

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 13/Suv/0013
(Original Case Number: 11/Suv/0160)

BETWEEN: MAMANUCA
APPELLANT

AND: TINA
RESPONDENT

Appearances: TERESIA LAGILAGI

Date/Place of Judgment: Tuesday 19 January 2016 at Suva

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 similarity to any persons is purely coincidental.

Anonymised Case Citation: Mamanuca v. Tina - Family Appeal number 13 of 2013

JUDGMENT

Catchwords:

FAMILY LAW - PROPERTY LAW · LEAVE TO ISSUE APPLICATION FOR PROPERTY DISTRIBUTION AFTER TWO YEARS OF DISSOLUTION OF MARRIAGE - FACTORS TO BE CONSIDERED · HARDSHIP TO PARTY OR ANY CHILD IF LEAVE IS REFUSED.

Legislation:

1. The Family Law Act No.18 of 2003 ("FLA"):ss.2 (d); 27(3) and (4).

Cause and Background

1. The appeal is against the decision of the Resident Magistrate ("RM") of 24 May 2012, where, upon the application of the wife, leave was granted to file the application for distribution of property after two years of dissolution of marriage.

2. The need for leave arose because s. 27 (3) of the FLA bars any party to the marriage from filing an application for distribution of the property of the parties to the marriage after expiration of 2 years from the date of marriage or the date of commencement of the FLA, whichever is later except by leave of the Court in which proceedings are to be instituted.

3. S. 27 (3) reads:

" Where a final order for dissolution of marriage or of nullity of marriage has been of the definition made, proceedings of kind referred to in sub-paragraph (c) or (d) of the definition of "matrimonial cause" in section 2(1) (not proceedings seeking the discharge, suspension, revival, or variation of an order previously made in proceedings with respect to the maintenance of a party) cannot be instituted after the expiration of 2 years from the date of the making of the order or the date of commencement of this Act, whichever is later, except by leave of the Court in which the proceedings are to be instituted".

4. The definition of" matrimonial cause" in s. 2(d) means:

"Proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings-

(i) arising out of the marital relationship;

(ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or

(iii) in relation to the dissolution or annulment of that marriage or legal separation of the parties to that marriage, being a dissolution, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that dissolution, annulment or legal separation is recognized as valid in the Fiji Islands under Part XI".

5. It is clear from the definition of s. 2(d) that the application for distribution of property is caught by s. 27(3).

6. The parties were married in 1994. They separated sometime in 2003 and finally their marriage was dissolved in 2004.

7. The parties had one child of the marriage born in 1991.

8. The residence of the child was granted to the father and he was also ordered to pay spousal maintenance in the sum of \$60.00 per fortnight with effect from 26 May 2004.

9. The application for leave was filed on 22 March 2011. The leave was sought to apply for property distribution and interim maintenance.

10. The grounds before the Court based on which the application was opposed was through the affidavits filed by the parties.

11. The affidavit of the wife deposed that despite the divorce, the parties continued living together with the child at Nakasi.

12. Since the parties continued living together, she did not apply for distribution of property. In 2011, the husband moved out of the house to live somewhere else. Due to this she seeks leave for distribution of the property which is the house in Nakasi registered under the husband's name.

13. The husband also deposed an affidavit to the effect that after the dissolution of marriage, the wife immediately left for her father's residence at Nasinu. She started visiting the daughter under the pretext of cooking for her during the exams. On one of his field trips for TFL, he found that she had permanently moved in the property.

14. The husband further deposed that since he had been frequently absent from the property, this gave the wife a chance to exploit the property and since she has been living there permanently, she is under the misapprehension that she can make a claim in the property.

15. It was also deposed by the husband that at the time of dissolution of the marriage, the wife was asked whether she wanted property and she had declined that. She should now be ashamed of herself. The application is an abuse of the process of court.

Magistrates' Courts Findings

16. The Court found that it had to determine the application for leave based on two factors which were the length and the reasons for delay and whether there would be any hardship caused to the wife or the child if leave was refused: s. 27(4) of the FLA.

17. The Court found that the only property for consideration is the house and the land situated at Nakasi.

18. On the question of delay, it was found that the application for distribution was made after 6 years but since the wife had the benefit of the property by virtue of living there with the husband, she did not apply for the same until the husband moved out of the house. The delay and the reasons were both excusable and satisfactory. The Court did find that there was no need to make a finding on whether the parties lived in the house as husband and wife but the fact that she occupied the property with him and had the benefit of the same.

19. The Court then dealt with the issue of hardship. It found that the wife will suffer substantial detriment if she was not given leave because she would lose out on her entitlement from a ten year marriage. There would not be any hardship to the husband as he was already the registered owner of the property.

The Appeal

20. Aggrieved at the findings, the husband appealed on the grounds that the Court erred in law and in fact:

1. in finding that it was not crucial for the court to investigate if the parties were living as husband and wife after the divorce as this was a disputed fact which was contested by the husband.
2. in finding that the wife's explanation for the length of delay was satisfactory and excusable.
3. in finding that any refusal to grant the wife leave to apply for property distribution out of time would amount to substantial detriment.
4. by relying substantially on the submissions of the wife and not fully taking into account the arguments advanced by the husband thus failing to determine the issue from the perspective of both parties resulting in unfairness to the husband.

