

**IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA**

**ORIGINAL JURISDICTION**

<b>ACTION NUMBER:</b>	<b>17/Suv/ 0416</b>
<b>BETWEEN:</b>	<b>MANISHA</b> <b>APPELLANT</b>
<b>AND:</b>	<b>DHARMA</b> <b>RESPONDENT</b>
<b>APPEARANCES:</b>	<i>Mr. G. O' Driscoll for the Applicant.</i> <i>Mr. P. Kumar for the Respondent.</i>
<b>DATE/PLACE OF ORAL JUDGMENT:</b>	<i>Friday 3 February 2023 at Suva.</i>
<b>DATE/PLACE OF WRITTEN JUDGMENT:</b>	<i>Thursday 2 March 2023 at Suva.</i>
<b>CORAM:</b>	Hon. Madam Justice Anjala Wati
<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>

**RULING**

**(Stay of Execution of Orders)**

**Catchwords:**

**FAMILY LAW – PROPERTY DISTRIBUTION** under Family Law Act 2003– Application by husband to stay the orders granted by court for distribution of the property on the grounds that he has filed an appeal against those orders and that the grounds of appeal are arguable and if stay is refused he will be prejudiced - in addition to the proposed grounds of appeal lacking merits, the husband has failed to prosecute his appeal with due diligence and the delay in execution of the judgment is prejudicial to the wife which warrants the application for stay to be declined.

### ***Cause and Background***

1. The wife had brought an application for an order for distribution of the property of the parties to the marriage. She had sought an equal distribution in the following properties:

- i. *Residential Home.*
- ii. *A Motor Vehicle.*
- iii. *Household Items.*
- iv. *Rental Proceeds at the rate of \$600 per month from 2009 till 2018.*
- v. *\$15,000 being cash lent to both the parties by her father.*

2. The husband refuted the wife's entitlement and sought that a declaration be made that the wife holds the property in trust for her or alternatively if there is to be a distribution then she be granted 25 per cent share in the residential home. He disputed the wife's right in any other properties claimed.

3. After the trial, I made the following orders on 11 September 2019:

*(a) That the husband shall pay to the wife her share in the residential home in the sum of \$97,000 within 3 months of the date of the order. Upon payment of these sums, the wife shall transfer the property in the husband's name exclusively.*

*(b) If any extension of time is needed for payment of the monies in paragraph (a) above, then the husband is entitled to one extension of one month upon a*

*satisfactory application to the Court. No such extension shall be granted unless the Court is satisfied that proper financial arrangements are being made by the husband.*

*(c) If no such payments are made within the time limits prescribed by para. (a) above or any extension granted under para. (b) above, the wife is at liberty to sell the property to a purchaser at a price not below \$195,000.*

*(d) If the property is to be sold, then the costs of the sale not exceeding the sum of \$3,000 is to be deducted from the sale price. Any further sums incurred for selling of the house is to be borne by the parties equally and not to be deducted from the sale price. In this regard, I have already taken account of the fact that a sum of \$500 has been discounted from the wife's share in the residential home as realization costs.*

*(e) If the sale is on foot and the husband refuses to sign any documents including transfer of the property and any statutory requirements like consent then the same should be signed by the Registrar or the Assistant Registrar of the Family Court.*

*(f) Any statutory liability arising from the sale of the property which falls under the responsibility of the vendors is to be paid from the proceeds of the sale.*

*(g) The husband is to pay to the wife \$1,500 as her share in the vehicle. If the same is not paid within a month then the husband is to sell the same within 14 days after the time for payment of \$1,500 has lapsed, at a price not less than \$3,000, and divide the proceeds equally between the parties.*

*(h) If the husband does not pay to the wife her share of \$1,500 within a month of the order or the proceeds of the sale within 14 days of the expiration of a*

*month from the date of this order, the wife is at liberty to have the vehicle transferred in her name in order to be able to sell the same at the market value and divide the same equally between the parties. The Registrar of the Court is to sign the order for transfer of the vehicle in the wife's name.*

*(i) The husband is ordered to pay to the wife \$3,500 for her share in the household items. These monies are to be paid within 3 months of the date of the order. If the monies are not paid then the wife is at liberty to enforce the same through the standard enforcement procedures.*

