

IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

APPELLATE JURISDICTION

ACTION NUMBER:	<i>FAMILY APPEAL # 7 OF 2021 (Magistrate's Court File # 6/LTK/0004)</i>
BETWEEN:	<i>RADHANA</i> <i>APPELLANT</i>
AND:	<i>RANDEEP</i> <i>RESPONDENT</i>
APPEARANCES:	<i><u>Appellant</u> – Present – Ms. L. Taukei (Legal Aid). <u>Respondent</u> – Not Present – Mr. Z. Mohammed & Ms. A. Naidu</i>
DATE/PLACE OF JUDGMENT:	<i>Tuesday 24 October 2023</i>
DATE OF HEARING:	<i>Monday 28 August 2023</i>
CORAM:	<i>Hon. Mr. Justice Chaitanya Lakshman</i>
CATEGORY:	<i>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.</i>

JUDGMENT

A. Introduction

- [1] The Appellant/Lady filed an appeal on 5th October 2021 appealing the Learned Magistrate's Ruling and Orders of 5th June 2020. The parties had entered into consent order on 3rd April 2008 in respect of the matrimonial property comprised in Housing Authority Sub Lease Number 434928, being Crown Lease No. 5037, Lot 3 DP 7358, located in Ba

Province, District of Vuda having an area of 293 square metres. The terms of the consent orders were that the Respondent/Man would transfer one undivided half share of the said property to the Appellant/Lady and the other undivided half share was to be held by the Appellant/Lady as Trustee for their daughter.

- [2] Two orders were respectively made on 10th November 2016 and 12th October 2017 enforcing the consent orders of 3rd April 2008. The Magistrate's orders of 12th October 2017 were registered by the High Court on 17th April 2018. The property was transferred in the names of the Appellant/Lady and their daughter on 21st February 2018.
- [3] Upon an application to the Magistrate Court by the Respondent/Man seeking to set aside the consent orders dated 3rd April 2008 the Learned Magistrate on 8th April 2021 set aside the consent orders dated 3rd April 2008 and granted an injunction refraining the Appellant/Lady from dealing with the property. This decision is the subject of this appeal. I would like to state at the outset that the circumstances relating to the Respondent/Man are sad, however emotions will not overrule my judgment. It will purely be based on the law and the materials before me.

B. The Grounds of Appeal

- [4] There are four grounds of appeal and we will go over each ground of appeal in turn. The **first ground** is that "*that the Learned Magistrate erred in law and in fact when he failed to consider that the Respondent was represented by Counsel when consent order was made on the 3rd of April 2008.*" This ground of appeal relates to representation of the Respondent/Man when the consent orders were made in April 2008. There was no submission by the Respondent/Man's lawyer on this issue. The Appellants submit that the Respondent had legal representation when the consent orders were made in 2008. They argue that that since the Respondent/Man had signed with his lawyer, he would have received legal advice. They also state that a family court counsellor was present and had explained the repercussions of signing the consent orders as is stated in paragraph 13 of the consent orders. The lawyer for the Appellant also states that the consent order was approved by a Magistrate and that the Respondent/Man came to Court after 10 years to set aside the consent orders. For the Appellant/Lady the argument is that in 2017 the Appellant applied for the enforcement of the consent orders and at that time the Respondent/Man was represented by a lawyer and they consented to the enforcement of the orders. Later in 2018 an application was made to the

High Court and at that stage the Respondent/Man was represented by a lawyer and at that stage they consented to the orders being made in favour of the Appellant/Lady and their daughter.

