IN THE FAMILY DIVISION OF THE HIGH COURT OF FIJI
AT LAUTOKA

[APPELLATE JURISDICTION]

Adoption Appeal Case No. 01 of 2019
(On appeal from the Family Division of the Magistrates Court at Nadi in Adoption Application No. 11 of 2018)

BETWEEN

RUTH BROWNE of Nadi

APPELLANT

AND

SERA TIKO of Nadi

RESPONDENT

AND

CHRISTIANA BROWNE

INFANT

AND

SOCIAL WELFARE DEPARTMENT – NADI

GUARDIAN-AD-LITEM

Appearances	**:**	**(Ms.) Laurel Sa- Rosey Vaurasi for the appellant**
	:	**The respondent is absent and unrepresented**
Hearing	**:**	**Friday, 31st January, 2020.**
Ruling	**:**	**Friday, 28th February, 2020.**

RULING

(01). Before me is a 'notice of motion' filed by the appellant seeking the grant of the following orders;

> *(1) An order that leave be granted to the appellant/original applicant to adduce further and or fresh evidence on the hearing of the appeal.*
>
> *(2) An order that the costs of this application be in the cause.*
>
> *(3) Any other order that this Honourable Court deems just and appropriate.*

(02) The application is made pursuant to Order 55, rule 7(2) of the High Court Rules 1988 and the inherent jurisdiction of the Court. The appellant relies on two affidavits;

- The affidavit in support of the appellant sworn on 17-07-2019.
- The supplementary affidavit in support of the appellant filed on 16-01-2020.

(03) The suit that gave rise to the appeal is an application filed by the appellant lady on 22-02-2018 in the Magistrates Court at Nadi seeking an Adoption order from the Court to adopt the infant.

(04) **On 13th November, 2018 the learned Resident Magistrate refused to make an adoption order on the ground that the appellant was not 'resident' in Fiji for the purposes of Section 6(4) of the Adoption of Infants Act (Cap 58).**

(05) Being aggrieved by the refusal of the learned Resident Magistrate to make an adoption order, the appellant appealed against the order of the learned Resident Magistrate to the High Court.

(06) There were three (03) grounds of appeal set out in the Notice of Appeal filed on 13th December, 2018. The grounds of appeal are;

> *(1) That the learned Magistrate erred in fact and law in holding that the applicant was not a "resident" of Fiji under section 6(4) of the Adoption of Infants Act.*
>
> > *(i) When holding that the Applicants stay in Fiji does not equate the degree of permanence for residence to more than a year.*

(ii) Failing to properly consider the contents of the Social Welfare Report in determining residence.

(iii) Failing to hold that the Applicant's settled headquarters is in Fiji, when the evidence is clear that-

(a) The Applicant is unmarried and has no commitment to Australia.

(b) The Applicant resided in a rented home in Nadi and holds Fiji citizenship.

(c) The Applicant travels outside of Fiji but always returns to Fiji as a place of adobe.

(d) The Applicant has legal guardianship of the child.

(e) The Applicant provides for the care and welfare of the child financially, socially, physically and emotionally.

(f) The Applicant is employed as an Administrator officer and employed at a company in Fiji earning $300FJD per week.

(2) That the learned Magistrate erred in law and in fact in refusing to grant an adoption order on the basis that the Applicant's sole purpose in Fiji was to adopt the child when the evidence says otherwise.

(3) That the learned Magistrate erred in law in refusing to grant an adoption order stating that the appellant should follow the proper procedure for the adoption through the "Convention on Protection of Children and Cooperation in respect of Inter Country Adoption".

(07) The learned Magistrate at paragraph (10) and (11) of the Ruling, said inter alia;

(10) In view of the above mentioned judicial precedence and the laws pertaining to this issue, in the matter before me the Applicant has obtained a dual citizenship in Fiji on 25th September, 2017 as per her application dated 04th September, 2017. The Applicant's duration of stay in Fiji is now merely 1 year. There is no argument with regard to the citizenship she is having in her hand. She is also granted the guardianship of the child.

