

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA**

**ORIGINAL JURISDICTION**

**ACTION NUMBER:** 15/Ltk/ 0491

**BETWEEN:** DAMON

**APPLICANT**

**AND:** ANA

**RESPONDENT**

*Appearances:* Ms. M. Tikoisuva for the Appellant.

Ms. J. Nair for the Respondent.

*Date/Place of Judgment:* Thursday 12 October 2017 at Suva.

*Coram:* Hon. Madam Justice Anjala Wati.

*Category:* All identifying information and contents in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are consequential

*Anonymised Case Citation:* Damon v Ana - Fiji Family High Court Case Number: 15/Ltk/0491.

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## **JUDGMENT**

**A. Catchwords:**

**FAMILY LAW – PRACTICE AND PROCEDURE – Proceedings for divorce and property distribution instituted by husband and orders partly made regarding the property in another jurisdiction; particularly occupational orders – wife then files application for distribution in Fiji Court—is the second proceeding an abuse of the process of the court? – Is Fiji a clearly inappropriate forum to try the matter?**

**B. (i). Legislation**

1. **The Family Law Act 2003 (“FLA”): ss. 28(1) (b); 207(1) a).**

**(ii). Cases**

1. **Henry v. Henry [1996] HCA 51; (1996) 185 CLR 571.**

### **Cause**

1. In 2017, I had exercised my powers under s. 28(3) of the FLA and transferred this file from the Family Division of the Magistrates' Court to the Family Division of the High Court.
2. The process followed in the Magistrates' Court had disregarded the basic rule that when the court is faced with an application to strike out the matter on the grounds of an abuse of the process of the court and on the question whether Fiji is clearly an inappropriate forum to try the matter, the court ought to deal with those issues first instead of proceeding with any substantive or interlocutory issues arising in the matter.
3. In this case, the applicant husband, in 2016, had filed in the Magistrates' Court a final application to strike out the action on the grounds that proceedings filed in Fiji is an abuse of the process of the court as well as frivolous and vexatious.
4. The main contention for that was that the issues raised in this action have been partly determined and adjudicated upon in the court of first instance overseas.
5. The Court did not hear the application for striking out until 2017 and continued to give directions in the substantive matter thus rendering the application for striking out futile.
6. The issues were administratively brought to my attention and I had to exercise my powers to transfer the proceedings to hear the application for striking out first. Due to the delay, and in the interest of justice, this was the most suitable option that I could exercise. The parties were called in court and advised of the progress. No objections were taken on the process invoked. Both counsel were given an opportunity to address the court on the issue of striking out.

### **History of the overseas Proceedings**

7. On 2015, the husband presented a petition to the court of first instance overseas seeking divorce, separate residence of spouses, attribution of the matrimonial home as his private property and alternate residence of the children. The case was assigned file number 15/00033.
8. There were conciliation hearings in 2015. Thereafter, the wife filed her response to the petition in 2015 and asked for certain orders as follows:
  - i. *allocation of the matrimonial home;*
  - ii. *spousal maintenance of 200,000 currency or 300,000 a month should the matrimonial home not be allocated to her;*
  - iii. *an advance of the liquidation of the marital property of 27 million currency and that she is entitled to half of the marital property under the common law;*
  - iv. *agrees to the alternate custody of the children but that education expenses be borne by the father and an extra 30,000 currency to be paid to her for the children; and*
  - v. *an advance of 500,000 currency for costs from the father.*
9. In 2015, the husband filed his reply in the overseas proceedings. There were further hearings of the overseas proceedings in 2015.
10. Later in 2015, the overseas court granted interim orders which included:
  - i. *declaring the husband's petition for divorce to be admissible;*
  - ii. *that both parties live separately;*
  - iii. *that both parents have joint parental responsibility;*
  - iv. *no order for spousal support for the wife;*