*(j) The husband is to pay to the wife a further sum of \$6,500 being her share of the rental proceeds for the two years post separation. These sums are to be paid within 3 months. Standard enforcement procedures may apply for recovery of any such monies.*

4. On 30 April 2020, after 7 months of the distribution orders, the husband filed an application to stay the execution of the judgment pending the determination of the appeal. The application is supported by an affidavit in support which contains the grounds of appeal filed in the Court of Appeal.
5. The husband states that his grounds of appeal are meritorious, is wholly likely to succeed and that the balance of convenience favours the grant of a stay as the wife is not likely to suffer prejudice on the basis that the status quo will be maintained.
6. The husband says that he is severely prejudiced as he is the one who is suffering a judgment or order which is unfair and prejudicial. He asserts that he has always abided the order of the court and is not guilty of contumelious conduct in the proceedings.

7. He says that he is advised by his counsel that the manner in which the proceedings were conducted in the High Court was unfair and prejudicial to him since a number of issues were not considered before the court and they all form part of the grounds of appeal. The Court of Appeal ought to determine these issues and a stay of the execution of the orders of this court ought to be granted.
8. The husband says that he undertakes to prosecute the appeal expeditiously and diligently.

### ***Analysis***

9. There is no doubt that the husband has filed an appeal in the Court of Appeal. The appeal is pending in the Court of Appeal since 13 November 2019. It is now over 3 years and 3 months. I believe the appeal has not been finalized and that there is immense delay in doing so. The husband had undertaken to prosecute the appeal with due diligence and expediency but no information has been provided to this court on why the finalization of the appeal has been delayed so much. If the appeal was prosecuted diligently, 3 years was enough to deal with the matter. The question of stay would not be necessary now.
10. It is the wife who is suffering due to the non – execution of the orders. She is neither able to live in the house nor realise her shares from the property. The husband on the other hand is living in the house, collecting the rent and not even expediting his appeal.
11. Although the wife is the joint owner of the property, she has not enjoyed any benefit from the property since her separation from her husband almost 6 years ago.

12. One the issue of prejudice, if find that it is the wife who is more affected by the delay in the execution of the judgment and not the husband. The onus on him was to expedite his appeal and he has not done so. He cannot continue to hold the execution of the judgment only on the basis that there is an appeal pending.
13. Apart from the husband's failure to prosecute the appeal with due diligence, his application for stay was filed very late. It was filed when time for compliance of the orders had expired. If the husband was serious in expediting this matter, he would have at least filed the stay application on time. The blame for the delay in filing a stay in the High Court and the hearing of the appeal in the Court of Appeal must be laid at his door.
14. I will now briefly deal with each ground of appeal to see whether there is any merits in the same. The first ground of appeal states that the court erred in law and in fact in taking into consideration that the sum of \$15,000 paid to the wife by her father was to be counted as her contribution when her own evidence was that the father had lent this to the parties which amount was to be returned. I find this ground to be baseless. I had said the following in my judgment:

*"The wife also claims that her father had lent to the parties a sum of \$15,000, which amount she asserts, should be included in the pool of assets. I have no reason to doubt the evidence of the wife and her half -brother that the father had lent to the parties this amount which was to be returned to him. The parties are now indebted to the father's estate.*

*Debts of this nature can be recoverable in civil suits. In distribution cases, under the Family Law Act, the debt cannot be classed as an asset in the pool. It is a*

*liability against the property which will have the effect of reducing the value of the existing pool of assets and thus impacting on the parties' entitlements.*

*In absence of any claim by the father or his estate, the most that can be done is that these monies be regarded as contribution by the father on behalf of his daughter. The amount should not be included in the pool to be divided”.*

