

**IN THE FAMILY DIVISION OF THE HIGH COURT OF FIJI**

**AT SUVA**

<b>APPEAL NUMBER:</b>	21/SUV/0186
<b>BETWEEN:</b>	<b>IRMA</b> <b>APPELLANT</b>
<b>AND:</b>	<b>JEREMY</b> <b>RESPONDENT</b>
<b>Appearances:</b>	Ms. Adrienne A for the Applicant Ms. Choo N for the Respondent
<b>Date/Place of Judgment:</b>	Tuesday, 04 <sup>th</sup> January 2022 at Suva
<b>Coram:</b>	Hon. Mr. Justice Vishwa Datt Sharma
<b>Category:</b>	<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>
<b>Anonymised Case Citation:</b>	Irmav. Jeremy –Family High Court Case Number 21/SUV/0186
<b>JUDGMENT OF THE COURT</b>	

**The Application**

- [1] The **Applicant**, filed a **Form 12 and 23 application** on **17<sup>th</sup> November, 2021** at the Family Division of the Magistrates Court and sought for the following Orders-

- (a) That the passports of CHILD A, born in Germany, and CHILD B, born in Germany, (together the "children"), which were voluntarily submitted by the Applicant to this Honourable Court, be returned to the Applicant.*
- (b) That the Applicant having residency of the Children may depart Fiji with the Children to return to their habitual residence in Germany on or about 6<sup>th</sup> December 2021.*
- (c) That the Respondent shall not interfere or hinder the Applicant and the Children from departing Fiji on or about 6<sup>th</sup> December 2021.*
- (d) The Respondent is at liberty to pursue family law proceedings in Germany.*
- (e) That an expedited hearing date be given for this Application.*
- (f) Any other Orders the Court deems just and expedient.*

- [2] The above application was assigned with an early Returnable Date of **23<sup>rd</sup> November 2021**.
- [3] Thereafter, the application was adjourned for Hearing on **13<sup>th</sup> December 2021**.
- [4] Subsequently, it was further adjourned for Hearing on **07<sup>th</sup> January 2022**. According to the **Applicant**, all the impending Family Division of the Magistrates Court applications filed by the parties to these proceedings in this action will be bundled together, heard and determined on **07<sup>th</sup> January 2022** accordingly.
- [5] The **Respondent** filed his **Affidavit Response, Form 13 and 23** on 07<sup>th</sup> December 2021 opposing the application and sought for counter Orders instead.
- [6] However, on **23<sup>rd</sup> December 2021**, the **Applicant** filed a consequent **Form 12 and 23** application and sought for the following Orders:
  - (a) That the Form 12 Application filed by the Applicant on 17<sup>th</sup> November 2021 in the family Action No. 21/SUV/0186 be immediately transferred to the High Court of Fiji for an expeditious hearing and determination of the application prior to 25<sup>th</sup> December 2021.*
  - (b) That an urgent and expedited hearing date be given for this Application.*
  - (c) Any other Orders the Court deems just and expedient.*
- [7] The **Applicant** was assigned a Returnable Date of **29<sup>th</sup> December 2021** on this particular application.
- [8] The Family Magistrates Court file together with all documents intact was administratively remitted to the Senior Court Officer, High Court Civil for allocation of file before a High Court Judge. Hence, it was accordingly allocated to me for Hearing and Determination of the "**Transfer Application**" only, which both counsels were made aware of.

- [9] At the commencement of the Hearing of the "**Transfer Application**", the **Applicant's Counsel** raised a **Preliminary Objection** that since the **Respondent** has failed to file and serve any **Response Affidavit** as was required in terms of the Court Directions made, on 24<sup>th</sup> December 2021, then it tantamount to the fact that the **Respondent** is not opposing the **Applicant's** application for "**Transfer**" and an Order be made in favour of the **Applicant** as sought herein accordingly. Further, she made an Oral Application that the Draft Reply at **paragraph 25** of the **Applicant's Affidavit** filed on 23<sup>rd</sup> December 2021 which was **expunged by consent on 24<sup>th</sup> December 2021 to be reinstated to IK-03**.
- [10] However, the Counsel representing the **Respondent** submitted otherwise and said that the current application for "**Transfer**" before the Court is an abuse of process and the **Applicant** is looking for a favourable outcome in light of her failure to make an application at the Originating Family Magistrates Court Division and not following the procedural steps as required in the law.
- [11] It cannot be disputed and the Court Record confirms that the **Respondent** has been continuously represented by the said Counsel to date.
- [12] The **Respondent** thought fit not to file and serve any Response Affidavit to the "Transfer Application" for the reasons best known to the **Respondent**. However, in the **Respondent's** Oral Submissions, the Counsel representing reiterated that she will put the **Respondent** into the witness box to testify on oath with regards to the current impending application before Court.
- [13] The **Applicant Counsel** objected to the above submissions.
- [14] Whatever it may be, the **Respondent Counsel** was present with the **Respondent** at the Hearing. The Counsel representing made Oral Submissions accordingly.
- [15] Further, the basis for the **Applicant's "Transfer Application"** hinges on the **Form 12, 23 application** filed by the **Applicant** on 17<sup>th</sup> November 2021 seeking for the Orders as enumerated at paragraph [1] of my Judgment hereinabove.
- [16] The **Respondent** filed a **Form 13 and 23 Affidavit Response** opposing the application filed by the **Applicant** on 17<sup>th</sup> November 2021 and sought for counter Orders instead.
- [17] In light of the above reasons and taking into consideration the **administration of justice**, it is only proper and befitting that I overrule the **Applicant's Preliminary Objection** raised herein and accordingly dismiss the same.
- [18] Further, **paragraph 25** of the **Applicant's Affidavit** filed on 23<sup>rd</sup> December 2021 was **expunged by consent of the parties** to the proceedings on 24<sup>th</sup> December 2021. Therefore, the **Applicant's Oral**