(11) The Applicant lady in her evidence in chief and at the cross examination stated that she came to Fiji to take the Guardianship of the child and that she has been contacting the Orphanage with the intention of the adopting of this child. There was no evidence adduced

to prove to this Court that the Applicant took the citizenship to live permanently in Fiji. Also, I cannot disregard the fact that the duration of the Applicant being in Fiji is merely one year.

(08) The appellant sought leave of the Court to adduce the following mentioned fresh documentary evidence on appeal;

(i) Pay slip dated 28/08/2018.

(ii) Employment pay history with the company in Fiji for the period 08th May, 2018 to 25th September 2018.

(iii) Appellant's sister's Medical Report dated 05th February, 2019.

(iv) Letter of Confirmation of employment dated 18th March, 2019.

(v) Pay slip dated 16th July, 2019.

(vi) Copy of the Certificate of Incorporation for the appellant's business,

(vii) Tenancy agreement for the appellant's current house.

(09) On the hearing of the application, Counsel for the appellant submitted that;

(*) The certificate of registration of business confirms the appellant's intention to reside in Fiji.

(*) The tenancy agreement shows that the appellant has a home in Fiji, and her principal place of residence is Fiji.

(*) The pay slips, employment pay history and confirmation of employment shows that the appellant has been in gainful employment in Fiji since 2018 until to date.

(*) The appellant's sister's medical report shows the appellant's need to travel to Australia at times to see her sister and she returns to Fiji thereafter as it is her usual place of abode.

(10) Counsel for the appellant submitted that the proposed evidence was not in existence at the time of the hearing and has an important influence on the results of the case. Counsel further submitted that the proposed evidence meets the criteria laid down in **Ladd v**

Marshall[1] and should be admitted. Counsel further relied on the following decisions in Fiji which adopted the principles laid in Ladd v Marshall.

(i) ***Chand v Chand***[2]

(ii) ***All Freight Logistics Ltd v Choice Resources Ltd***[3]
(iii) ***Fiji Performing Rights Association Ltd v Lautoka Sugar Festival Association***[4]
(iv) ***Chetty v Desley*** [5]
(v) ***Ittay Weiss v Darsana Dilasha Kumar*** [6]

(11) This Court is cognizant of and guided by the principles laid down in **"Ladd v Marshall"** (supra) and the three conditions that must be fulfilled in order to justify the reception of fresh evidence. As Lord Denning said in that case at page 788;

> *"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled;* ***first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".***
>
> [Emphasis added]

(12) Section 6(4) of the Adoption of Infants Act [Cap 58] provides that "an adoption Order shall not be made in favour of any applicant who is not resident in Fiji or in respect of any infant who is not so resident". The word **"resident"** is not defined in the Adoption of Infants Act.

The concept of residency involves an element of permanent settlement for a foreseeable period of time and not merely some temporary period or sojourn[7].

(13) The provisions in Section 6(4) of the Adoption of Infants Act is mandatory. The provisions relating to **"residency"** clearly circumscribes the discretion of the Resident Magistrate in making adoption orders in favour of an applicant not resident in Fiji.

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[1] 1954 (1) WLR page 1489
[2] [2012]FJCA 22; ABU0033.2008 (23 March 2012)
[3] [2019] FJHC 87; High Court Appeal 12 of 2018 (14 February 2019)
[4] [2019] FJHC 432; HBA 18.2018 (8 May 2019)
[5] [2018] FJHCFD 3; Family Appeal Case 15 of 2015 (31 January 2018)
[6] Suva Adoption Appeal Case No. 3 of 2019
[7] Byrne J in IN THE MATTER OF S. (An Infant), (1997) 43 FLR 292.