15. The wife wanted the sum of \$15,000 to be included in the pool of assets. The parties had to return this money to the wife's father. They did not do so on time. He died and his estate did not make any claim for this money. The only way to account for this money was to treat it as the contribution by the father on behalf of his daughter as it is on the account of that father- daughter relationship that the father had lent the money. What is so unjust about this finding? There is no unjust benefit to the wife if that sum is counted towards her contribution. I simply cannot understand what is so flawed about that finding.
16. The next ground of appeal is that the court erred in taking into account that 3 withdrawals were made from the wife's FNPf account and paid towards the house when there was no evidence from the Bank to say that the FNPf withdrawals were used to pay the mortgage debt. I had made this finding based on the statements from the FNPf, the wife's evidence and also on the basis that the husband had not contradicted this evidence. For him to challenge this at the appeal stage is preposterous because the proper stage for challenging the evidence is during the trial.
17. The third ground of appeal is that the court erred in law and in fact in finding that the wife had carried out the repairs when in fact both parties had carried out the repairs and renovations jointly on the property. I have clearly said at

paragraph 52 of the judgment that the husband had not denied that the wife carried out the repairs to the property. I therefore accepted the evidence of the wife. There cannot be any other finding in light of the evidence that unfolded before me. This ground lacks merits.

18. Ground 4 of the appeal states that the court erred in making a finding at paragraph 54 of the judgment by accepting that the wife had sent the money to the husband in the vicinity of NZD\$20,000 when documents pertaining to this money transfer was not fully provided by her.

19. I had made the following findings:

*“From New Zealand, she continuously sent monies to her husband. I accept that she had sent to him monies in the vicinity of NZD 20,000. There is documentary evidence of some monies that she sent from New Zealand for the benefit of the husband. The documentary evidence substantiates the wife’s evidence that she did send monies as claimed. There may not be evidence of all the monies she has sent. This is only because she could not retrieve the documents pertaining to some transactions.*

*The documentary evidence from Western Union shows that the wife had sent monies to the husband in the sum of NZD 6,674.53 between the period 7 March 2011 to 14 December 2016. Further, the documentary evidence from Exchange & Finance (Fiji) Pty Limited shows that the wife had sent to her husband monies from New Zealand in the sum of NZD 2,400 between the periods 7 October 2011 to 22 December 2012. The documentary evidence from Fexco Pacific shows that the wife had sent monies to the husband in the sum of NZD 1,560.56 between the periods 30 March 2015 to 6 November 2015. In total the documentary evidence shows that the wife sent about NZD 10,635.09 for the husband. This, if converted to Fijian Dollars, would be close to \$15,000.*



*I find from the wife's evidence that she continued to contribute to the family financially despite leaving the shores. Her contributed cannot be discredited. I reject the husband's evidence that the monies were sent as debt repayment to him. This material information was never put to the wife when she gave evidence to address the same.*

*On 23 June 2016, when the wife came to Fiji, I accept her evidence that she brought NZD 8,000. She used about NZD 3,000 to repair the fence, install a sliding gate, and clean the house. There was a balance of NZD5, 000 which I find she left in the hands of her husband.*

*The husband had to spend the money is renovating the flats as it did not have any maintenance to it for long. If he has done any repairs after the wife had left, it would be from these monies that were left with him. There is, however, no evidence of him repairing the property.*

*The wife testified that she used to send monies from New Zealand for the payment of the ground rent for the residential property and for the postal box fee as well. Her evidence in this regard remains uncontroverted, which I accept. I find that she did send monies for this purpose which I find is financial contributions by her”.*

20. The finding that the wife had sent money in the vicinity of NZD 20,000 was based on both the documentary evidence, my acceptance of the wife's evidence over that of the husband and the fact that the evidence could not be controverted by the husband. There is no cogent basis on which the evidence of the wife can be impeached now.

21. Ground 5 of the appeal states that the court erred in fact in finding that a balance of NZD 5,000 was left by the wife in the hands of the husband. I had accepted the evidence of the wife and rejected the evidence of the husband. The court had the firsthand experience of assessing the demeanour of the parties which advantage no other court has. There is no satisfactory basis to say that there was an error on my part to accept the evidence of the wife.
22. Ground 6 of the appeal states that the court did not take into account the husband's contribution towards keeping and maintaining the property such as paying utility bills, grass cutting, day to day repairs of the house like changing light bulbs and mortgage repayments.
23. The husband was occupying the property and living in the same. It was therefore his responsibility to look after his expenses such as paying utility bills, cutting grass and changing light bulbs. By doing this, he was managing his living. How can those acts be given credit as contribution towards the property? What kind of contribution does that fall under? The husband has not identified that.
24. As for repairing the property, I had clearly found that there was no evidence of him repairing the property. The judgment very clearly explains this. I cannot do any better in my reasons than that I have already provided.
25. On the question of paying the mortgage, the monies from the rental was sufficient to cover this. It was not from his income that the husband paid the mortgage for me to assess that his financial contribution was greater than that of the wife.
26. Based on the evidence before the court, I had made the following findings at paragraph 53:

