

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	Family Appeal Case Number 10 of 2018 [original Case Number: 18/SUV/0167]
BETWEEN:	KALAN APPELLANT
AND:	MABELLA RESPONDENT
APPEARANCES:	Appellant in Person. Mr. A. Chand [LAC] for Respondent.
DATE/PLACE OF JUDGMENT:	Friday 6 October 2023 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.

JUDGMENT

A. Catchwords:

***FAMILY LAW** – SPOUSAL MAINTENANCE – Person liable to pay died – matter cannot continue against the estate - arrears to be recovered against estate.*

***FAMILY LAW** - PROPERTY PROCEEDINGS AND INJUNCTION – Injunction necessary to protect rights of the wife to prosecute her distribution application - husband not prejudiced as he had been given the liberty to apply to deal with any property he considered necessary – property proceedings can continue against the estate as law allows for that – certain injunction orders need registering in High Court especially orders dealing with land.*

***FAMILY LAW** – CONTEMPT PROCEEDINGS – The application has become redundant as the husband has died – the orders cannot be enforced against the estate.*

***FAMILY LAW** – TRANSFER OF PROCEEDINGS – Under Rule 5.16 of the Family Law Rules is there any proper basis to transfer proceedings to High Court?*

***FAMILY LAW** – STAY OF PROCEEDINGS – Proceedings in Family Court Magistrates Division cannot be stayed as no*

application pending in High Court for determination.

B. Legislation

1. *Family law Act 2003 (“FLA”): ss.163 and 165.*

2. *Family Law Rules 2005 (“FLR”): Rule 5.16.*

3. *Land Transfer Act 1971 (“LTA”): s. 2.*

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Cause and Background

1. The proceedings in the Family Division of High Court started by the appellant husband filing an appeal against the decision of the Resident Magistrate of 2 November 2018 restraining the husband from disposing off certain properties in which the wife had sought distribution and for the maintenance ordered by consent earlier in the proceedings to be paid in the maintenance registry. The husband was also ordered to pay overdue spousal maintenance within 7 days failing which the wife was given liberty to calculate the arrears from her records and issue a judgment debtor summons to deal with the arrears.

2. Together with the appeal, the husband had also filed an application for stay of all proceedings pending appeal. It was on 15 November 2018, when the application for stay was listed before me. I made the following orders by consent:
 1. *That the wife will vacate the University of the South Pacific’s accommodation on or before 23 November 2018 and hand over the same to the husband. I had therefore, discharged the Resident Magistrate’s earlier order for the husband to continue paying rent to the University of the South Pacific until the tenancy was in place as the order had become redundant upon granting of this consent order.*

 2. *The husband to hand over the private yacht to the wife to occupy from 23 November 2018 and for him not to live on the yacht unless both parties agreed.*

3. *The payment of arrears of maintenance under the Judgment Debtor Summons and all the arrears, and the contempt proceedings is suspended and stayed until hearing of the appeal.*
4. *In respect of future spousal maintenance, I had suspended in part the payment of the sum of \$200.00. Instead of payment of \$400.00 a week, I had ordered the husband to pay a sum of \$200.00 per week in spousal maintenance with effect from the same week of the order until the hearing of the appeal.*
5. *The wife was to remove all the items from the USP's rented apartment except a telephone table, a Maisey table and a ling outdoor table which she said was infested with termites. I had ordered that she can leave all these properties behind.*
6. *In respect of the properties that the wife needed to remove, I had directed both parties to make and sign an inventory of the said properties that are taken away and a list was to be filed in the High Court file before 23 November 2018. I had restrained the wife from disposing these properties in the inventory in any manner whatsoever. I had ordered that if the value of the property deteriorated more than the wear and tear than the responsibility of the valuation going down would lie with the wife. I had also ordered the husband to bear the responsibility for transporting the items in the inventory list.*
3. From the orders that I had issued on 15 November 2018 [identified above] other applications were filed by both the parties.
4. On 26 November 2018, the husband filed a writ of possession against the wife and all such persons occupying USP's accommodation on the ground that the wife had failed to vacate the same on or before 23 November 2018 as per my orders of 15 November 2018.
5. On 7 January 2019, the wife filed an application for the husband to pay a sum of \$290.00 for the cost of transportation of the household items as the husband did not

pay the same as ordered by this court on 15 November 2018. She also sought that the injunctive orders issued by the Resident Magistrate on 2 November 2018 be registered by this court.

