

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 102 of 2017

IN THE MATTER of an application for partition proceedings under Section 119 (2) of the Property Law Act Cap 130

BETWEEN : **KRISHNEEL NATH MAHARAJ** of 1 Vaivai Place, Vesi Street, Flagstaff, Suva, IT Personnel as Administer in the Estate of **RAJENDRA PRASAD NATH** aka **RAJENDRA MAHARAJ** late of Daria, Bua, Fiji, Farmer, deceased, Intestate.

APPLICANT

AND : **SATYA WATI** of Lot 154 Votua Road, Nasinu, Domestic Duties as the Executor and Trustee in the **TARAWHATI** aka **TARA MATI aka TARA WATI** late of Daria, Waiunu, Bua in the Republic of Fiji, Retired, Testate.

RESPONDENT

Counsel : **Applicant: Mr A.Nand**
: **Respondent: Mr M.A.Khan**

Date of Hearing : **31 July, 2017**

Date of Judgment : **29 May, 2020**

JUDGMENT

INTRODUCTION

1. This is an action filed by way of originating summons in terms of Section 119(2) of Property Law Act 1971. Plaintiff (Applicant) had obtained Letters of Administration for one of deceased beneficiary of one forth share of a property in terms of a last will where Defendant (Respondent) is the trustee and executor. Defendant obtained probate on 18.8.2016 and had sought application for provisional certificate of the property and this application for sale was made on 6.4.2017. The Affidavit in support is filed by power of attorney for Plaintiff. Though a power of attorney can institute an action in terms of the powers given, he cannot give evidence by way of an affidavit as to the facts of the case unless he is aware of those facts in an originating summons. According to Order 41 rule 5 of High Court Rules 1988 the supporting affidavit of the originating summons and reply affidavit to the affidavit in opposition are both defective. This is not an objection raised by Defendant, and in any event there are sufficient admitted facts to consider the application before court. Section 37 of

Succession Probate and Administration Act 1970 states that an executor is not bound to distribute property of the estate for which probate relates, before expiration of one year from the grant of the probate. In my judgment, that provision does not preclude this action being filed few months before expiration of one year. At the time of hearing it was more than one year from grant of the probate to Defendant. Defendant's main contention is Section 119(2) of Property Act 1971 cannot be relied by a trustee of a beneficiary to seek sale of land subjected to common tenancy. In terms of Section 119(2) of Property Act 1971 a party interested can institute an action for sale and court can make an order for sale, if that is in the benefit of interested parties. There is no evidence before me in proof of that sale would benefit all interested parties in order to make orders for sale of the property as requested. This originating summons is dismissed. The preliminary objections raised by Defendant regarding this application are overruled.

FACTS

2. The Applicant in this case has filed Originating Summons seeking the following Orders:
 1. *The Property comprised in Certificate of Title No. 26842 being Lot 5 on DP No. 5947 Situate in the District of Bua containing an area of 68 hectares 7407 sqm(The Property) to be sold.*
 2. *The Applicant to appoint a reputable valuer, to carry out the valuation of the said property.*
 3. *The said property to be sold at the best price obtained by any of the parties.*
 4. *The Applicant Solicitors to attend to the transfer of the said property on behalf of the Respondent.*
 5. *Proceeds received from the sale of the said property be used to clear the Town rates with Labasa Town Council of any costs associated with the sale of the property including the legal fees of transfer after which proceeds are to be shared equally.*
 6. *The Respondent to execute all the conveyancing documents pertaining to the transfer of the said property and if the Respondent fails to execute the conveyancing documents then the Chief Registrar of the High Court is to execute the conveyancing documents in place of the Respondent.*
 7. *The Respondent to hand over the Duplicate Original Certificate of Title No. 26842 to the Solicitors of the Applicant.*
3. Defendant is the executor and trustee in the estate of Tarawati and probate was granted on 18.8.2016. Said estate property comprised CT 26842 being Lot 5 on DP 5947 containing and are over 68 ha and 7407 square meters.
4. There were four equal share beneficiaries to the said land one such beneficiary was late Rajendra Prasad and other beneficiaries were Defendant, Roshini Devi, and Lalita

Nath. So each beneficiary would inherit equal share being one fourth share of the Property.

5. Plaintiff is the administrator of late Rajendra Prasad who was a beneficiary of the estate of Tarawati.(see annexed SW 6 to affidavit in opposition)
6. Defendant had taken steps to distribute the property in issue as the executor, though no distribution was made at the time of institution of this action.

ANALYSIS

7. Whether Applicant has a right to bring this Action under Section 119 (2) of the Property Law Act 1971 is a preliminary legal issue. The application is for sale of the land in terms of Section 119(2) of Property Act 1971 and court should be satisfied that sale of the land would 'benefit the parties interested'.
8. Previously, I have held that Section 119(2) is linked to Section 119(1) of the Property Law Act 1971 hence no sale of land can be ordered without seeking partition of the same, but further research on this I found that there is an alternate contention on that point. I have also found a local authority, which was not cited by counsel, which I fully agree.
9. Section 119 of Property Act 1971 states;

"119.-(1) 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.