- [5] The submission on behalf of the Appellant on the issue of representation of the Respondent/Man is pertinent. The issue that is being raised by the Appellant before this court was also put before the Learned Magistrate. The Learned Magistrate did not address the issue of representation of or legal advice to the Respondent/Man at the time the consent orders were made in his Ruling.
- [6] Of the various grounds set out in Section 163 (1) para (a) of the Family Law Act 2003 – ‘miscarriage of justice’ amongst other grounds (fraud, duress, suppression of evidence, and giving of false evidence) includes ‘any other circumstance’. In **Korsky v. Bright (No 2) 2007 38 Fam LR 106; (2007) FLC ¶93-352; [2007] FamCA 1512** the court held that an unjust order will not necessarily mean there has been a miscarriage of justice, and in **Holland v. Holland (No 2) (1982) 8 Fam LR 233 at 236**, the Full Court held that the expression ‘miscarriage of justice’ in this context extends to any situation ‘which sufficiently indicates that the decree or order was obtained contrary to the justice of the case. In **Clifton v. Stuart (1990) 14 Fam LR 511; (1991) FLC ¶92-194**, the wife claimed miscarriage of justice by reason of the unprofessional conduct and neglect of her solicitor. The Full Court, first determined that while the expression ‘any other circumstance’ should not be read as *ejusdem generis* (Latin: of the same kind) with fraud, duress, the suppression of evidence and the giving of false evidence; there must nevertheless still be a circumstance that created a miscarriage of justice. Secondly, they interpreted ‘justice’ as referring to the integrity of the legal process, incompetence of a legal representative, unless equivalent to no representation, does not of itself affect the judicial process.
- [7] It is clear from the documents before this Court that the Respondent/Man had proper and adequate legal representation all along. There is no complaint from his current lawyers that he was not adequately advised or properly represented at any stage of the court proceedings.
- [8] The **second ground** of appeal is that “*the Learned Magistrate erred in law and in fact by not properly evaluating the terms of settlement entered by both parties which was made as an order of the Honourable Court on the 12th day of May 2008.*” The terms of settlement entered into between the parties is of 2 pages and has 13 clauses. The clauses respectively dealt with the following:

- (a) creation of family trust deed for the property for one undivided half share to the daughter with Appellant/Lady as trustee.
- (b) Trustee to maintain and keep property in good condition for benefit of their daughter until she attains the age of 21.
- (c) Respondent/Man would transfer of the other undivided half share to Appellant, absolutely.
- (d) Appellant/Lady to continue making regular payments on the mortgage to Housing Authority and to undertake to make good all repayments before daughter attains 21 years.
- (e) Appellant/Lady and their daughter to reside on the property without disruptions from the Respondent/Man as he has moved out of the property.
- (f) If Appellant/Lady rented out the property, she was to use half the rental sum for the upkeep of their daughter.
- (g) Respondent/Man to clear FNPF Charge, in lieu of maintenance for his daughter.
- (h) In the event FNPF charge not cleared. Respondent/Man would transfer subject to charge and pay his daughter the relevant sum upon reaching 55 or death, whichever is earlier, in lieu of maintenance.
- (i) Appellant/Lady would not seek maintenance for the daughter from Respondent/Man.
- (j) Respondent/Man's proposals to be sanctioned by Court and made orders of Court.
- (k) Appellant/Lady been advised to seek independent legal advice of the terms of settlement.
- (l) The terms of settlement were reached in presence of Family Court Counsellor, Ms Begum, who explained the meaning and repercussions of the same to both parties.
- (m) parties were at liberty to apply to the Magistrate's Court at Lautoka.

The terms of settlement were signed by the parties and witnessed by lawyers. The Lawyer representing the Appellant/Lady was Mr Peni Dalituicama, while Ms Natasha Khan represented the Respondent/Man before Resident Magistrate Mr Maika Nakora when the terms of settlement was sanctioned by the Court on 3rd April 2008.

