

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 17/Suv/ 0006

BETWEEN: ARUF
APPELLANT

AND: NAZRIN
RESPONDENT

Appearances: Mr. A. Ali in Person.

Mr. N. Nambiar and Ms. S. Naidu for the Respondent.

Date/Place of Judgment: Tuesday 21 January 2020 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 similarities to any persons is purely coincidental. Not reportable unless anonymised.

JUDGMENT

Catchwords:

FAMILY LAW – PROPERTY DISTRIBUTION – property brought in the marriage will be included in the pool of assets for distribution – the parties can show their relevant contributions to the same– a person’s contribution as a homemaker parent for 17 years cannot be dismissed lightly – the wife has contributed as a homemaker parent and also financially and non-financially for the maintenance and acquisition of the property – her contribution is to equated at 50%.

Cause and Background

1. The husband has appealed the decision of the Family Division of the Magistrates' Court Of 15 March 2017 granting orders for property distribution. The orders by the Magistrates' Court are as follows:

(a) The husband is to transfer 50% of the freehold property as joint tenants within 60 days.

(b) The costs associated with the conveyance is to be paid from the income derived from the property.

(c) That the mortgage payments for the property is to be made from the rental proceeds received from the property.

(d) The remaining balance from the rental proceeds is to be shared equally between the parties with effect from the date of the judgment.

2. The husband appeals the decision on the grounds that the Court erred in law and in fact:

(a) When it made an order that 50% of the share be transferred to the wife in 60 days without considering that the property was under mortgage and it was impossible to transfer the same unless it is paid off.

(b) When it ordered that the parties hold the property equally as joint tenants when the property that the wife had contributed towards was the building containing flats and not the whole property which already had the land and house built on it.

(c) When it failed to consider that the wife was entitled to 50% of the property that was built during the marriage and not all of it.

(d) When it failed to consider that the property had been in debt for so long and that it will take 15 years to pay the debt before it can be transferred.

(e) When it did not take into account proper factors in making a fair distribution of the property.

3. The parties were married in 1997. Their marriage was dissolved in 2014. They have two children of the marriage, a son born in 2005 and a daughter born in 1999. Currently, the son resides with the mother and the daughter resides with the father.
4. When the parties got married, there was already a 4 bedroom house on the property. After the marriage, the wife lived and occupied the same with her husband. The rest of the 8 flats were built during the marriage.

Appellant's Submissions and Analysis

5. The husband informed the Court that the XYZ Bank is the mortgagee of the property and it has indicated to him that since the loan is in his name, the order cannot be fulfilled. He asserts that the debt will take 15 years to be paid off and until that the property cannot be transferred. According to him, the Bank has refused to transfer the property in the joint names due to the existence of the mortgage.
6. Upon hearing this submission of the husband, I gave both the parties a chance to go and discuss the matter with the Bank and obtain information from the Bank on whether what the husband had informed the Court was correct.
7. None of the parties have provided to me any information that the Bank cannot transfer the said property under the names of the parties as joint tenants subject to the mortgage. The wife's counsel provided to me information from the bar table that the Bank has no issues in complying with the order as long as the mortgage on the property is not affected. The order, as I understand it, has not disturbed the mortgage on the property. It includes how the mortgage payments are to be made.
8. The husband has also not shown to me that he carried out any paper work towards fulfillment of the order and the Bank's refusal to follow the orders. The parties were given an

opportunity to settle the matter in terms of complying with it and sign the respective documents required by the Bank. The husband however refused to engage in any discussion with the counsel for the wife.

9. Given the circumstances, I do not find that there is any basis for the appellant to refuse to comply with the order of the Court. The transfer shall be subject to the mortgage and all costs of the transfer shall be paid from the rental proceeds derived. The concern that the debt will take 15 years to be paid off is immaterial in enforcing the order. The changes in the ownership of the property shall not affect the mortgage or the payment of the debt.
10. Both the parties shall be responsible for payment of the same through the rental proceeds. If the rental proceeds are not applied towards the debt then the mortgagee will exercise its rights under the mortgage.
11. If the mortgagee is refusing to carry out the orders, then it is at liberty to inform the Court of its position so that appropriate changes are made by the Court to effect the distribution. Till date no such information is before the Court for the original or the appellate Court to make changes to the existing orders. I therefore dismiss this ground of appeal.
12. The next concern of the husband was that the Court took the entire property as the property of the parties to the marriage when the property already had a 4 bedroom flat on the same land. The 8 extra flats were built when they got married so a 50 % distribution of the entire property is unfair and unjust.
13. The husband's contention overlooks two matters. First, the definition of what is a property of the parties to the marriage and second, her contribution during the marriage which ensured that another 8 flats were being built on the same.
14. I must first identify that property of the parties to the marriage includes property brought or acquired in the marriage. The parties are at liberty to show their respective contributions to the same if they are of the view that they have brought in the marriage property of greater value and that the distribution should reflect the same.

15. The property that is subject to distribution is the same property that the wife had contributed to by ensuring that the magnitude of it in terms of building and value is enhanced drastically. Her contribution is what that matters when it comes to the issue of distribution. The Court cannot disregard the property by saying that it was acquired before the marriage. I therefore find that the Court had correctly included this as a property that could be subject to distribution.
16. The next aspect is the contribution of the parties to this property. The husband kept saying to the Court that the wife should only get 20% and the rest of the property shall be given to all his children in equal shares.
17. I have to assess whether the Court's finding of equal contribution was an error of fact. The marriage of the parties was dissolved in 2014. That makes the duration of the marriage to be 17 years.
18. I find from the evidence that during the term of her 17 years marriage, the wife not only contributed as a homemaker parent but also contributed both financially and non-financially to the acquisition and improvement of the property.
19. Without anyone's help, she single handedly looked after the husband's two children from his previous marriage. She used to support them mentally, physically and play the role of a parent. She cooked for them, washed for them, got them ready for school, and helped and looked after them when they came back from school. That contribution cannot be disregarded in any way. She may not have contributed to the initial four bedroom house but when she got married and lived in it, she maintained and cleaned it and looked after these two children.
20. Her evidence cannot be ignored that if it was not her responsibility to look after these two children from the husband's previous marriage, she would have studied and would be in a better position to look for a job and earn a decent income. She sacrificed her potential to earn by looking after two children who needed someone in their lives when their biological mother died due to a terminal illness. They got full support from the respondent.

