

**IN THE FAMILY DIVISION OF THE HIGH COURT
APPELLATE JURISDICTION
LAUTOKA**

**FAMILY APPEAL CASE
NUMBER:**

11 of 2018

BETWEEN:

GRAM

AND:

VASITI

Appearances:

Mr. Jackson Bale for the Appellant.

Mr. Mosese Naivalu for the Respondent.

Date/Place of judgment:

Friday, 26th June,

Coram:

Hon. Mr Justice Jude Nanayakarra

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:

Gram v. Vasiti Family High Court Appeal Number 011 of2018

JUDGMENT OF THE COURT

[A] INTRODUCTION

- (01) This is an appeal from the Judgment of the Learned Magistrate at Nadi, delivered in 2018, on the hearing of Form 9 application filed by the respondent for altering interests of parties in the property – property distribution.
- (02) The parties were married in 2007. They separated after 10 years of marriage in August 2017. There are no children of the parties' marriage.
- (03) There are four (04) grounds of appeal set out in the notice of appeal filed on 09th October, 2018. The grounds of appeal are;
- (1) *The Learned Magistrate erred in law and in fact when he failed to consider and subsequently determine that the Appellant's 75% share and the Respondent's 25% share of the total matrimonial property must be distributed after deduction of the total debt owed to Bank of the South Pacific under registered Mortgage No. A1 over Certificate of Title No. A2 being Lot 30 on Deposited Plan No.A3.*
 - (2) *The Learned Magistrate erred in law and in fact when he failed to consider and subsequently determine that Appellant's 75% share and the Respondent's 25% share of the total matrimonial property must be distributed after deduction of the total sum of \$177,000.00 paid by the Appellant from his Fiji National Provident Fund contributions towards the acquisition and maintenance cost for the matrimonial property being Certificate of Title No. A2 being Lot 30 on Deposited Plan No.A3.*
 - (3) *The Respondent shall be entitled to 25% and Appellant shall be entitled to 75% of the matrimonial property being Certificate of Title No.A2being Lot 30 on DP A3 valued at \$573,000.00 after deduction of the total mortgage debt owed to the Bank of South Pacific under registered Mortgage No. A1and after deduction of the total sum of \$177,000.00 paid by the Appellant from his Fiji National Provident Fund contributions towards the cost of acquisition and maintenance of the property.*
 - (4) *The Respondent shall be entitled to 25% and the Appellant shall be entitled to 75% of the matrimonial properties being:*
 - (i) *Motor Vehicle Registration No.MV1 valued at \$23,000.00;*
 - (ii) *Motor Vehicle Registration No, MV2 valued at \$8,000.00;*
 - (iii) *Household Goods valued at \$40,000.00.*
- (04) On the hearing of the appeal, Counsel for the appellant abandoned the third and the fourth grounds of appeal and confined the appeal to the first and second grounds of appeal.
- (05) The relevant orders made by the Learned Magistrate may be stated as follows;
- (1) *The applicant is entitled to 25% and the Respondent is entitled to 75% share of the total matrimonial property being:*

- (i) *Certificate of Title No. A2 on DPA3 valued at \$573,000.00;*
 - (ii) *Motor Vehicle Registration No.MV1 valued at \$23,000.00;*
 - (iii) *Motor Vehicle Registration NO. MV2 valued at \$8,000.00;*
 - (iv) *Household Goods valued at \$40,000.00.*
- (2) *The parties are at liberty to determine amongst themselves and their respective Counsel how they wish to pursue settlement of respective entitlements.*
- (3) *Should the parties fail to reach an agreement, a formal application should be made to Court by either party for the Court to determine payout of percentage distribution.*
- (06) The appellant is not seeking to challenge the percentage decided by the Learned Magistrate for the purposes of distribution of the matrimonial properties under the Act. The appellant is only seeking to challenge the Learned Magistrate's failure to direct certain deductions from the value of the matrimonial properties before distribution is calculated.