- v. *disallowing the application for costs by the wife; and*
  - vi. *hearing the children of the marriage.*
11. The overseas court proceedings also noted that it would not make any orders at that time on allocation of marital residence, pension or contribution or welfare of the children.
12. In 2016, the children were interviewed in the overseas court proceedings.
13. In 2016, the overseas court granted the following final orders:
- i. *that the husband has the main use of the matrimonial home;*
  - ii. *that the residence of the two children will be fixed with their father for the school year;*
  - iii. *the wife to have a right of access and accommodation every second weekend from Friday 5pm to Monday 8am and the school holidays with the first week of even years with the wife and the first week of odd years with the husband;*
  - iv. *that the husband is responsible for the children's education and medical expenses; and*
  - v. *each parent to incur expenses for the children during their respective access.*

### **History of Fiji Proceedings**

14. In 2015 the wife instituted the current case in the Family Division of the Magistrates' Court seeking ex-parte interim reliefs and substantive relief concerning the distribution of the property of the parties to the marriage. She obtained interim injunction orders the same day restraining the husband from disposing of his properties and freezing all his bank accounts.

15. On the same day, the wife filed in the Fiji Court an application for domestic violence restraining order and obtained on the same day an interim order for domestic violence which included non-contact orders. This led to the husband out of his home without him being given an opportunity to defend himself.
16. Subsequently in 2015 the husband filed in the Fiji proceedings:
  - i. *an application to vary the interim Domestic Violence Restraining Order against him to allow him to reside on the property; and*
  - ii. *a final application for parenting orders seeking residence of his two children.*
17. In 2016, interim orders were granted in the Fiji proceedings allowing the husband to sell his property in Suva and deposit the proceeds in the court.
18. In 2016, the husband filed in Fiji court an application to strike out the proceedings in Fiji court. The application lay in abeyance and there were no signs of the same being heard anytime.
19. It is perhaps with that frustration a further application was filed by the husband in 2017 for an order for transfer of the matter to another Resident Magistrate. I had exercised my powers to transfer the case before the application was heard.
20. Even though not relevant to mention at this stage, I find that it is improper to burden another court with application from a different court which is not prepared to hear the matter when it should. In light of the unfairness that the situation might have created, the prudent option was for me to hear the matter.

### **Law and Analysis**

21. S. 207 (1) (a) of the FLA allows for dismissal of proceedings on the grounds that the same is frivolous and vexatious. S. 28 (1) (b) also allows for dismissal of proceedings if

it appears to the court that other proceedings which have been so instituted or are being so continued in relation to the same matter is pending in another court.

22. Although s. 28(1) (b) essentially refers to proceedings pending in another court but in the same jurisdiction, the courts power to dismiss the proceedings in relation to the same matter that is pending in another jurisdiction cannot be fettered.
23. The provision of s. 28(1) (b) and s. 207 (1) (a) can both be used to consider the application before me. The latter provision, although confined to one ground of frivolous and vexatious, cannot exclude additional grounds like the one upon which the application is founded for example the application being an abuse of the process of the court.
24. It is undoubtedly clear that the wife has participated in the overseas court proceedings and continues to do so. In that proceeding, she has also asked for a division of the property of the parties to the marriage. The court in that proceeding has also made occupational orders. The main distribution is still pending.
25. There was no need for a second proceeding for distribution of property to be instituted in Fiji as the wife has already asked for a distribution in the overseas court. There is no contention that the overseas court will not take into account the property in Fiji.
26. The only reason that was advanced on why a second proceeding was instituted in Fiji was that the Fijian law has a presumption that contribution of the parties to the marriage in respect of the property of the parties is equal. It was argued that there is no such benefit of any presumption in the overseas jurisdiction.

