

IN THE HIGH COURT OF FIJI

CIVIL JURISDICTION

Civil Action No. 214 of 2016

BETWEEN

SUNILA DEVI of Auckland, New Zealand, Pre-School Teacher as the
Administratrix of the Estate of Mohan Kumar Sharma.

PLAINTIFF

AND

RAKESH KUMAR SHARMA of Stage 4, Tacirua Plains, Tamavua, Suva, Fiji,
Sales Manager.

FIRST DEFENDANT

AND

THE REGISTRAR OF TITLES of Ground Floor, Civic Tower,
Victoria Parade, Suva.

SECOND DEFENDANT

Counsel : Mr. S. Singh for the Plaintiff.
Mr. G. O'driscoll for the 1st Defendant.
Ms. S. Ali for the 2nd defendant.

Date of Hearing : 27th February, 2018

Date of Judgment : 14th March, 2018

JUDGMENT

[1] The plaintiff filed the Originating Summons seeking the following orders:

- A. Within 7 days of making and service of this order, the First Defendant delivers the duplicate Native Lease No. 22851 to the second defendant.
- B. Within 14 days of making and service of this order, the Second Defendant cancels Transfer dealing number 777849 on Native Lease No. 22851 in the name of Rakesh Kumar Sharma and enters a Transfer in the name of Sunila Devi as the Administratrix of the Estate of Mohan Kumar Sharma as to one undivided half share and Rakesh Kumar Sharma as to one undivided half share on Native Lease No. 22851.
- C. An order that the property comprised in Native Lease No. 22851 being Stage 4 Lot 119 as shown Lot 9 on SO. 1671 be valued and cost of the valuation be shared equally between the Plaintiff and the First defendant.
- D. An order that the property comprised in Native Lease No. 22851 being Stage 4 Lot 119 as shown Lot 9 on SO 1671 be sold by the plaintiff by way of tender to the highest tenderer.
- E. The tender for the sale of the property be advertised at least once in two newspapers being published in Fiji.
- F. An order that all sale proceeds be deposited in Court.
- G. An order that after deduction of costs, the net proceeds of sale to be shared equally between the parties.
- H. Such further or other relief as seems just and equitable to this Honourable Court.
- I. The Defendants pay the cost of this action on a full indemnity basis to the Plaintiff.

[2] The plaintiff is the wife of Mohan Kumar Sharma (deceased) and the administratrix of his estate. The first defendant is the brother of the deceased.

[3] There had been an earlier action (HBC 357 of 2006) filed by the first defendant against the estate of Mohan Kumar Sharma (deceased) in the High Court of Suva in respect of the property which is the subject matter of this action and the Court on 05th August 2008 made *inter alia*, the following orders:

(a) A Declaration that the plaintiff is entitled to one undivided half share in the property situated at Rokosawa Road Cunningham Stage 4 and comprised in NL 22851 described Tacirua Plains Subdivision Stage 4 Lot 119 as shown Lot SO 1671.

(b) The 1st defendant to execute a fresh transfer, Land Sale Declarations, Consent forms for transfer of the undivided half share to enable one undivided half share in the aforesaid land to be transferred to the Plaintiff.

[4] The then solicitors for the plaintiff Naidu Law prepared the documents in compliance with the orders of the court. In the transfer document prepared by the solicitors the land has been described as follows:

Tacirua Plains Subdivision Stage 4 Lot 119 As shown Lot 9 on SO 1671 (as to one undivided half share.

[5] In the same document the area of the land has been described as follows:

474 square meters (as to one undivided half share)

[6] However, in the transfer registered with the Registrar of Titles the words "as to one undivided half share" had been struck out. There is no dispute between the plaintiff and the defendant that this error has to be corrected.

[7] The plaintiff seeks orders to sell this property and divide the proceeds of the sale between her and the 1st defendant. The learned counsel for the plaintiff submitted that such a course is provided for in section 119 of the Property Law Act 1971.

[8] Section 119(2) of the Property Law Act provides as follows:

The court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the court that, by reason of the nature of the land, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstance, a sale of the land would be for the benefit of the parties interested.

[9] In **Thomas v Estate of Eliza Miller** [1996] FJHC 168; Hbc0136j.94s (12 December 1996) it was held:

The application here is under s 119(2) under which sale of land under the direction of the court may be ordered if such sale is considered by the court to be "for the benefit of the parties interested" for the said section 119(2) clearly specifies the circumstances under which the Court could make an Order for sale notwithstanding the dissent or disability of any other party provided that "the sale would be for the benefit of the parties concerned". In the definition of "land" is included "all estate and interests in land" (section 2 of the Act).

In any consideration of the issue in this case the court acts on evidence and decisions will have to be reached on the basis of the evidence. On the affidavit evidence the Plaintiff has proved and satisfied the Court that s. 119(2) is available to her.

In coming to this conclusion I have been persuaded by the observations made by BROOKE J.A in his judgment in Re DIBATTISTA et al. and MENEOLA et al. (Ontario Court of Appeal 74 D.L.R. (4th) p.569). There he refers to COOK v JOHNSTON (1970) 2 O.R. 1 (H.C.J.) where GRANT J considered the question of when and in what circumstances the court may order a sale. I quote below what GRANT J said in his judgment at pp. 1-2:

[10] The learned counsel cited many other decisions from various jurisdictions from all these decision and from the provisions of section 199(2) of the Property Law Act it appears that the discretion is with the court to order a sale of commonly owned property. The court will order the sale of the property if is to the benefit of the parties. In the instant case the 1st defendant did not file any defence. However, when the court is called upon to exercise its discretion, it cannot give a default judgment. It must consider whether there are sufficient grounds to exercise its discretion conferred upon by the statute.

[11] In this matter the plaintiff nothing is stated in the affidavit in support of the plaintiff why this property cannot be partitioned. The learned counsel for the plaintiff submitted that the 1st defendant has not given any reason why the property should not be sold. The plaintiff cannot ask for a sale as of a right. She must first satisfy the court that there are sufficient grounds for the court to make such an order.

[12] In **Thomas v Estate of Eliza Miller** (supra) the property involved was a flat. It is impracticable if not impossible partition a flat and therefore, the proper course was to sell the flat and distribute the proceeds among the co-owners. In this case the extent of the land is 474 square meters and it is reasonable for the plaintiff to say that this property cannot practically be divided into two allotments. The learned counsel in his submissions mentioned that there is a house on the property and ask the court how to divide the house. I am not in a position to advise the parties on that but they must first make an effort to see whether it can be divided into two allotments. Failing which the parties can always seek an appropriate order from the court.

[13] For the reasons aforementioned the court makes the following orders.

- (1) The 1st defendant is ordered to deliver the duplicate Native Lease No. 22851 to the 2nd defendant within seven days from today.
- (2) The 2nd Defendant is ordered to cancel Transfer dealing number 777849 on Native Lease No. 22851 in the name of Rakesh Kumar Sharma and to enter a Transfer in the name of Sunila Devi as the Administratrix of the Estate of Mohan Kumar Sharma as to one undivided half share and Rakesh Kumar Sharma as to one undivided half share on Native Lease No. 22851.
- (3) The 1st defendant is ordered to pay the plaintiff \$1000.00 as costs of this action (summarily assessed).
- (4) Other reliefs sought in the Originating summons are refused.




Lyone Seneviratne

JUDGE

14th March, 2018.