- [9] The Learned Magistrate in his Ruling stated that “... *the Applicant Man is now living on the streets. He has lost his job in 2005. After the orders were made in 2008 the Applicant Man was sleeping at the Lautoka Bus Station. According to the Applicant Man he had moved out of the property ever since the orders were granted in 2008. The agreement between the parties was that the Applicant Man was to transfer everything to the Respondent Lady and her daughter’s name on the belief that they would allow him to live on the property. Moreover, there are no clause in the consent orders that reflects the interest of the Applicant Man...*”.
- [10] The Learned Magistrate in his analysis went on to state that the clauses in the consent order did not reflect the interests of the Respondent/Man. This is not correct. The parties had agreed that in lieu of maintenance for their daughter the Respondent/Man would clear the charge with FNPF. The Appellant would not make any application for maintenance for their daughter. The parties had also agreed that the Appellant/Lady would make regular repayments on the mortgage to Housing Authority and make good all repayments before the daughter attains the age of 21. The Appellant/Lady in her affidavit filed on 13th June 2019 stated that the city rates and ground rent was cleared. I find that all these were in the interest of the Respondent/Man. Reading clause 12 (independent advice to be sought by Appellant/Lady) and the header, clauses 1, 3, and 7 of the agreement where is reference to “I”. That reference is to the Respondent/Man. From the wordings of the agreement, it seems it was initiated by the Respondent/Man or drafted for him to be put to the Appellant/Lady. The Respondent/Man had already moved out of the property when he entered into the terms of settlement. He had noted in the agreement that he wanted to give uninterrupted access to the property to the Appellant/Lady and their daughter.
- [11] It seems to me that the Learned Magistrate was easily convinced by the submissions made by the Respondent/Man’s Lawyers. Certain submissions by the lawyers were selective and emotive. If not read and evaluated carefully with all relevant materials they can lead a judicial officer astray. For instance, in the submission (filed on 31st October 2019) to the Learned Magistrate the Respondent/Man’s Lawyers in the second page (pages are not numbered) the first paragraph state “*iv. That in affidavit filed on 28/09/2016, the Respondent Lady had annexed a medical report from St. Giles Hospital which clearly stated that the Applicant Man was in depression and also suffered from epilepsy.*” It is important to note that the medical report (of August 2001) referred to by the Respondent/Man’s Lawyers amongst other things noted as follows “*on examination, Mr P was neatly dressed and groomed. He appeared*

anxious and dysphoric. But subjectively said he was feeling mentally well. His speech was slow, deliberate and low in volume. He had normal form and content of thought. He denied having any perceptual abnormalities. Mr. P was orientated person, place and time. Memory was intact. Concentration, judgment and insight was fair. Calculation was poor.”

- [12] On the issue of the Man losing his job the submission by the Respondent/Man’s Lawyers was that “*vi The Respondent Lady in her affidavit (Form 23) filed on 28/09/20[16] clearly stated that the Applicant Man had lost his job in 2005 as he was suffering mentally.*” The corresponding part in the Appellant/Lady’s affidavit is “*8. The Respondent was working for Fiji Electricity Authority (FEA) and at some point in time he started missing work which affected his work. Towards the end of 2005, the Respondent was suspended from work without pay and subsequently he was terminated from his employment.*” At no point the Appellant/Lady stated that the Respondent/Man lost his job due to his mental state.
- [13] The Appellant/Lady in her affidavit had stated that “*few years after the court order was made in 2008, the Respondent was found to be living in the streets of Lautoka. He would spend his time loitering around the Lautoka Bus-stand area and even took shelter and slept at the bus-stand.*” The submission by the Man’s Lawyers is “*vii. After Orders were granted in 2008, the Applicant Man has been living on the streets and sleeping at Lautoka bus stand; this has been confirmed by the Respondent Lady’s affidavit*”. I note the distortion of the Lady’s affidavit and attributed to her in the written submission for the Man. The Appellant/Lady had mentioned that few years after the orders were made in 2008, whereas the submission by the Man’s lawyers was that after orders were granted in 2008 the man was onto the streets.
- [14] The terms of settlement and the consent orders which was being challenged by the Man was based on his “mental illness”. The affidavit of the Respondent/Man filed on 24th June 2018 with his application seeking to set aside the consent orders in Para 5 states “*I have been suffering from a mental illness which had affected me on and/or before the Order dated 3rd April 2008 which the Respondent is aware of and had deposed in detail in her Affidavit filed on 24th January 2017*”. The reference of the ‘mental illness’ in the affidavit of the Man being “*deposed in detail*” in the Appellant/Lady’s affidavit filed on 24th January 2017 is solely contained in Para 7 where she averred to as follows “*during our marriage I had come to know that the Respondent was suffering from epilepsy. In 2001, the Respondent was taken to St Giles Hospital, Suva for psychiatric evaluation.*” This again is an example where something is being

attributed to the Appellant which is not truthful. She did not refer to mental illness, she referred to epilepsy. Caution must be exercised by lawyers who draft such affidavits and make such claims which are misleading. An attempt should never be made to portray another in bad light, when it is not so.