27. This court was provided a sworn statement from the husband's counsel that in distributing the property, the overseas court will apply Fiji as well as the common law. There was no contrary assertion to this sworn statement by any other counsel.
28. In light of that statement, I do not find that the wife had or has any cogent reason to institute proceedings in this country. The second proceeding therefore is an abuse of the process of this court.
29. It has come to a stage where the two courts in different jurisdiction are now dealing with the same subject matter. The parties might end up in a situation where they would obtain inconsistent orders from two different countries. It will then become very difficult for one country to enforce the order of the other. Each will give priority to its own orders. There is no need for such a situation to be created. There will be no end to litigation between the husband and wife. I am sure none of them desire this.
30. In case of inconsistent orders, the parties' will only enforce the order that suits them. One has to always guard against that potential danger. To add to that, the principle of judicial comity requires that judges in different countries respect the proceedings and orders of other courts. Having known about the proceedings in the overseas court, it is improper for this proceeding to continue.
31. Although this court has jurisdiction to deal with the matters brought by way of substantive proceedings, the parties cannot be asking two different courts to exercise jurisdiction over the same issues.
32. Normally when two different countries have jurisdiction over the same subject matter, the court then proceeds to decide on the issue of whether the local court is clearly an inappropriate forum to continue with the proceedings. The factors to decide the "*clearly inappropriate forum*" issue is laid down in **Henry v. Henry [1996] HCA 51; (1996) 185 CLR 571**. This list set out in **Henry** is not exhaustive:

1. *No question arises unless the courts of the respective countries each have jurisdiction.*
2. *Whether the courts of each country will recognize the other's orders and decrees.*
3. *The order in which proceedings were instituted, the stage reached and costs incurred.*
4. *The connection of the parties and their marriage with each of the jurisdiction and issues on which relief may depend in those jurisdictions.*
5. *Which forum may provide more effectively for a complete resolution of matter involved in the parties' controversy.*
6. *Having regard to the respective resources and understanding of language, the parties' ability to participate in the proceedings.*

33. Undoubtedly, the two courts in different countries both have jurisdiction to hear the proceedings for distribution of the property. There is no contention regards that by the husband or the wife.

34. On the question of whether each jurisdiction will recognize the others orders and decrees, I will first of all start with Fiji. I answer that in the affirmative. I find that property orders in other jurisdiction can be registered in Fiji and enforced in Fiji except for certain reasons. Some of the reasons are that the order sought to be enforced does not contravene the laws on property and the rights of the secured creditors. If the orders issued in the other country contravenes the domestic law and is made without regard to the other parties whose interest are at stake, the application for registration could be declined. There could be other reasons



associated with a refusal to decline the application for registration. I will not even attempt to provide an exhaustive list.

35. Speaking from the point of view of the overseas court, I refer to the affidavit of the solicitor Mr. Nilesh Prasad. In his affidavit he deposes that a legal practitioner of the Noumea Bar in New Caledonia is the current solicitor representing the husband in the overseas court proceedings.

36. The said legal practitioner has produced a sworn statement attached to Mr. Prasad's affidavit. The sworn statement reflects very pertinent matters. It indicates that in 2015, the Judge of Family Affairs of the overseas court had informed the parties to put a stop to all proceedings instituted in Fiji and that the Judge was going to contact the Fiji authorities to put an end to those proceedings which to his mind was illegal.

37. The said legal practitioner further states that the wife was represented by counsel at the hearing and is aware that the proceedings in Fiji were deemed illegal by the overseas court.

38. The said legal practitioner also stated that in distributing the property of the parties, the overseas court is going to apply the laws of Fiji and the common law.

39. The wife's insistence to continue with the proceedings in Fiji courts is an indication that she will not respect the orders of the jurisdiction that are not favourable to her (*there is already indication of non-compliance of occupational orders granted by the overseas court*). She had been ordered to discontinue the Fijian proceedings and she has failed to so do. She insists to continue with the proceedings in Fiji whilst proceeding and participating with the process in the overseas court. I cannot conceive the reason behind insistence of the proceedings in Fiji Court.

40. There are only 5 assets in Fiji whereas 9 properties in the agreed pool of assets and 15 in the disputed pool of assets are in the overseas territory. Even if Fiji courts gave

orders for distribution, the overseas court, after having ordered that the Fijian proceedings be discontinued, is not going to enforce the orders of the Fiji court. This will finally leave the wife with orders which she might not be able to execute.

41. Arguably, she can recover her share from the Fijian properties but like I have said, there are not so many properties that are here or any evidence available to say would realize her final shares.

