

**IN THE HIGH COURT OF FIJI AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 25 of 2018**

BETWEEN

**JOSEFA GUMATUA TIKOICINA** a.k.a. **JOSEFA TIKOICINA** of Kaunicina Place,  
Reservoir Road, Suva, Taxi Driver.

**PLAINTIFF**

AND

**SAU UKUTAKIVAKARUA TIKOICINA** a.k.a. **SAU TIKOICINA** of Nasole,  
Nasinu, Nausori, Immigration Officer.

**DEFENDANT**

**Counsel** : Mr K. Singh for the Plaintiff  
Mr P. Niubalavu for the Defendant

**Date of Hearing** : 05<sup>th</sup> February, 2019

**Date of Judgment**

:

22<sup>nd</sup> February, 2019

## JUDGMENT

[1] The plaintiff filed this originating summons pursuant to section 119 of the Property Law Act 1971 seeking the following orders:

- i. Property comprised in Crown Lease No. 223378 being Lot 1 on Deposited Plan No. 5991 Kinoya Subdivision situated in the District of Naithasiri comprising of an area of 1095 square meters be:
  - a) Valued and the cost of the valuation be shared equally by the plaintiff and the defendant.
  - b) Sold by the plaintiff by tender to the highest tenderer and/or by giving the property to a registered real estate agent for sale and in the event the defendant refuses to execute the instrument of transfer, the Chief Registrar of the High Court execute the said instrument and all other documents in place of the defendant.
- ii. All sale proceeds be deposited in court.
- iii. After deduction of costs, the net proceeds of sale to be shared equally between the parties.
- iv. Or alternatively for an order that the defendant be given option to buy out the plaintiff's share at the valuation amount.
- v. Costs of the action.

[2] The defendant in her affidavit in response states that the property in question was acquired during the course of the marriage and there is an ongoing application in the Family Court for the distribution of the property.

- [3] The averments in the affidavit in support of the plaintiff shows that this property is matrimonial property although he has not stated in the affidavit. The plaintiff and the defendant has purchased this property in 2006 and the marriage between the plaintiff and the defendant was dissolved in 2012. Since this property has been purchased by the plaintiff and the defendant it becomes matrimonial property.
- [4] It is common ground that there is a matter pending before the Magistrate's Court of Nausori for distribution of matrimonial property. In the distribution of matrimonial property the court must also take into consideration the maintenance of the children who are under the age of 18 years. In the present action there are four children who are under the age of 18 years. Even if this court orders the sale of the property acting under section 119 of the Property Law Act 1971, for the following reasons, the proceeds cannot be divided between the parties as claimed by the plaintiff because, apart from the matter pending before the Magistrate's court for distribution of matrimonial property, there is a charge and a mortgage over this property.
- [5] The learned Counsel for the plaintiff cited the decision in **Wati v Nath** [2013] FJHC 368 where the court cited the following findings of the Supreme Court in **Atu v Atu** [1983] FLR 100:

"Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly."

Subject to one issue Mr Knight raised which I will consider later, unless the Court sees good reason to the contrary, it is mandatory to direct sale of the property since the plaintiff's interest in the property is not less than one moiety.

A 'moiety' means a half and the issue raised by Mr Knight is that section 119 is not available to be plaintiff because he is a joint tenant and not a tenant in common entitled to a moiety or upwards of the property.

It is not necessary to enter upon a description of joint tenancies and tenancies in common because partition of land by the Court is available to persons having concurrent interests whether jointly or in common in a property.

Halsbury Laws of England Volume 21 first edition as p. 810 when describing the legal term "partition" says:

"The legal term 'partition' is applied to the division of lands, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."

In a note regarding co-owners, the author says:

"The co-owners may be joint tenants in common or co-partners."

The plaintiff is entitled to an order for sale of the property unless the Court considers there are good reasons to the contrary.

- [6] There cannot be any dispute as to the ownership of this property. The defendant does not deny that both of them contributed in purchasing this property but is not merely a co-owned property it is also a matrimonial property. The plaintiff intentionally suppressed this fact from the court. For these reasons the most appropriate forum to decide this matter is the Family Magistrate's Court.
- [7] The learned counsel for the plaintiff also submitted that the matter before the Magistrate's Court is time barred. The first application for matrimonial property distribution was struck out by the learned magistrate for non-appearance of the parties. What is pending before the Magistrate's Court is the second application. The second application has been filed after the institution of these proceedings but before the Originating summons was served on the defendant. The learned counsel relied on section 27(3) of the **Family Law Act 2003** where it is provided:

Where a final order for dissolution of marriage or of nullity of marriage has been of the definition made, proceedings of a kind referred to in sub-paragraph (c) or (d) of the definition of "matrimonial cause" in section 2(1) (not being proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) **cannot be instituted before the expiration of 2 years** after the date of the making of the order or the date of commencement of this Act, whichever is the later, except by leave of the court in which the proceedings are to be instituted.

[8] What this section says is that a matrimonial cause cannot be instituted before the expiration of two years from the date of the dissolution of the marriage and not after the expiration of two years. Therefore, the objection of the leaned counsel for the plaintiff that the application of the defendant to the Magistrate's court is out of time has no merit. On the other hand if it was time barred the plaintiff should have taken that objection in the Magistrate's Court before instituting these proceedings.

[9] For the reasons set out above I make the following orders.

#### **ORDERS**

1. The originating summons of the plaintiff is struck out.
2. The plaintiff is ordered to pay the defendant \$3000.00 as costs (summarily assessed) of this matter.



22 February, 2019

  
Lyone Seneviratne

**JUDGE**