[B] SUBMISSIONS ON APPEAL

- (07) Mr Bale's argument in support of ground (1) ran thus; (The following passages were taken from the appellant's written submissions filed on 24th January, 2020).
- (26) *The appellant respectfully submits that in rendering his Judgment, the Learned Magistrate failed to consider that the outstanding sum of \$279,215.27 due under **Mortgage No. A1** as at the date of the Hearing ought to have been deducted from the value of the property before the 75/25 percent distribution under the final Judgment.*
- (27) *The appellant respectfully submits that Section 161 of the Family Law Act 2003 does not allow the Court to alter or displace the interest of a third party in a matrimonial property, especially where that interest has been secured by a registered encumbrance, such as mortgage or charge.*
- (28) *In the High Court case of **NK V VVR [2013] FJHC 702; Appeal 0001.2012 (9 July 2013)**, his Lordship Judge Mutunayagam considered the appeal of the Judgment by Resident Magistrate Anjala Wati (as she was then) in 2009. In dismissing the appeal and upholding the Judgment of Learned Magistrate, Judge Mutunayagam considered the nine grounds of appeal. The eight ground of appeal in that case is especially relevant to this Appeal in that the Judge considered the question whether the Learned Trial Magistrate erred in law and in fact when she ordered the reimbursement of an FNP charge from the sale proceeds of the property.*
- (29) *In **NK v VVR** (supra), Judge Mutunayagam stated at paragraph 3.3.22 as follows:*

“VVR purchased the matrimonial property with his wages and a charge on his monies in his Fiji National Provident Fund. The proceeds of the sale must necessarily first, be used to pay that charge.”

- (30) *The appellant respectfully submits that the High Court in **NK v VVR** (supra) recognized that the alteration of the interests of parties to a Family Court proceeding under **Section 161** of the **Family Law Act 2003** must always be subject to the registered interests of third parties in the matrimonial property.*
- (08) Mr Bale’s argument in respect of ground (2) ran thus; (The following passages were taken from the appellant’s written submissions filed on 24th January, 2020).
- (42) *If this Honourable Court were to refer to **page 718 of Volume 4 of the Court Record**, it will note a letter from FNPF to the Appellant dated 16th September, 2016. The letter is especially relevant because it confirms that the sum of **\$177,073.00** was a **loan under the FNPF housing scheme** which is to be repaid to FNPF. The contents of the letter are unambiguous and speak to the repayment of the housing funds disbursed to Appellant in the sum of **\$177,073.00**. A copy of the FNPF letter dated 16th September, 2016 is annexed hereto for your easy reference.*
- (43) ***Certificate of Title No.A2 being Lot 30 on DP A3** does not have a registered charge by FNPF for the sum borrowed by the Appellant under the FNPF housing scheme, so it is not, technically speaking, a registered interest like **BSP’s Mortgage No. A1**.*
- (44) *The Appellant however would respectfully submit that since the sum of **\$177,073.00** taken from the Appellant’s FNPF contribution were understood by both the Appellant and FNPF was a **loan to be refunded to the FNPF, the funds:***
- (a) *invested into the property ought to be treated as a legitimate (registerable) interest which takes precedence over any alteration of interests under **Section 161** of the **Family Law Act 2003**; and/or*
- (b) *were at all material times the Appellant’s “FNPF contribution” and therefore cannot be distributed in light of the amendment to **Section 154** of the **Family Law Act 2003** by **Section 141(2)(a)** of the **Fiji National Provident Fund Act 2011**.*
- (45) *The Appellant once again draws this Honourable Court’s attention to the High Court case of **NK v VVR** (supra), wherein Judge Mutunayagam stated at paragraph 3.3.22 as follows:*

“VVR purchased the matrimonial property with his wages and a charge on his monies in his Fiji National Provident Fund. The proceeds of the sale must necessarily first, be used to pay that charge.”

