

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.HBC 83 of 2014

BETWEEN : PRIYA PRAKASH MATI CHAND a.ka. PRAKASH MATI RATTAN of
352 Fletcher Road, Vatuwaqa, Suva, Senior Human Resources Assistant

PLAINTIFF

AND : SOLOCHANA BHARTI, of Lot 19, Mandir Street, Nadera, Domestic
Duties.

DEFENDANT

BEFORE : Master Thushara Rajasinghe

COUNSEL : Ms. S Deven. for the Plaintiff
Mr. Maisamoa for the Defendant

Date of Hearing : 8th July, 2014

Date of Judgment: 21st November, 2014

JUDGMENT

A. INTRODUCTION

1. The Plaintiff instituted this action by way of this Originating Summons dated 18th of March 2014 together with her affidavit in support seeking an order for immediate

possession of the property morefully described in certificate of title No 28127, being Lot 19 on Deposited Plan No 5521 pursuant to section 169 of the Land Transfer Act (here in after referred as “the Act”).

2. Upon being served with this Summons, the Defendant filed her affidavit in opposition which was followed by the Plaintiff’s reply affidavit. Subsequently, this Summons was set down for hearing on the 8th of July 2014, where the counsel for the Plaintiff and the Defendant made their respective oral arguments and submissions. At the conclusion of the hearing, both counsel tendered their respective written submissions. Having carefully considered the respective affidavits and the submissions of the parties, I now proceed to pronounce the judgment as follows.

B. BACKGROUND

Plaintiff’s case,

3. The Plaintiff claims that she is the last registered proprietor of this property morefully described in the Summons. She deposed in her affidavit in support that she together with her late ex-husband Mr. Rattan bought this property under a joint tenancy with right of survivorship. However, she had to divorce her late husband in 2005 and started to live separately with her son. The late husband continued to live at the property with his present wife, the Defendant of this Action. After the death of her late husband, she claims that she became the only registered proprietor of this property pursuant to the joint tenancy with the right of survivorship. Having stated the factual background of this dispute, the Plaintiff claims the vacant possession of this property as the Defendant has no right to the possession to occupy this property.

Defendant’s Case.

4. The Defendant in her affidavit in opposition contended that she has a right to the possession of this property as the wife of one of the join tenants of the property. She further claims that the joint tenancy with the right of survivorship has terminated by

operation of law. She claims that this property is a part of her late husband's estate, for which she has obtained a letter of administration.

5. The Plaintiff in her affidavit in reply disclosed some vital information, which is essentially important for the determination of this action. She deposed that the family division of the Suva Magistrates' court on 19th of June 2007 delivered a decision in respect of the distribution of matrimonial properties of the Plaintiff and her late ex-husband, where this property was included as part of their matrimonial properties.

C. THE LAW

6. Sections 169 to 172 of the Act have stipulated the procedure for the application in this nature. In view of the section 169 of the Act, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrear for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has been expired are allowed to institute proceedings under section 169 of the Act.
7. Sections 171 and 172 of the Act deal with the scope of the hearing and the burden of prove of the parties. Section 171 states that ;

“On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.”

8. Section 172 states that

“If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;

9. The scope of the hearing of the application under section 169 constitutes two main components. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor as described under the section 169 (b) and (c) of the Act. Once the Plaintiff satisfies it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land. The scope of the Defendant's burden of prove of a right to the possession of the land has discussed in **Morris Hedstrom Limited-v- Liaquat Ali** CA No: 153/87, where it was held that

“Under Section 172 the person summonsed may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced.”

Accordingly, the defendant is only required to present some tangible evidence to establish a right of the possession or the existence of an arguable case for such right to defeat the Plaintiff's claim.

10. I now turn to this instance case. I do concur with the learned counsel for the Plaintiff's submissions on the rights of joint tenant with the right of survivorship. However, having carefully considered the affidavits tendered by the parties with their respective annexures, specially, the copy of the decision delivered by former Resident Magistrate Ms.

Waqavonovono in the family division of the Magistrates' court on 19th of June 2007, it appears that the Plaintiff and her late ex-husband have terminated their joint tenancy with right of survivorship in respect of this property. Both of them have invoked the jurisdiction of the family division of the Magistrate court in order to distribute their matrimonial property. They have included this property as part of their matrimonial property and assets.