Appellant's Submissions

21. Ms. Vaniqi argued that the Family Law Act came in force on 1 November 2005. When the parties were divorced, they were still bound by the Matrimonial Causes Act.

22. Under the old law, all applications for various reliefs were filed in one petition. There was no application for property distribution filed then. It is safe to assume that the wife, who was represented by the Legal Aid, would have asked her whether she wanted a division in the property. The Court record is silent on whether the wife made any request for distribution of the property but if she was interested in getting her share, she would have included that in her petition.

23. Even after she moved in the property, she still made no request for the division. She had been divorced and her not applying made the husband believe that she was not interested in the property. After a lapse of such a long time, allowing her to make a claim in the property is detrimental to the husband.

24. It was crucial for the Court to decide whether the parties having lived under the same roof had resumed cohabitation as husband and wife. The wife said that she believed that they started living together as husband and wife. This goes to the root of her reasons for the delay in filing the application.

25. Ms. Vaniqi also argued the Court failed to consider the hardship that the husband will face, if leave were to be granted. The husband will face hardship because he is either hoping to move back in the property or develop the same but cannot do so because of the pending application for distribution.

26. Ms. Vaniqi further argued that the RM has almost cut and pasted the submissions of the wife's counsel in her judgment. For example paragraph 18 of the ruling is the same as paragraph 3.4.2 of the respondent's submissions; paragraph 27 of the ruling is the same as paragraph 3.5 of the submissions; and paragraphs 28 and 29 of the ruling is the same as paragraph 3.6 of the submissions.

27. In following the wife's submissions, the court went on to rule in her favour without justifying its decision. This shows that the husband's submission was not considered by the Court.

Law and Analysis

28. S. 27(4) of the FLA only requires that the Court considers the hardship that would be faced by a party to the marriage who is making the application for leave or any child of the marriage.

29. The husband did not dispute that after a year of the divorce, the wife had the benefit of living in the house. He allowed her to live in the property. She therefore had the benefit and comfort of the house the parties had acquired during their marriage.

30. The husband also lived on the same property without interfering with her peaceful occupation. At least there is no evidence of him doing so. This caused the wife to believe that she had the benefit of the property until she was faced by another separation from the husband who left the home in 2011 and started living separately.

31. The physical separation of the parties made the wife realize that she may not have the benefit of the property anymore so she quickly acted to file an application for leave.

32. If the parties lived together under the same roof, there was no reason for her to actually ask for her entitlement because she had the benefit of the property without any fear of losing the same. Now there is potential that she may lose the occupational and equitable benefits, there is good reason why she has to apply and apply late.

33. She will definitely suffer detriment because there is potential that she would be deprived of a home in which she may have made contributions post the dissolution of marriage in any form she could. Her contribution to the welfare of the family is admitted by the husband as he is the one who deposed in his affidavit that she came back in the house to assist the child in cooking her meals when she was studying for her exams. This is the wife's material contribution that would not be lightly dismissed in assessing her entitlement.

34. If leave were not granted, she will not only lose her occupational benefits but her entitlement as well which would not be equitable on the facts of the case.

35. By allowing the wife to stay in the property, the husband did insinuate that she can have the benefit of the same. She was led to believe that she can live in the same until I repeat she faced the reality of the physical separation.

36. I agree with the RM that there was no need to make a finding on whether or not there was cohabitation as husband and wife. What is material is that the wife was allowed to live in the property on the impression that she will not lose the benefit of her share and be allowed to occupy the same.

37. Ms. Vaniqi stated that the dissolution of marriage took place under the Matrimonial Causes Act and if she wanted a distribution she would have filed one in the same petition.

38. I cannot say why any such application was not filed but there never used to be any realistic division of property under the old Act. Whatever the reason maybe, the FLA allows the parties who have had dissolution under the old Act to file for distribution under the new Act as long as it is made within two years of its commencement. As such the wife cannot be precluded on the grounds that she did not ask for her share then.

39. Ms. Vaniqi also argued that The RM had cut and paste the wife's counsel submissions in her judgment. I find that only the parts containing the legal principles were reflected in the judgment and there is nothing legally wrong in accepting and reflecting verbatim the principles of law cited by a counsel in his or her submission as long as the principles are correctly reflected.

40. The issue of hardship to the wife if leave were not granted was correctly determined and I find that the appeal has no basis.

Final Orders

41. The appeal is dismissed. The wife is entitled to file an application for distribution of property within 21 days if the same has not been filed yet. The Registrar to assign a date to any such application being filed or if it is already filed then a date to be fixed for the action to take its normal course.

42. Each party shall bear their own costs of the appeal proceedings.

Anjala Wati

Judge

19.01.2016

To:

1. Ms. Vaniqi for the Appellant,

2. Respondent.

3. File: 13/Suv/0013.