6. On the same day of 7 January 2019, the wife filed another application for contempt against the husband. The allegations were that the husband:

(i) *Failed to participate in the making of the inventory list and having the same verified and signed before filing it in court as per the order of 15 November 2018.*

(ii) *Failed to provide the transportation of the cartage of the household items as per order of 15 November 2018.*

7. On 15 January 2019, the husband filed an application for transfer of spousal maintenance claim and property distribution claim to the Family Division of the High Court.

8. On 16 March 2019 the husband filed another application seeking that the interim injunction be rescinded or the wife pays security for costs in the sum of \$65,000.00 or that she joins the proceedings in the Civil Court where he was seeking damages.

9. On 28 May 2019 the husband filed another appeal against the order of the Resident Magistrate where his application for stay of all proceedings in the Magistrates Court was refused.

10. On 5 August 2019 the husband filed an application to stay all proceedings in the Magistrates Court until final determination of the Civil Action No. HBC 256 of 2010.

Hearing

11. All the appeal and the wife's application were listed for hearing except the husband's application for transfer of proceedings to the High Court and dissolution of the interim

injunction. Nevertheless, it is essential that I determine the remaining applications as well because the remaining applications can be heard on papers and none of the parties will be prejudiced.

Law and Analysis

12. I will deal with each application in turn under separate headings. Before I do that it is important to outline that the husband died on 16 September 2019, within 4 months of the hearing of the application. His death will have a bearing on some of the applications.

A. Appeal Against the Injunction Order, the Order to Pay the Maintenance Arrears and All Future Maintenance in the Maintenance Registry: The Magistrate's Courts Order of 2 November 2018

13. The wife had filed final order proceedings for her share in the properties owned by the husband. The purpose of the injunction was to preserve the properties to ensure that the wife was able to have a meaningful hearing of the application for distribution.

14. There is always a danger that assets can be dissipated by a party and the share of one party diminished. To protect the interest of the wife the injunctive orders were granted.

15. I do not find any prejudice in the orders issued by the court below. The court below had given the parties an opportunity to file applications in the court if any party needed to deal with any asset that came within the purview of the injunction orders.

16. The order giving liberty to the parties to apply to the court to deal with any asset if it was necessary or urgent, catered for the husband's needs as well. If there was a need for any assets to be disposed, he could have applied to the Court. He has not shown why the orders are prejudicial to him and if he needed to dispose any assets, why he has not chosen to go back to the court below.

17. There is no reason for me to interfere with the injunctive orders of the court as those are temporary orders to protect the prosecution of the proceedings. The orders also recognized that the husband may need some of the assets for his benefit at some point in time. The court therefore allowed him that opportunity to make an application in Court. I find the orders proper providing security to both parties in preserving the properties of the parties to the marriage. I am not shown that the husband is affected by the issuance of these orders.
18. The husband is also aggrieved with the order to pay maintenance and for the future maintenance to be paid in the Maintenance Registry. The judgment notes that he had informed the court that he did not make any payments since 21 August 2018. The court ordered him to put all payments in order.
19. On 29 March 2018, the parties had agreed for the status quo to be maintained which was for the husband to pay \$400.00 per week in interim maintenance in his account to be utilized by the wife and for the husband to continue paying rent for the USP accommodation until the tenancy was in place.
20. The above order was by consent. I will not interfere with an order made by consent of the parties unless the party's consent to vary it. If one of the parties wishes to apply for the order to be varied, it is for the parties to apply for variation of the same in the court they consented for the order to be made. It is not proper for the parties to apply for the order to be changed by the appellate court.
21. On 15 November 2018, the parties had agreed to suspend payment of \$200.00 per week until the hearing of the appeal. I had however not discharged the payment of the remaining sum. Now that I have arrived at a finding that I will not disturb the consent order made by the Magistrate's Court, I find that husband's liability to pay the sum of \$400.00 per week from 29 March 2018 until 2 November 2018 remains. There may be a problem for the Registry to calculate the arrears as these monies were ordered to be paid in the husband's account to be utilized by the wife. There is no clear way of working out the arrears. The court below had ordered that the arrears be worked out from the wife's records. This may have been possible if the husband was alive to

contest the wife's records. Now that he is dead, his estate may not have the past records. Both parties must take responsibility for agreeing to an order which was foreseeably going to be ineffective. The best the Registry can do is to work out the arrears based on the records provided by the wife which can be contested by the estate.

