

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 0037 of 2014
(High Court of Suva Civil Action No. HBC 236 of 2011)

BETWEEN : **VILIAME BAULEKA**
Appellant

AND : **VILIAME VAKACOCO COLATI** *as Administrator*
Respondent

Coram : **Basnayake JA**
Guneratne JA
Kumar JA

Counsel : **Mr. R. Singh with Mr. A. Nand for the Appellant**
Respondent in person

Date of Hearing : **16 August 2017**

Date of Judgment : **14 September 2017**

JUDGMENT

Basnayake JA

[1] This is an appeal by the appellant-plaintiff (hereinafter referred to as the Appellant) seeking the following reliefs, namely:

- (i) To have the judgment of the learned High Court Judge set aside.
 - (ii) To order the sale of the property which is the subject matter of this case by public tender to be handled by the Appellant's Solicitors under the directions of court and the net proceeds of the sale to be equally distributed between the Appellant and the Respondent.
 - (iii) To order the respondent defendant (hereinafter referred to as the Respondent) to give accounts of the property and pay the Appellant his share of the income.
 - (iv) Legal costs including disbursements relating to the valuation and the sale to be paid out of the funds of the Estate on an indemnity basis.
 - (v) Costs.
- [2] By this judgment the learned judge dismissed the Appellant's originating summons on the ground that it is misconceived.
- [3] The Appellant filed the High Court action pursuant to section 119 of the Property Act Cap 130 with summons and an affidavit by the Appellant's Power of Attorney Holder. According to this affidavit the Appellant was married to one Fane Lotu Fewanilau. The Appellant and his wife had been registered as joint tenants in common of lot 6 of DP No. 6818 with an area of 796 square meters by virtue of a Memorandum of a lease issued by The Methodist Church in Fiji. The Appellant's marriage was dissolved on 1 March 2006. They had no children from this marriage.
- [4] Fane Lotu Fewanilau died on 27 June 2007 and letters of administration of her estate were granted by the High Court to the Respondent.
- [5] The Appellant claims that he is the holder of an undivided one half share of the property (containing a house) and is entitled to the proceeds or a share upon distribution. The Appellant seeks the partition/distribution of property by way of sale and equal distribution of the proceeds between the Appellant and the Respondent, the latter being the legal representative of the estate of Fane Lotu Fewanilau.

- [6] The Respondent opposed the Appellant's application.
- [7] The learned Judge after an inquiry held on 7 May 2014 concluded that the Appellant and his wife being joint tenants, the interests of the wife devolved on the Appellant upon her death.
- [8] The issue in this case is whether the property was held by the Appellant and his wife as joint-tenants or tenants in common. The lease does not state whether the property was owned by the parties as joint tenants.
- [9] Section 34 of the Land Transfer Act 1971 provides that unless a contrary intention is expressed in the instrument of title, the holders shall be deemed to be entitled to as tenants in common. Section 34 is as follows:-

(1) Subject to the provisions of any law for the time being in force in relating to trusts and to the provisions of Part XV, unless the contrary intention is expressed in the instrument of title, where two or more persons are registered as proprietors of any estate or interest in land subject to the provisions of this Act, they shall be deemed to be entitled to the same as tenants in common and on the death of anyone of such proprietors there shall be no right of survivorship in the other or others and the share of such deceased proprietors shall pass to his personal representative (emphasis added).

(2) Where two or more persons are entitled as tenants in common to any estate or interest in land subject to the provisions of this Act, they shall unless the contrary intention is expressed in the instrument of title be deemed to hold the same in undivided equal shares.

- [10] In the event of holding the property in common the rights of the deceased party shall pass to the legal representative. The law states that they shall be entitled to equal shares. The Appellant's claim of half share right is based on this law. The learned Judge however in paragraph 6.6 of the judgment held that the interest of the former wife, upon her death devolved on the Appellant on the basis that they were joint tenants.

- [11] Reference is made in paragraph 3 of the affidavit (pg. 11 of the Record of the High Court (RHC)) of the Power of Attorney holder of the Appellant that, "*the Plaintiff and Fane Lotu Lewanilau are registered as joint owners as tenants in common.*"
- [12] The learned counsel for the Appellant submitted that the memorial by which this transfer was effected does not contain any express intention that the property is held as joint tenants. It is only if there was such reference that the learned Judge would have the power to treat the owners as joint tenants. On perusal of the court record it appears that the attention of the learned Judge had not been brought to the law referred to in section 34 of the Land Transfer Act 1971. I am of the view that the learned Judge had erred by holding the Appellant a joint tenant.
- [13] Mr. Singh submitted in open court that the Appellant does not seek any monetary relief and does not pursue relief (iii) of the notice of appeal. The said relief is as follows:-
- (iii) That the Court order the Respondent to give accounts for the Estate Property and pay the Appellant's share of the income to him.
- [14] The Respondent did not make any oral submissions although he was explained the above legal position through the Court Officer Ms. Maria Raikivi. The Respondent was also told about the Appellant not pursuing relief (iii) of the Notice of Appeal (relief (ii) in the originating summons). The Respondent agreed to the sale of the property and the other reliefs as he did not have to give an account or pay the Appellant anything.
- [15] Considering the clear legal position, I am of the view that the learned Judge had erred in the dismissal of the Appellant's originating summons. Hence the judgment of the learned Judge dated 7 May 2014 is set aside and the Appellant is entitled to the reliefs (i) and (iii) of the Originating Summons.

Guneratne JA

[16] I agree with the reasons and decisions of Basnayake JA.

Kumar JA

[17] I also agree with the reasons and decisions of Basnayake JA.

The Orders of the Court are:

1. *Appeal allowed.*
2. *Judgment dated 7 May 2014 sets aside.*
3. *The Appellant's Solicitors shall advertise the sale of property known as Lot 6 on Deposited Plan No. 6818 Davuilevu (part of) comprised and described in Methodist Church Lease No. 430271 containing seven hundred and ninety-six square meters (hereinafter referred as "Lease No. 430271") with full description of the property including improvements thereon with details of any amenities close to the property and any other special features at least once in the Saturday issue of Fiji Sun and the Fiji Times.*
4. *Tenders are to be sealed and marked "**Tender - Lease No. 430271 (ABU 37/14)**" and shall be opened in the presence of the Deputy Registrar, High Court, Suva.*
5. *Sale of Lease No. 430271 should be to the highest tenderer which tender should be fair market price of Lease No. 430271 or above.*
6. *The Deputy Registrar, High Court of Fiji, Suva to execute the Sale and Purchase Agreement, Transfer of Lease No. 430271 and all other incidental documents for and on behalf of the registered lessee of Lease No. 430271 or Transferor.*
7. *Net sale proceeds of Lease No. 430271 being sale proceeds less Appellant's Solicitors legal costs and disbursements for advertisement of the property for sale and for acting as Solicitors for the registered lessees of Lease No. 430271*

in the sale transaction (if any), outgoings such as outstanding lease rental, city rates, water and electricity rates be paid into court with statement of account upon settlement.

8. *Appellant's Solicitors to make an application to High Court in Civil Action No. HBC 236 of 2011 for disbursement of net sale proceeds.*
9. *Parties to bear their own costs of this appeal.*



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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice A. Guneratne
JUSTICE OF APPEAL

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Hon. Mr. Justice K. Kumar
JUSTICE OF APPEAL