

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

APPEAL NUMBER:	20/Suv/ 0002 (Original Action Number: 18/Nas/0247)
BETWEEN:	Kesaiya APPELLANT
AND:	Tomasio RESPONDENT
Appearances:	<i>Ms. S. Kunatuba for the Appellant.</i> <i>Ms. M. Rakai of the Respondent.</i>
Date/Place of judgment:	<i>Wednesday 20 October 2021 at Suva.</i>
Coram:	<i>Hon. Madam Justice Anjala Wati</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 similarities to any persons is purely coincidental.</i>

JUDGMENT

A. Catchwords:

FAMILY LAW – Appeal – Application made in lower court for leave to institute property distribution proceedings two years after the dissolution of marriage– application refused on the grounds that since the application was made 6 years post the dissolution, the wife was not going to suffer any hardship – the lower court failed to take into account a holistic picture of the parties, the ownership of the property and the complications and effect of not ordering a distribution – both parties will be prejudiced in that no one party will ever be able to have a complete claim of right in the property and deal with the same during their lifetime if there is no division – in the interest of both parties, the distribution is necessary – leave granted for wife to institute property distribution proceedings.

B. Legislation:

1. **Family Law Act 2003 (“FLA”): S. 27.**

1. The wife has filed an appeal against the decision of the Family Division of the Magistrates Court, Nasinu when it dismissed her application to grant leave to institute property distribution proceedings.
2. The basis on which leave was refused was that 6 years had lapsed since the parties' marriage was dissolved and since there were no children of the marriage under 18 years who required financial support, the wife could not establish that she would suffer any hardship.
3. The application for leave was necessary under s. 27 of the FLA which states that property proceedings should not be instituted after the expiration of 2 years of the dissolution of marriage unless leave of the court to do so has been obtained. The leave must not be granted unless a party or a child of the marriage is shown to suffer hardship.
4. The subject property in respect of which leave was sought for distribution is a residential property. I have examined the certificate of title of this property. This property is owned by the parties as tenants in common and has a mortgage over the same.
5. When the Family Division of the Magistrates Court was required to determine the question of leave, it was to look at whether any party or a child of the marriage will suffer hardship if leave were to be refused. The Magistrate considered two factors in determining whether there would be any hardship to the wife or any child of the marriage. The first being the delay in bringing the application and the second being the age of the children and whether they required any financial support.
6. I find that by narrowing the considerations to only two aspects, the Court fell in error of law and fact. The court overlooked to examine the holistic circumstances of the parties, the nature of the ownership of the property and the future effect on the parties if leave were to be refused in the matter. If all the matters were given due consideration, I do not think that the result that was arrived at was justified.

7. I must start off by discussing the delay aspect of 6 years in bringing the application for leave for distribution of proceedings. Why is the delay laid at the wife's door and not at the husband's? Why is she made responsible for the delay? Why did not the husband make the application for distribution? I will not ask these questions if the husband owned the property solely because if there were no proceedings by the wife, it would be understood that the legal interest in the property vests in the husband. However, in this case the property is co-owned by the wife as well.
8. I have examined the certificate of title and it reveals that both the parties are tenants in common. If there are no distribution proceedings by either party, both of them will remain legal owners of the same for life. Since they hold the same as tenants in common, each owner can devise and bequeath the same. It is not that this property will go to the surviving spouse because the memorial in the certificate of title does not state that they own the property as joint tenants. In absence of any such notation, the property by law vests in both parties as tenants in common.
9. If parties own the property as joint tenants then upon the demise of one owner, the legal interest vests in the surviving owner. By refusing an order for distribution means that both the parties hold equal shares in the property and both will not be able to realize the shares until there is distribution of the same. Even the husband will not be able to have the property all to himself. If he wanted to have the property shared or transferred to him, then he should applied for distribution of the same. He sat on it perhaps on the ill advice that if the wife does not make the claim, he can be the owner of the same which is not the legal consequence of the lack of distribution orders.
10. Even now, if the husband wishes to have the property transferred in his name, he will not be able to because he is also caught by time and the decision of the Magistrates' Court. He will never be able to sell the same or even deal with the whole property in any manner without the consent of the co-owner.
11. By resisting the application for leave, the husband has only made matters difficult for him in the future. He must realise that it is better for the parties to clear their financial issues once

and for all and bring a finality to the property dispute. To that end, only the grant of leave will rescue the situation.

12. I find that both parties will suffer hardship if the Family Court refuses to distribute the property of the parties to the marriage. The parties will have to seek the intervention of the civil court for their respective shares. There is no prohibition for them to seek a civil remedy. If there is, then the wife can leave the property as it is and occupy the same. The husband will not be able to intervene in her right to occupy the same as she is the co-owner of the same and has legal interest in the property. There are no orders excluding her from occupying the property. All these matters will complicate the parties' position.

13. I find that the appeal should be allowed. I therefore grant leave to institute the proceedings. The application proper must be filed within 21 days of the grant of the leave. Each party must bear their own costs of the proceedings.

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Hon. Madam Justice Anjala Wati

Judge

20.10.2021

To:

- 1. Law Solutions for the Appellant.*
- 2. Sherani & Company for the Respondent.*
- 3. File: Appeal Case Number: 20/Suv/0002.*