42. I therefore find that the overseas court will not execute any property distribution orders made in Fiji and that the effect of the orders made in Fiji would be futile.

43. On the next consideration about the time when the two proceedings were instituted, the progress of the case and the costs incurred, it is clear that the overseas court proceedings were instituted first. The overseas court proceedings have already provided final orders for the parties' separation and occupation of the matrimonial home as well as custody and maintenance of the children. It is now proceeding to the final stages of its deliberations on the finalization of the divorce and property distribution.

44. In the Fiji proceeding, final orders have not been made in respect of any issue. The parties are incurring costs in both jurisdiction regarding the same issues and it is not in the interest of justice that parallel proceedings be allowed to be continued on the same matter.

45. The fourth factor requires consideration on the connection of the parties and their marriage with each of the jurisdiction and issues on which relief may depend in those jurisdictions.

46. It is not disputed that the wife lives in the same jurisdiction as the overseas court proceedings. She comes to Fiji only on tourist Visa. She instituted the proceedings

whilst on visitor's visa. Given the acrimony between the parties, she may not even be able to stay in this country as long as she wishes to participate in the Fiji proceedings.

47. Further, the majority of the properties are in overseas jurisdictions. The documents proving the existing of the properties will be in a language used in the overseas jurisdiction. These documents can be translated in English but there is this issue of costs which will be unnecessarily incurred if proceedings are conducted in the Fijian court.

48. The wife's assets are in the overseas jurisdiction and the husbands assets are in overseas jurisdictions as well. The overseas Court can easily have knowledge and value of these properties. I can imagine the difficulty the parties will have to go through in getting all the information available in English for these properties. It is not impossible but costly. There is no need for the parties to go through such extensive costs and engage legal counsel in Fiji when they are already incurring legal costs in the overseas court proceedings.

49. In regards to the last two factors I find that the parties can conveniently have the matter tried in the overseas jurisdiction. The wife stays there. The husband has no issues in travelling. Most of the properties are in overseas territories and most information regarding the same is available in a language used in that overseas jurisdiction.

50. The overseas court will now not accept any orders from this court to enable parties realize the fruits of the judgment. The effect of this proceeding is therefore redundant.

### **Costs**

51. I do not find that there was any cogent reason for the proceedings to have been instituted in the Fiji court. There ordinarily has to be costs against the wife. However, since the husband too had participated in the Fiji proceedings instead of initially

moving for a striking out, I find that both have created a situation where they incurred costs for themselves. To that end, an order for costs to be borne by each party is justified.

### **Final Orders**

52. I find that since there were already proceedings on foot between the parties regarding the property of the parties to the marriage, it is an abuse of the process of this court to be moved for similar orders.

53. I also find that given the situation, it is more convenient for the overseas court proceedings to continue and be finalized. I therefore strike out the proceedings filed in the Fiji court.

54. Given that there would not be any pending proceedings in court, this court has to make arrangements regarding the monies that are deposited in court after sale of one of the properties in Fiji. In that regard I order that:

- a. any monies deposited in the Fijian court be remitted to the husband. The husband must subsequently deposit this money in an interest bearing account and not to withdraw or deplete the funds in any manner whatsoever until the completion of the property distribution case in the overseas court proceedings.***
- b. Upon completion of the proceedings, the proceeds are to be divided in the manner ordered by the Court in the overseas court proceedings. For this purpose, if the bank requires the order of the Fijian courts to dispense with the funds, the parties are at liberty to register the orders in the High Court to give it the effect and validity.***
- c. Within 48 hours of the deposit of the monies, the husband to provide to the wife and/or his counsel the details of the bank and account in which the funds are kept***

**to enable service of the orders on the bank to ensure that the funds are not interfered with.**

55. I order that each party bears their own costs of the proceeding.

Anjala Wati

Judge

12.10.2017

To:

1. *Mitchell Keil Lawyers for the Applicant.*
2. *Messrs P & N Lawyers for the Respondent.*
3. *File: 15/Ltk/0491*