties to be granted their entitlements according to their contributions and adjustments.
46. If the vehicle has been disposed by the wife then the valuation of the vehicle at the time of disposition be considered in the pool and if the husband is found to have any share in the vehicle then his entitlement be adjusted from the other assets. If a separate hearing is to be conducted due to the fact that the final cause for alteration has already taken place then the final order (if any) allocating the husband his share must be made in monetary terms to be paid by the wife directly or from her FNPF

funds or by any other means the Court deems just and equitable upon hearing the parties.

47. The status quo in respect of the vehicle as at the date of this judgment is to remain.

48. It is proper that the matter be heard by another Resident Magistrate and I so order.

49. Each party must bear their own costs of the appeal proceedings

ANJALA WATI

Judge

30.07.2014

To:

1. Ms. Vasantika Patel for the Appellant
2. Respondent
3. File Number 13/LTK/0005