[C] **CONSIDERATION AND THE DETERMINATION**

(09) **Ground (01)**

*The Learned Magistrate erred in law and in fact when he failed to consider and subsequently determine that the appellant’s 75% share and the respondent’s 25% share of the total matrimonial property must be distributed after deduction of the total debt owed to Bank of the South Pacific under registered **Mortgage No. A1** over **Certificate of Title No.A2** being **Lot 30 on Deposited Plan No.A3**.*

(10) In **Ascot Investments Pty Ltd v Harper**¹ the High Court of Australia has laid down a basic rule that “*the family court must take into account the property of a party to the marriage as it finds it*”.

(11) Family Law does not operate in a vacuum. The legitimate rights of third parties are not ignored when determining the rights to property between the husband and wife inter se.

(12) In the illuminating judgment of his Lordship Justice Gibbs in **Ascot Investments v Harper** (supra), contained the very significant passage following;

“It can safely be assumed that the Parliament intended that the powers of the Family Court should be wide enough to prevent either of the parties to a marriage from evading his or her obligations to the other party, but it does not follow that the Parliament intended that the legitimate interests of third parties should be subordinated to the interests of a party to a marriage, or that the Family Court should be able to make orders that would operate to the detriment of third parties. There is nothing in the words of the sections that suggests that the Family Court is intended to have power to defeat or prejudice the rights, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform.”

(13) The Family Court must take the property of a party to a marriage subject to any mortgage, charge, restrictive covenant or other incumbrance that has been placed upon it. In accordance with usual practice, this would be done by deducting the value of outstanding mortgages, debts and other liabilities.

(14) In this case, there was secured mortgage on the property. Both parties agreed that the outstanding sum of **\$279,215.27** is due under **Mortgage No. A1** as at the date of the hearing.

¹ (1981) HCA 1; (1981) 148 C.L.R. 337 at 355

- (15) The Learned Magistrate erred in law by failing to consider the sum of \$279,215.27 as the liability to be deducted from the value of the property to arrive at a net value on which the distribution was to be worked out.
- (16) I hold that the outstanding mortgage sum of **\$279,215.27** due under **Mortgage No. A1** must be deducted from the property value of **\$573,000.00** before the parties 75; 25 percentage interests are distributed under judgment.
- (17) The first ground of appeal succeeds.
- (18) **Ground (02)**

*The Learned Magistrate erred in law and in fact when he failed to consider and subsequently determine that Appellant's 75% share and the Respondent's 25% share of the total matrimonial property must be distributed after deduction of the total sum of \$177,000.00 paid by the Appellant from his Fiji National Provident Fund contributions towards the acquisition and maintenance cost for the matrimonial property being **Certificate of Title No. A2 being Lot 30 on Deposited Plan No.A3.***

- (19) It is not in dispute that the appellant has contributed \$177,000.00 from his FPNF monies to the acquisition and maintenance (renovation) costs of property comprised in Certificate of Title No. A2. **It is significant to note that the FPNF has not placed a charge upon the property.**
- (20) The appellant has taken a loan from "FNPf Housing Finance Assistance Scheme". **In my view, the appellant is not under any obligation to FNPf to repay because the money obtained as the loan represented his FNPf funds to which he had entitlement. It is clear that the funds came from his side.** Therefore, the sum of \$177,000.00 cannot be regarded as a liability of the appellant.
- (21) The second ground of appeal lacks merits. The second ground of appeal fails.

[D] **ORDERS**

- (1) The appeal is partly allowed.
- (2) The outstanding mortgage sum of **\$279,215.27** due under **Mortgage No. A1** must be deducted from the property value of **\$573,000.00** before the parties 75: 25 percentage interests are distributed under judgment.
- (3) I make no order as to costs.

.....
Jude Nanayakkara
[Judge]

At Lautoka
Friday, 26th June, 2020