22. The arrears from 2 November 2018 until 16 September 2019 can be calculated easily as from 2 November 2018, the husband was required to pay a sum of \$400.00 per week in the Registry. This sum should be paid until 16 September 2019 being the date of death of the appellant.
23. The order for maintenance ceases upon the death of a party. The relevant provision of the law is s. 165(1) (c) of the FLA which states that "an order with respect to the maintenance of a party to a marriage ceases to have effect upon the death of a party". Given this provision, the application for spousal maintenance cannot continue.
24. The wife can however recover arrears of maintenance from the estate of the husband. S.165 (5) of the FLA states that "*nothing in this section affects the recovery of arrears due under an order at the time when the order ceased to have effect*".

B. Writ of Possession

24. The application to enforce the order for vacant possession is now redundant. There is no need for a writ of possession to be issued as the USP accommodation was provided to the husband on account of his employment. He is now deceased and USP will now not continue with the tenancy with his estate.

C. Wife's Application for Payment of \$290.00 for Cartage Cost pursuant to the Consent Order of 15 November 2018 made in the High Court and to Register the Magistrate's Courts Injunction Orders in High Court

25. I have not been shown any satisfactory evidence that the sum of \$290 was paid by the wife for cartage cost. If she had paid these monies, she ought to have provided the

Court with the receipts. In absence of any evidence, I am not prepared to award any sums of money to the wife. It could well be that she was able to remove the items without any payment of monies.

26. In regards registration of the injunction orders in the High Court, some of the orders needs to be registered and these are orders affecting the land. The Registrar of Titles only registers injunctions by the High Court due to the definition of the term “court” in s. 2 of the LTA which states that “court” means the High Court”.

27. I therefore register the injunction restraining the husband from dealing with the vacant lot situated in Wakaya Island. The details of the property can be found in the judgment of 2 November 2018 for purposes of sealing the order.

28. I also register the injunction restraining the estate from dealing with the husband business properly described in paragraph 1(h) of the Final Orders of the Magistrates Court’s Judgment of 2 November 2018. The reason is that the business may contain an asset which includes a land.

29. All other orders need not be registered as the Magistrates Court’s orders ought to be recognized by the other institutions such as the Land Transport Authority, the bank, the Court and the employer.

D. Wife’s Application for Contempt Against Husband for Failing to Prepare an Inventory List and to Pay Cartage Costs both being Subject of the Order of 15 November 2018

30. Owing to the death of the husband, I do not consider it necessary to deal with the two applications as any findings for contempt can only be made against the husband and not the estate.

E. Husband’s Application for Transfer of Proceedings to High Court

31. Although this application was not argued, this can be safely dealt with on papers given my other findings.

32. Rule 5.16 of the FLR outlines the factors that the court may have regard to in determining the application for transfer. It states:

“5.16-(1) In considering a transfer under this Order, the court shall have regard to –

- (a) The wishes of the parties;*
 - (b) Whether proceedings in respect of an associated matter are pending in the other court; and*
 - (c) Whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceedings is not transferred;*
 - (d) Whether the proceeding is likely to be heard and determined earlier in the other court;*
 - (e) The availability of particular procedures appropriate for the class of proceeding; and*
 - (f) The interests of the administration of justice.*
- (2) In addition to the factors set out in subrule(1) the Family Division of the High Court must, when considering whether to transfer a proceeding to the Family Division of the Magistrates Court , take into account –*
- (a) whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Family Division of the High Court on one or more of the points in issue; and*
 - (b) whether the resources of the Magistrates’ Court are sufficient to hear and determine the proceeding.*
- (3) In making an order rule 5.15, the court may impose such terms and conditions as it thinks fit.”*

33. The application for the transfer is objected to. I find no cogent reason why the application for property distribution cannot be dealt with by the Magistrates Court

and continued against the estate. The proceedings for spousal maintenance cannot be continued against the estate.

34. The High Court is a Court primarily exercising an appellate function. Unless there is a reason satisfactory enough to transfer the proceedings in the High Court, the Family Division of the Magistrates Court is the forum to hear property distribution proceedings. I am not satisfied that any of the factors assist the husband's application.

F. Husband's Application to Rescind Injunction Orders and for Wife to Pay Security for Costs in the sum of \$65,000.00 or that she be joined in the Civil Court Proceedings.