(14) There is no question that the infant is not a resident in Fiji. The question which confronts me in limine, like the learned Magistrate at Nadi, is whether the applicant was a resident in Fiji within the meaning of Section 6(4) of the Adoption of Infants Act, when the appellant applied to the Resident Magistrate for leave to make the adoption. **<u>This is a question of fact.</u>**

(15) On the question of the **"<u>residency</u>"** requirement stipulated by Section 6(4) of the Act, the following passage of Justice Harman in **<u>Adoption Application 52/1951</u>**[8] is illuminating;

> ***"The court must be able to postulate at the critical date that the applicant is resident, and that is a question of fact. Residence denotes some degree of permanence. It does not necessarily mean the applicant has a home of his own, but that he has a settled headquarters in this country. It seems dangerous to try to define what is meant by residence. It is very unfortunate that it is not possible to do so, but, in my judgment, the question before the court is in every such case whether the applicant is a person who resides in this country. In the present case I can only answer that question in the case of the wife by holding that she is not resident in this country; she is merely a sojourner here during a period of leave; she is resident in Nigeria, where her husband's duties are, and whither, in pursuance of her wifely duties, she accompanies him. I do not think either of the applicants is resident in England at present."***

(16) Section 6(4) of the Adoption of Infants Act (Cap 58) provides that an application for adoption order can only be made by a person who is resident in Fiji. **<u>It is a pre-condition to the application</u>**. The question before the Resident Magistrate was whether the appellant was resident in Fiji on the day when the **<u>application</u>** for adoption order was made. Section 17(1) of the Adoption of Infants Act provides that an application for an adoption order may be made to the High Court or, at the option of the applicant, to a Magistrate Court within the jurisdiction of which the applicant or the infant resides at the date of the application. Residence at the date of the application is specially mentioned in the provision. **<u>Therefore, the applicant should be a resident in Fiji on the day when the application for adoption was made.</u>** As I understand it, the provision as to residence is not directed to the merits of the application but relates to the jurisdiction of the Court.

(17) The application for adoption order was made on 22nd February, 2018. Turning to the facts of this case, the appellant has a dual citizenship in another country and Fiji. She was born in Fiji on 05th July, 1976. Her father was an employee of Fiji Sugar Corporation. The family moved to overseas where the appellant completed her tertiary education. She worked as a Customer Liaison Officer. She was residing in overseas with her partner until 2017. At least until 2017, the appellant continued to be a resident in

[8] (1952) 1 Ch. 16

overseas and remained in overseas. She set foot in this country in 2017. I will assume that she spent the last 30 years of her life continuously in overseas before she set foot in this country.

(18) The appellant told the Resident Magistrate at Nadi **two (02) conflicting objects** for her coming to Fiji in 2017. They are;

[A] To obtain the guardianship of the child.

[B] To live in Fiji.

(19) Certainly, this does not leave a good impression. I confess, that I cannot resist my temptation to say that the appellant is not allowed to blow hot and cold in the stance she adopts. She cannot adopt two inconsistent attitudes. The truth is a primary value in the administration of justice and should be pursued, if not for its own sake, then at least because it invariably is the best means of doing justice. Of course, I do not deny for a moment that the court's duty is finished once it is satisfied that the adopter is a suitable person, that she has the means and, accommodation at the time of the order, which seems likely to lead to the child's advantage.

She does not say that she came to live permanently in this country. There is no evidence as to how long she meant to stay in this country. It causes me concern. I resist my temptation to examine the matter further because to do so would involve a hearing of the appeal. It would be wrong for this court, on this application, to say anything that indicates any view on the merits of the appeal.

(20) The appellant's residence here in Fiji at the date of the application for adoption was less than 12 months (not for a longer period). It is not a considerable time. **She applied for an adoption order within one year after she set foot in this country.** The word 'reside' is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place". Residence involves some degree of continuity.

The question which confronts me in *limine* is this? Was she resident here on the day when the application was made?