21. Then she had her own two children for whom she provided the mental and physical support and looked after them as well. She had little or no contribution from the husband whose main focus was work and the building of the house. Had it not been for the wife looking after his two children from the previous marriage and from the existing marriage, he admits he would not be able to work and build the house.
22. He was able to dedicate his time to obtain income and build the house only because he had entire support from the wife to look after other aspects of the home for 17 years. That is quite a long time. The law in Fiji does not disregard such contributions of a home-maker parent. In fact the law presumes such contribution equal to financial contribution unless it is repugnant to justice to hold otherwise. I have not been shown any evidence that it is repugnant to justice to disregard the wife's contribution as a homemaker parent to be of equal value.
23. Apart from her contribution as a homemaker parent, the wife also made other contributions. Her evidence indicated that she also worked as a minivan driver for her husband's business. From that she earned \$150 a week. She used the money on the children and the family. She worked as a driver for one year. This should count towards her indirect financial contribution to the property. Her income was used to run the affairs of the family. That allowed the husband to use his income towards the building and maintenance of the property. He needed his own money for running the building affairs notwithstanding the fact that he had obtained loan to build the flats. The loan is to mainly build the flats. There are other aspects for which money is needed to ensure that the building is completed. That is where the wife freed the income of her husband to look after the project. Such contributions of the wife cannot be ignored in law.
24. She also had a chicken business from which she used to get \$200 per week which she used on the family. She used to buy the household items from her income as well. This is regarded as contribution for the acquisition of property although the household items were not subject to the distribution application. Once again her contribution of this nature allowed the husband to use his income for the benefit of the subject property.

25. The wife's brother helped her to pay off the arrears of loan on the house. This was in the sum of \$1,000. This is her direct financial contribution to the maintenance of the house. If the house arrears was not paid off, the property would be subject to mortgagee sale and the parties would have lost the entire property.
26. The evidence unfolded that she sold her gold chain for \$1,500 to pay off the arrears on the house. From her chicken business savings, she also used \$2,000 for finishing works in the house. This is her direct financial contribution towards both the acquisition and maintenance of the property. Lack of this contribution would have seen the property sold by the mortgagee. Monies from her chicken business ensured that the property was completed on time and that it derives income.
27. The wife also assisted in the construction works. She painted the flats and worked as a labourer too. She would also supervise the labourers and cook for them as well. She would maintain the house by cleaning and ensuring it is in order. This is her non-financial contribution towards the acquisition and maintenance of the same.
28. If it was not for the wife's immense contribution as a homemaker parent, the husband would not have been able to generate any income and find time to be able to raise the 8 flat house. She has also supported him both financially and non-financially. Her contribution cannot be equated to less than 50 % despite the fact that there was already a 4 bedroom flat in the property.
29. Apart from the above grounds, the husband had expressed concerns that if he gives the share to his wife, he will not be able to gift anything to his children.
30. I do not find any substance in the husband's submission on not being able to gift the property to his children. He is always at liberty to pass onto his children his share of the property which he will hold as a tenant in common. It has been ordered that the property be transferred as tenants in common which means that the husband is free to dispose his share of the same in the manner he wishes. He can gift the property to his children if he so wishes.

Final Orders

31. In the final analysis:

(a) I do not find any merits in the appeal. I therefore dismiss the same.

(b) I affirm the orders of the Magistrates' Court subject to the modification of the same as identified hereinafter and order that the parties attend to enforce the same immediately.

(c) In addition to the orders of the Magistrates' Court, I grant the following orders:

- (i). the wife is entitled to occupy one of the flats from her share of the flats which has been identified as flat 3, flat 5, flat 7 and flat 9.*
- (ii). I note that both parties agree that the wife can be physically allocated the 4 flats for ease of access and management of the same. I order accordingly.*
- (iii). The mortgage shall be paid equally by the parties. This means that the wife shall pay her share of the mortgage equally from the rental proceeds derived from her flats. She is entitled to the balance monies from her rentals flats for her own use and benefit. The orders will apply to the husband in respect of the flats that he will use and occupy, that is, flat 2, flat 4, flat 6, and flat 8.*
- (iv). The wife shall have the full right to manage her tenants and her flats without interference from the husband. The same applies to the husband as well.*
- (v). If the husband or the wife is not paying their share of the mortgage, then one party is at liberty to apply against the defaulting party in the Magistrates' Court to collect rents for the entire flats in the property so that there is no hindrance in payment of the mortgage debt and sharing the balance remaining between the parties as per their entitlements from their flats.*

(vi). *If the husband refuses or neglects to sign any paperwork for the enforcement of the order, then the Registrar or the Deputy Registrar of the Family Division of the High Court shall sign instead for the orders to be effected. This includes signing of all documents relating to the transfer of the ownership of the property and the changes in any mortgage documentation required by the Bank and any other necessary paperwork.*

(d) *Each party shall bear their own costs of the appeal proceedings.*

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Hon. Madam Justice Anjala Wati

Judge

21.01.2020

To:

1. *Appellant in Person.*
2. *Legal Aid Commission for the Respondent.*
3. *File: Appeal Case Number: 17/Suv/0006.*