35. My earlier findings on the need to preserve the property for the wife to be able to successfully prosecute her application for property distribution applies to the husband's application for rescission of the injunctive orders. He was given liberty to make that application in the Magistrate's Court and that is the proper forum in which he should make that application.
36. There is no basis for the husband to ask for security of costs to be paid by the wife. She is prosecuting her application for property distribution. If costs are ordered against her, it can be adjusted from her entitlements.
37. I also see no basis to deal with any joinder application by the husband seeking for her to be joined in the pending civil cause seeking damages. The husband can file that application in the civil case. I understand that the injunctive orders have restrained the husband from dealing with any damages awarded in the civil case. He is now dead. His personal representative may wish to continue with the civil proceedings if it is so desired.
38. The husband's grievance was this: why should he spend the monies and prosecute the case for the wife to benefit from the damages? The issue of costs incurred in prosecuting the civil cause can always be argued as liability on the property to be

excluded from the value. It is for the court to then decide if it would and the extent to which it would allow the costs to be treated as proper liability.

G. Appeal against Refusal to Stay Proceedings in the Magistrate's Court and for Stay of all Proceedings until Determination of Civil Case seeking damages.

39. There are two substantive proceedings pending in the Magistrates' Court. One is the spousal maintenance claim against the husband which cannot continue since the husband is now dead.

40. The second is the property distribution proceedings. Since I have declined to transfer the case in the High Court and dismissed all the appeals by the husband, there is no basis to stay the proceedings until the determination of the Civil High Court matter. My powers to stay proceedings extend only to making an order for stay until determination of the appeal.

41. Further, I do not have the substantive case of property distribution pending before me to consider any stay. It is only proper for any such application to be made in the court in which the proceedings are pending.

Final Orders

42. In the final analysis I make the following orders in relation to the various applications.

- A. Appeal Against the Injunction Orders, the Order to Pay the Maintenance Arrears and All Future Maintenance in the Maintenance Registry: The Magistrate's Courts Order of 2 November 2018
- i. *The appeal is dismissed. The wife is only entitled to recover arrears of maintenance at the rate of \$400.00 per week until 16 September 2019 (being the death of the husband). The initial order was made on 29 March 2018. From 29 March 2018 to 2 November 2018, the arrears ought to be calculated from the*

- records kept by the wife. The estate is at liberty to challenge the records kept by the wife. From 2 November 2018 until 16 September 2019, the arrears ought to be calculated from the records kept at the Registry as the husband was ordered to pay the maintenance from 2 November 2018 in the maintenance registry.*
- ii. *The arrears can be recovered from the estate through a Judgment Debtor Summons served on the trustee or the personal representative of the estate.*
- B. Writ of Possession to enforce order for vacant possession against wife.
- i. *The application for leave is dismissed as the application is now redundant.*
- C. Wife's Application for payment of \$290.00 for cartage costs under the order of 15 November 2018 and to register the Injunction Orders in the High Court.
- i. *The application for payment of \$290.00 for cartage costs is dismissed against the husband.*
- ii. *I register the Magistrates' Court orders granting injunction against the husband (which now binds his estate) restraining his estate from deal with the properties identified in paragraph 1(a) and (h) of the final orders of the Magistrates' Court Judgment of 2 November 2018.*
- D. Wife's Application for Contempt against Husband for Failing to Prepare an Inventory List and to Pay Cartage Costs both being Subject of the Order of 15 November 2018.
- i. *The contempt proceedings are dismissed as the husband is now deceased.*
- E. Transfer of Proceedings- Spousal Maintenance and Property Distribution Proceedings to High Court.

- i. *The spousal maintenance proceedings cannot be continue against the estate due to the death of the husband on 16 September 2019.*
- ii. *I dismiss the application for transfer of the property distribution proceedings to the High Court. It can be continued in the Magistrates' Court against the estate pursuant to s.163 (5) (a) of the FLA.*

F. Husband's Application to Rescind Injunction Orders and for wife to pay Security for costs in the sum of \$65,000.00 or that she be joined in the Civil Court Proceedings.

- i. *The applications are dismissed. If the estate wants to deal with any asset it can apply to the Magistrates' Court pursuant to the Judgment of 2 November 2018.*

G. Appeal against refusal to stay proceedings in the Magistrate's Court and for stay of all proceedings until determination of HBC 256 of 2010.

- i. *The application for spousal maintenance cannot continue in the Magistrates' Court due to the death of the husband.*
- ii. *The application to stay property proceedings until determination of the Civil Claim is dismissed.*

43. On 15 November 2018 I had ordered that *"the payment of arrears of maintenance under the Judgment Debtor Summons and all the arrears, and the contempt proceedings is suspended and stayed until hearing of the appeal"*. I now discharge that order.

44. I order each party to bear their own costs of the proceedings in the High Court.

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Hon. Madam Justice Anjala Wati

06.10.2023

To:

1. Applicant.
2. Legal Aid Commission for the Respondent.
3. File: Family Appeal Case Number: 10 of 2018.