(21) With regard to the **first criteria**, laid down in ***Ladd v Marshall*** that is, whether the proposed fresh evidence could have been obtained with reasonable diligence?

The proposed fresh evidence (see paragraph 08 above) was obviously **not in existence** at the time of the hearing before the learned Resident Magistrate at Nadi on 14th August, 2018.

(22) With regard to the **second criteria**, laid down in ***Ladd v Marshall,*** the proposed fresh evidence, i.e.., the period of her employment with the company in Fiji from 08-05-2018 to 25-09-2018 cannot touch on the question as to whether she was "resident" in Fiji within the meaning of Section 6(4) of the Adoption of Infants Act, on the day when the application for adoption was made. As stated, the application for adoption was made on 22-02-2018. She joined the company in Fiji subsequently, about three (3) months after the application for adoption was made. **It is difficult to see how her conduct which occurred subsequent to the date of the application for adoption order could be treated for the purpose of deciding whether she was resident in this country on the day when the application for adoption was made.** I confidently say that her conduct which occurred subsequently could not have had a possible influence on the outcome of the case. With respect, the case was not all about whether the appellant was a resident in this country between the period 08-05-2018 to 25-09-2018.The case concerned whether the appellant was a resident in this country on the day when the application for adoption was made, i.e., 22-02-2018. As stated, Section 17(1) of the Adoption of Infants Act provides that an application for an adoption order may be made to the High Court or, at the option of the applicant, to a Magistrate Court within the jurisdiction of which the applicant or the infant resides at the date of the application. **Residence at the date of the application is specially mentioned in the provision. It is a pre-condition to the application.** Therefore, the appellant/applicant should be a resident in Fiji on the day when the application for adoption was made. The provision as to residence is not directed to the merits of the application but relates to the jurisdiction of the Court on the day when the application for adoption was made. Thus, I find it difficult to understand (Ms.) Vaurasi's argument that the proposed fresh evidence could have had a possible influence on the outcome of the case before the Magistrate at Nadi. I must confess that, as best as I tried to understand her submission, she failed to convince me.

(23) The proposed fresh evidence that on 21-09-2018 she became a permanent employee as a Customer Services Officer occurred subsequently and hence cannot be taken into account in deciding whether she was a resident in this country on the day, 22-02-2018, when the application for adoption order was made.

(24) The proposed fresh evidence that on 13-09-2019 she registered a business name and on 01/12/2018 she took a lease of a house (flat) for one year (to live) occurred subsequently and hence cannot be taken into account in deciding whether she was a resident in this country on the day, 22-02-2018, when the application for adoption order was made.

(25) I do not see that the proposed fresh evidence throw any light on the question as to whether she was a resident in this country on the day, 22-02-2018 when the application for adoption was made. It must be judged by her residence, all her roots, her home and her avocations here on the day, 22-02-2018, the application for adoption was made.

(26) I am driven to the view that the proposed fresh evidence could not have had a possible influence on the outcome of the case. Consequently, ***Ladd v Marshall*** does not avail the appellant. **The proposed fresh evidence does not meet the second criteria laid down in *Ladd v Marshall.*** Consequently, I do not think I need to consider the third criteria. There is therefore absolutely nothing on which this Court could exercise its discretion.

The application to adduce fresh evidence is therefore refused and dismissed.

(27) I regret this conclusion. It is a conclusion I reach with regret. No doubt the appellant will be disappointed at the decision of this court. But the decision has been based on the principles of law and the legislative provisions which apply to the facts as found. The question of jurisdiction is vital. The appellant's circumstances, however unfortunate, do not relieve me of the duty of determining the correct meaning of Section 6(4) of the Adoption of Infants Act, its proper application in the circumstances and the application of the principles laid down in the oft cited judgment of Lord Denning in the case of Ladd v Marshall.

ORDER

The application seeking leave to adduce fresh evidence on appeal is dismissed.

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Jude Nanayakkara
[Judge]

At Lautoka
Friday, 28th February, 2020