**Application seeking for the Reinstatement of the expunged paragraph 25 of the Applicant's Affidavit** filed on 23<sup>rd</sup> December 2021 is also refused and accordingly dismissed.

[19] Now I will proceed to deliberate and determine the **Applicant's Application for Transfer of Proceedings** to the High Court.

[20] The **Application for Transfer** is provided for at **Section 28** of the **Family Law Act - 18 of 2003**. **Section 28 (2) (b)** of the Act states-

*"Staying and transferring proceedings*

*28. - (2) If-*

*(b) it appears to that court that it is in the interests of justice, or of convenience to the parties, that the proceedings be doubt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court."*

[21] Further, **Division 5.2** of the **Family Law Rules 2005** deals with **Transfer of Proceedings between Courts**. In particular, **Rules 5.14 (b) (ii) and Rule 5.15 (b)** are relevant which provides-

*"Division 5.2—Transfer of proceedings between courts*

*Application of Division*

*5.14. This Division applies to and in relation to the transfer of proceedings under section 28 of the Act—*

*(b) from the Family Division of the Magistrates' Court to the Family Division of the High Court-  
(ii) on application, in accordance with this Order; or...*

*Applications by parties*

*5.15. A party who has filed an application or response in proceedings in a court exercising jurisdiction under the Act may, by application in accordance with Form 12, filed in the filing registry, apply to have the proceedings heard—*

*(b) in another court exercising jurisdiction under the Act."*

[22] The **Application for Transfer of Proceedings** hinges on the **Form 12 and 23 Application** filed by the **Applicant** on **17<sup>th</sup> November 2021** and sought for Orders as reproduced at Paragraph [1] of my Judgment hereinabove.

[23] I note that on **11<sup>th</sup> November 2021**, the **Applicant** wrote a correspondence to the Registrar of the Family Court in regards to an **urgent Appeal to the Family Division of the High Court**. The contents

of the correspondence were not copied to the **Counsel for the Respondent** for one reason or the other. The outcome in terms of the refusal was relayed to the **Applicant** by the Family Court accordingly. I have perused the entire Form 23 Affidavit of the **Applicant** deposed on 15<sup>th</sup> December 2021.

- [24] I gather from the paragraphs of the said Affidavit that the **Applicant's** contract was coming to an end on **31<sup>st</sup> December 2021 and that it would not be renewed**. Further, **air tickets** for the **Applicant** and the two children's flight to Germany was received by the **Applicant** on 06<sup>th</sup> December 2021 from her employer.

Hence, this prompted the **Applicant** to file the Application seeking for the **release of the children's passport by Form 12 and 23 Application filed on 17<sup>th</sup> November 2021**.

The Counsel Representing the **Respondent** informed Court that the **Applicant's** Work Permit did not expire on 31<sup>st</sup> December 2021 rather is **valid until May 2022**. The **Applicant Counsel** reiterated that the **permit expires on 31<sup>st</sup> December 2021**.

- [25] However, I do not find any Certified True Copies of the ticket and/or expiration of **Applicant's** Work Permit or any correspondence whatsoever from her employer confirming the same in support, which cannot be found annexed within her Affidavit. The reason for not annexing these essential evidence or documentation is best known to the **Applicant**.

- [26] In considering a **transfer of the proceedings** in terms of **Rule 5.16 (1) of the Family Law Rules 2005**, the Court shall have regard to various matters as outlined from (a) - (f) inclusive.

- [27] I have thoroughly considered each and every matters that needs Court's consideration, in particular, **the wishes of the parties; whether proceedings of an associate matter are pending in the other Court; whether, if the proceedings is transferred, it is likely to be heard at less cost and more convenience to the parties than if the proceeding is not transferred; whether the proceeding is likely to be heard and determined earlier in the other Court and the interests of the administration of justice**.

- [28] It will be noted and will not be in dispute that the impending applications were filed by the parties to the proceedings at the **Originating Court of the Family Court Division of the Magistrates Court** and yet to be finally heard and determined by the Court.