11. The Plaintiff stated in her affidavit in reply that the learned magistrate delivered her decision after a fiercely fought trial. It was held in the decision of the learned magistrate that the Plaintiff has contributed 60% to the matrimonial properties and to the joined pool of assets. The learned Magistrate further held that the Plaintiff is entitled to receive 60% of the matrimonial properties and assets. Having distributed the matrimonial properties between the Plaintiff and her late ex-husband, the learned Magistrate made following orders inter alia;

(i) Either party including the wife and son may pay off the share of the other party in the matrimonial home located at Lot 19 Mandir Street, Nadera described in Certificate of Title No. 28127, DP No. 5521, by firstly paying all outstanding charges including to the ANZ Bank and the FNPF on the property, before deducting the said outstanding payments from the sum of \$251,500 and paying an equal one third shares(s) in the property to the other party or parties. Where the son is not a party to the purchase of the property, his 1/3 share will be held in trust until he reached 21 years;

(ii) Alternatively, the husband and the wife will take all necessary action to cause the matrimonial home including the two (2) adjoining flats to the same property located at Lot 19 Mandir Street, Nadera to be listed for sale as soon as possible or no later than 19/7/07 and to sell the same property for not less than \$251,500 and after paying off all sale expenses and charges remaining on the property including those owing to the ANZ Bank and the FNPF, shall divide the proceeds of the sale as to 1/3 to the

husband, 1/3 to the wife and the remaining 1/3 to be held in trust for the child until such time as he reaches 21 years;

(iii) The husband will give one half (1/2) share of all rental proceeds received forthwith from the 2 flats adjoining the matrimonial home at Lot 19 Mandir Street, Nadera to the wife, until the property is sold;

i. All furniture and household items in the matrimonial home are to be listed for sale as soon as possible or no later than 19/7/07 and the net proceeds to be divided as to 60% to the wife and 40% to the husband if the parties are unable to divide the items amicably;

ii. The family car registration number EA 511 for which more than half the value at cost price has been paid by the wife is to be transferred into her name

iii. The husband will pay \$90.00 per week maintenance for the child until he reached 18 years or leaves school;

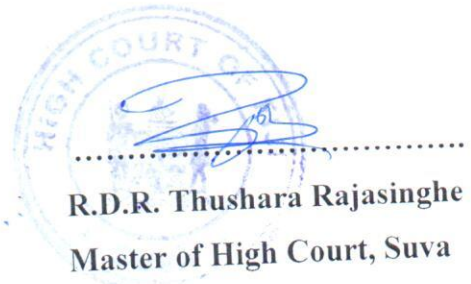
iv. The husband is to pay the wife's legal costs for this application which is summarily assessed at \$400.00 plus court costs.

12. In view of this decision of the learned Magistrate in the Family division of the Magistrate court, it appears that the ownership of this property has been divided by a judicial decision between the Plaintiff, her late ex-husband and her son. In fact, parties have not executed or implemented the orders given by the learned Magistrate so far; however, that does not invalidate the effect of this judicial decision. There is no appeal against this decision, wherefore, it still stands as a final judicial determination against the Plaintiff, her late ex-husband and his successors, and their son. In view of this decision, the late ex-husband was entitled to 40% of the matrimonial properties which includes this property as well. This 40% of entitlement of the matrimonial properties constitute as a part of his estate, where the Defendant is the appointed administrator.

13. Having considered the reasons set out above; it is my opinion that in view of the decision of the learned Magistrate dated 19th of June 2007, the status of the ownership of this property has been changed from a joint tenancy to a divided ownership of 60% to the Plaintiff and 40% to her late ex-husband. I do not wish to discuss the correctness or the legality of this decision as it does not come under the jurisdiction of this court. The Decision of the learned Magistrate has not been appealed or changed by any other higher court with competence jurisdictions. Hence, the parties are bound by this decision. Accordingly, the Defendant being the wife of late Mr. Rattan has a right to the possession to this property. I accordingly make following orders that;

- i. The Originating Summons dated 18th of March 2014 filed by the Plaintiff is hereby refused and dismissed.
- ii. The Defendant is awarded with cost of \$ 1000 assessed summarily.

Dated at Suva this 21st day of November, 2014.


R.D.R. Thushara Rajasinghe
Master of High Court, Suva