[15] The written submissions for the Respondent/Man to this court are not of much assistance. It is an attempt to pull wool over my eyes. In the submissions they state “...*The Appellant Lady and her Solicitors scrupulously got the Respondent man admitted at St Giles Hospital and quickly got the orders for Deputy Registrar of High Court execute all the documents for the transfer of the property...*”. The orders that were made in the High Court on 17th April 2018 were by consent and both sides had legal representation. The Respondent/Man was referred to St Giles Hospital on the orders of the Learned Magistrate and not the Appellant/Lady and her lawyers.

[16] I would deal with the third and fourth grounds together as the issues are related. The **third ground** of appeal is that “*the Learned Magistrate erred in law and in fact when he failed to consider that the Respondent was a fit and proper person and did not have any psychiatric issue/nor any mental condition when signing the Terms of Settlement and when the consent Orders were made in 2008*”, while the **fourth ground** of appeal is that “*the Learned Magistrate erred in law and in fact without properly considering section 162 and 163 of the Family Law Act 2003.*”

[17] The Learned Magistrate had ordered a psychiatric evaluation of the Respondent/Man. It was conducted at St Giles Hospital in 2019. In the comprehensive report Dr Kiran Gaikwad found that the Respondent/Man “...*should be mentally capable of forming a legal strategy for him. He has adequate knowledge of the basic roles of the key court actors, including the judge, prosecutor and defense counsel. The same applies to his comprehension of procedures of the court. He has the mental capacity to give his testimony on the witness stand under examination or cross-examination. He manifests self-serving motivation and not self-defeating motivation.*” The report confirmed that the Respondent/Man at that moment was “...*under treatment and needs to stay in hospital for observation and management of epilepsy...*”. The Doctor went on to state “*I cannot comment on his mental state at the time when he signed off his property on his wife’s name. however, at present he should be able to form his legal strategy.*”

[18] The Report of the Doctor and what the Appellant/Lady in her affidavits stated about the Respondent/Man are consistent. They both refer to

epilepsy as compared to reference of “mental illness” for the Respondent. The Respondent/Man informed the Doctor that he lost his job due to his medical problem and that he suffered from epilepsy since childhood. On his examination the Respondent/Man denied any symptoms of mental illness. The Doctor also noted that he did not display any odd or bizarre behaviour when free from seizure episode. The Doctor noted that the Respondent/Man did not have “*perceptual disturbances such as hearing voices (auditory hallucinations) or seeing imaginary things (visual hallucinations). His thought process is goal-directed and he does not have any delusions.*”

- [19] The information before the Learned Magistrate was submissions on behalf of the Respondent/Man, in addition to the Report he had ordered following the psychiatric evaluation. Having had this information and having analysed everything the Learned Magistrate found that “... *the Applicant Man was struggling with his mental illness and Epilepsy when the consent orders were made in 2008.*” The only evidence the Learned Magistrate had before him was of the epilepsy. There was no evidence before the Court of “mental illness” of the Respondent/Man.
- [20] The Learned Magistrate also relied upon Section 163 (2) of the Family Law Act 2003 which is as follows “*A court may, on application by a person affected by an order made by a court under section 162 in proceedings with respect to the property of the parties to a marriage or either of them, and with consent of all the parties to the proceedings in which the order was made, vary the order or set the order aside and, if it considers appropriate, make another order under section 162 in substitution for the order so set aside.*” in setting aside the consent orders of 3rd April 2004.
- [21] Section 163 (2) of the Family Law Act 2003 is in the context of varying orders made by consent. The application before the Learned Magistrate was one to set aside the consent orders. The relevant law being Section 163 (1) of the Family Law Act 2003. Section 163 (2) FLA 2003 applies where parties consent to each other seeking variation of consent orders. It is dealt with by a Court as has been guided by **Gitane v. Velacruz (2008) 39 Fam LR 460; (2008) FLC ¶ 93-371** which suggested a two-step approach to determining whether an order should be varied. First, the court should consider whether an appropriate ground to vary orders has been made out (in this case consent); and second, the court should consider all the discretionary factors, including whether the order should be varied and, if appropriate, what new order should be made. The Learned Magistrate misapplied the law.