- [29] However, it will also be noted that the **Form 12 and 23 Application** filed by the **Applicant** on **17<sup>th</sup> November 2021** sought for the release of the two passports of the two children which were voluntarily submitted by the **Applicant** to the Court together with other Orders on which the current Application before the High Court hinges on. The Application was assigned with an early Returnable

Date of **23<sup>rd</sup> November 2021**. The presiding Resident Magistrate was not available and the matter was adjourned for mention to **01<sup>st</sup> December 2021**. However, in light of the **Form 12 and 23 Application**, the presiding Magistrate rescheduled the matter to **29<sup>th</sup> November 2021**. Certain directions were made and the matter was then adjourned to **13<sup>th</sup> December 2021** for Hearing. On **13<sup>th</sup> December 2021**, the Court presided over the case and according to the **Applicant's Counsel**; the matter was being mediated upon. The matter was finally adjourned for Hearing to the **07<sup>th</sup> of January 2022**. Subsequently, on **23<sup>rd</sup> December 2021**, a consequent **Form 12 and 23 Application** was filed by the **Applicant** for the **Transfer of Proceedings** to the High Court accordingly.

- [30] It can be easily ascertained from above that the **Applicant's Form 12 and 23 Application** was allocated an early date of 23<sup>rd</sup> November 2021, the Application was assigned and expedited a re-scheduled date of 29<sup>th</sup> November 2021 and necessary directions were accordingly made. On the early assigned Hearing date of 13<sup>th</sup> December 2021, as informed to Court by the Applicant that mediation took place but eventually failed and the matter was adjourned to 07<sup>th</sup> of January 2022 for Hearing.
- [31] Unless a party is otherwise able to show cause that undue delay is being caused by the presiding Resident Magistrate at the Family Magistrates Court Division, then it may prompt a party to the proceedings to make an appropriate Application for the Transfer of the Proceedings to the High Court Division for Hearing and Determination.
- [32] Upon the perusal of the Court file, I find that the presiding Resident Magistrate endeavored to assign early Hearing dates, deliberate upon the **Applicant's Application** and accommodate the parties as he thought fit in the given circumstances of which both Counsels to the proceedings are well aware of.
- [33] The Applicant must bear in mind that the nature of the impending applications filed by the parties to the proceedings and the orders sought for therein are very sensitive, especially dealing with the two children. Therefore, I must remind the parties that the Court may have to deal with the hearing and determination of the impending applications holistically and not on a piece meal basis and/or in a haphazard manner as is being done herein by the applicant.
- [34] Further, the current Form 12 and 23 applications seeking for the "**Transfer of Proceedings**" is impending and sub-judiced in the Family Division of the Magistrate's Court. The Transfer application is now made to the High Court so that the impending cases can be heard and determined easily and may be in an expeditious manner.
- [35] I find that there is no basis or grounds for the High Court to intervene and interfere at this stage of the proceedings in the pending process before the Family Magistrate's Court, unless there is some

strong basis for doing so. If the party aggrieved is complaining about delay then that request and concern should be made to the respective Presiding Resident Magistrate rather than filing an application straight away to the High Court Division which is the Appellate Jurisdiction.

[36] In the current case, I fail to understand why the Applicant did not complain about the delay to the Presiding Resident Magistrate but chose to file a Form 12 and 23 Application seeking for the Transfer of Proceedings to the High Court Division respectively.

[37] However, bearing in mind the nature of the **Applicant's Form 12 and 23 Application filed on 17<sup>th</sup> November 2021**, the Orders sought therein, taking into consideration the paramount interest and the best wishes of the two children together with the pending Hearing date of 07<sup>th</sup> January 2022 as was already assigned by the presiding Resident Magistrate, it is only appropriate that I remit the Family Court File 21/SUV/0186 together with all documents intact to the Registrar of the Family Magistrates Court for the attention of the presiding Resident Magistrate to expedite the Hearing and Determination of the Orders sought in the **Applicant's Form 12 and 23 Application** accordingly. The presiding Resident Magistrate is at liberty to reassign an early Hearing date if the 07<sup>th</sup> of January 2022 date has been taken over by another urgent case.

[38] The current Application before Court seeking for Transfer of the proceedings to the High Court proceeded to a Full Hearing with both Counsels making Oral Applications. It is only appropriate that I Order the **Applicant** to pay to the Respondent summarily assessed costs of **\$1000**.

#### **FINAL ORDERS**

- i. The **Applicant's** Form 12 and 23 Application seeking an Order for Transfer of the proceedings to the High Court is refused and accordingly dismissed.
- ii. The Presiding Resident Magistrate at the Suva Family Magistrates Court Division to expedite the Hearing and Determination of the Orders sought in the **Applicant's Form 12 and 23 Application filed on 17<sup>th</sup> November 2021** accordingly.
- iii. The **Applicant's** Preliminary Objection raised herein is also dismissed.
- iv. Paragraph 25 of the **Applicant's Affidavit** filed on 23<sup>rd</sup> December 2021 which was expunged by consent on 24<sup>th</sup> December 2021 to be reinstated to IK-03 stands dismissed.
- v. The **Applicant** is ordered to pay the **Respondent** a sum of \$1000 as summarily assessed costs to be paid before the assigned Hearing date.

DATED at SUVA this 04<sup>th</sup> day of January, 2022.

VISHWA DATT SHARMA  
JUDGE

cc: InterAlia Consultancy, Suva.  
R. Patel Lawyers, Suva.