*“When the wife left Fiji in 2009, the debt was about \$10,000. I find that the rental monies were used to pay the debt as it was sufficient to cover the loan repayments. It was the wife’s equal effort and contribution towards the acquisition and maintenance of the property that resulted in the flats being rented out and the monies used for the payment of the loan. It would be inequitable to find that she did not contribute after 2009 when she left for New Zealand to work. Her contribution right throughout was equal in my finding”.*

27. The wife was entitled to equal share of rent from the property which she did not get and which was used to pay the debt of \$10,000. I therefore cannot say that it was the husband alone who made the contribution. The husband has been given equal recognition for his contribution. His contribution was given equal value. He was not denied his share in the property. I therefore cannot fathom the basis of his complaint.

28. Ground 7 of the appeal states that the court erred when it arrived at the sum of \$97,000 as the wife’s share when there was no legal basis for arriving at such a sum. I have very carefully explained in the judgment how I have arrived at the decision that the wife is entitled to an equal split in the residential property valued at \$195,000. There is no basis put forward to challenge her equal contribution and the value of the house. This ground is without any merits.

29. Ground 8 states that the court erred in stating that \$7,000 is the cost of the household items when there was no evidence tendered as to the list of household items. At paragraph 21 of the judgment I had stated:

*“The third property is the household items. The wife, in her evidence, fixed different values on each item. The items she identified in the house were a television set, dining table with chairs, 2 double beds, 2 wardrobes, a coffee*

*table, a washing machine, a sofa set, electrical appliances (blender, microwave electric jug), stainless steel utensils, and pots and pans”.*

30. The list of household items was not in contention and so the court had to accept the list as provided by the wife. There was no contradictory evidence before the court that the house did not have those items when the wife left the place. No one had provided the valuation of the household items either and I had fixed the value at \$7,000 on the basis that it would cost approximately that amount to buy those items even if it were to be bought second hand.
31. Ground 9 states that the court erred in making a finding that the *“husband is to pay to the wife \$1,500 as her share in the vehicle”*. The appellant husband says that the court made this order after finding that the value of vehicles depreciates and the car that was the subject of the dispute is 21 years old from the date of manufacture.
32. Paragraphs 16 to 20 of the judgment very clearly explains why I had picked the value of the vehicle at \$3,000 when it was bought for double the price. No one had provided the valuation of vehicle. I had took into account the fact that the vehicle was 21 years old from the date of manufacture and that the value of the vehicle depreciates. The parties had used the vehicle for 4 years after purchasing the same. In absence of any valuation provided by the husband, he has no basis to complain about the value assigned by the Court. In any event I had assessed the value at half the price it was bought.
33. The last ground states that the court erred in not properly considering the evidence of the husband. No specifics of what evidence I had not taken into account has been provided. The judgment very clearly outlines the evidence of the parties and indicates why one evidence was accepted over the other. All the

counsel need to do is to read the judgment in its context carefully with interest instead of just reading the final orders or reading it out of context. It is preposterous to make a general assertion that the husband's evidence was not considered.

34. I find that all the grounds of appeal lack merits and is only put forward to find a way to refuse the wife her entitlement in the property. The appeal is founded to delay the wife from realizing her shares. If there was any interest to know the final orders of the Court of Appeal, the husband would have expedited the hearing of the appeal. It is prejudicial to grant any stay of the orders.

***Orders***

35. I make the following orders:

- (a) *The application for stay of the orders of the High Court is dismissed.*
- (b) *Each party shall bear their own costs of the proceedings.*
- (c) *The wife is at liberty to execute the orders of this court.*

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**Anjala Wati**

Judge

2.03.2023

**To:**

1. ***A. K. Singh Lawyers for the Applicant.***
2. ***Patrick Kumar Lawyers for the Respondent.***

**3. File: 17/Suv/0416.**