[22] Section 163 (1) FLA 2003 provides that “*If, on application by a person affected by an order made by a court under section 162 in proceedings with respect to the property of the parties to a marriage or either of them, the court is satisfied that-*

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;

(b) in the circumstances that have arisen since the order was made it is impracticable for the order or a part of it to be carried out;

(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order; or

(d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage, the child or, where the applicant has caring responsibility for the child (as defined in subsection (3)) the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order,

the court may, in its direction, vary the order or set the order aside and, if it considers appropriate, make another order under section 162 in substitution for the order so set aside.”

[23] Property orders are characterised by a high degree of finality. Once final orders have been made under Section 161 of the FLA 2003, the only way an order may be altered is through the appeal process or through an application to vary or set aside an existing order pursuant to Section 163 of the FLA 2003. Final property orders can only be varied or set aside on the strictly limited grounds set out in Section 163 (1) of FLA 2003 and, in general the section is given restrictive interpretation. Even if one of the grounds is made out, the court still retains discretion as to whether to set aside the orders: **Prowse v Prowse (1995) FLC ¶ 92-557; Gitane v. Velacruz (2008) FLC ¶ 93-703**. The Applicant bears the onus of establishing that the discretion should be exercised: **Official Trustee in Bankruptcy v Donovan (1996) FLC ¶ 92-703**.

[24] The Respondent/Man relied upon “mental illness” in seeking to set aside the consent orders. The Respondent/Man in his affidavit avers that he had “mental illness” which affected him on or before the consent orders were

made. The affidavit however does not make any reference to or detail that due to the “mental illness” the Respondent/Man did not have the requisite capacity to enter the terms of settlement which formed the consent orders. The issue in this matter is about the mental capacity of the Respondent/Man to enter into the agreement.

[25] I am of the view that “mental incapacity” to enter into the terms of settlement would fall in as ‘any other circumstance’ that may allow the setting aside of consent orders under Section 163 (1) of the FLA 2003. It is well established that a person who lacks mental capacity (ability to fully understand the meaning and effect) is not legally capable of entering into a contract.

[26] The term “mental incapacity” is not defined in the Family Law Act 2003. The test as to the ‘mental capacity’ of a party in question was formulated by Singleton LJ in **Estate of Park; Park v. Park [1954] P 112** as follows:

“was the deceased capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? In order to ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.” (My emphasis)

[27] What was required in this matter for the Respondent/Man to set aside the consent orders was medical and other evidence on which a Court could be satisfied on the balance of probabilities that Respondent/Man lacked mental capacity to enter to the terms of settlement and consequently seek consent orders. There was no medical evidence about the state of mind of the Respondent/Man at the time he entered into the terms of settlement. The Court could not have assessed the mental capacity of the Respondent/Man time he entered into the terms of settlement in the absence of any medical or other evidence at the. In **Gibbons v Wright [1954] HCA 17, (1954) 91 CLR 423**, the High Court of Australia (at 437 per Dixon CJ, Kitto and Taylor JJ) defined a decision-specific test for mental capacity to enter into a contract: *“The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he [or she] is doing by his [or her] participation.”* The same approach was explained

as follows in *Scott v Scott* [2012] NSWSC 1541 at [205]: “*It is not, literally, a matter of imposing, or recognising, a different ‘standard’ of mental capacity in the evaluation of the validity of different transactions. What is required, rather, is an appreciation that the concept of ‘mental capacity’ must be assessed relative to the nature, terms, purpose and context of the particular transaction. Nothing more, or less, is required than a focus on whether the subject of inquiry had the capacity to do, or to refrain from doing, the particular thing under review*”

[27] For the reasons given herein the appeal succeeds. The orders of the Resident Magistrate dated 8th April 2021 are set aside. The injunction placed on the property by Justice Wati on 10th November 2022 is lifted. Given the circumstances there shall be no orders for costs.

C. Court Orders

- (a) *The orders of the Learned Magistrate of 30th March 2022 are set aside.*
- (b) *The injunction placed on the property by Justice Anjala Wati on 10th November 2022 is lifted.*
- (c) *No Orders as to costs.*

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Chaitanya Lakshman
Acting Puisne Judge