*(2) **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.***

(3) The court may also, if it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale, and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.

(4) On directing any such sale or valuation to be made, the court may give also all necessary or proper consequential directions.

(5) Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other or others, and it shall not be competent to any defendant in the action to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considerations:

Provided that all persons who, if this Act had not been enacted, would have been necessary parties to the action shall be served with notice of the decree or order on the hearing, and, after that notice, shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of court, apply to the court to add to the decree or order.

(6) On any sale under the provisions of this section, the court may allow any of the parties interested in the land to bid at the sale, on such terms as the court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters.”(emphasis added)

10. In *Thomas v Estate of Eliza Miller* [1996] FJHC 168 (decided on 12 December 1996) Pathik J held;

I agree with Mr. Gago's submission that in s. 119(1), (2) and (3) provision is made for three separate kinds of action which can be maintained in relation to any property. I reject the defendants' contention that land can only be sold on a court order if there is "an action for partition and not otherwise", and therefore that an application under s. 119(2) must be based on an "action for partition".

In England under the old law the Court had no power to decree sale instead of partition until the Partition Act, 1868 when the court was given power to order a sale. The views of the holders of the greater share prevailed, unless the minority could prove to the Court that their view was the most beneficial. Rules were laid down for the guidance of the Court which are similar to the provisions under our section 119(1), (2) & (3). **In all these cases the Court had discretion.**

Where a large estate had to be divided among a few people, the expense was not heavy; but many cases have occurred where a small estate has been given (generally by Will), as in the case before me, to a very large number of persons, some of whom cannot be found, and in these cases the expenses were out of all proportion to the value of the estate. This produced numerous inconveniences and absurdities such as for example a house which was partitioned by actually building a wall up the middle (*TURNER v MORGAN* (1803) 8 ves 143, *LORD ELDON LC*). This led to the passing of the Partition Act 1868 (31 & 32 Vict. C.40) and the Partition Act 1876 under which the Court was given jurisdiction to order a sale of the property and distribution of the proceeds in lieu of making an order for partition. But since the Law of Property Act, 1925 the necessity for sale by the Court no longer exists in England, since, whenever several persons share land beneficially, it is now vested in trustees on trust for sale. Hence the Partition Acts no longer enable the Court to order a sale in a partition action but an action for partition can apparently still be brought, if occasion arises.

This is not a partition action. The subject matter of this application is not based on 119(1) which requires the court to direct a sale of the land and a distribution of the proceeds but there the applicant's interest has to be "*one moiety*" before that can be done. A "*moiety*" is defined in *ATU* (supra) to mean "*a half*". Therefore no action for partition of land and subsequent sale can be brought by an applicant where interest in the property is below one-half of the total interests in land. Such is the case here.

Here the Plaintiff is neither applying for a partition nor a distribution of the proceeds. The word "*partition*" is described in *HALSBURY* 1st Ed. Vol 21 at p.810 as:

"The legal term 'partition' is applied to the division of land 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."

It is further stated in Halsbury that "*the co-owners may be joint tenants, tenants in common or co-partners.*"

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 MENECOLA 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:

In Morris v. Morris (1917), 12 O.W.N. 80 Middleton, J., in dealing with a similar matter stated at p.81:

"Sale as an alternative for partition is quite appropriate when a partition cannot be made."

In Gilbert v. Smith (1879), 11 Ch.D. 78, Jessel, M.R., at p.81 stated:

"The meaning of the Legislature was that when you see that the property is of such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money amongst the parties."

In Lalor v. Lalor (1883), 9 P.R. (Ont.) 455, Proudfoot, J., who was deciding whether partition or sale should be ordered, stated:

"I do not think any party has a right to insist on a sale; and it will not necessarily be ordered, unless the Court thinks it more advantageous for the parties interested."

In Ontario Power Co. v. Whattler (1904), 7 O.L.R. 198, Meredith C.J. reviewed the legislation in the Province giving jurisdiction to the Court to order a sale instead of partition. In reference to the form of such remedies then adopted by the Consolidated Rules, he stated at p. 203:

"That form must be read in the light of the legislation by which jurisdiction has been conferred on the Court to order a sale instead of a partition; and the provision as to proceedings being taken for partition or sale is, I think, a compendious mode of saying that proceedings are to be taken to partition unless it appears "that partition cannot be made without prejudice to the owners of, or parties interested in, the estate," but that if that is made to appear proceedings are then to be taken for the sale of the lands."

11. Accordingly Plaintiff needs to satisfy the court to exercise discretion in favour of the Plaintiff though sufficient evidence that sale of the land will benefit the interested parties. Plaintiff is an interested party as the trustee of an estate that inherits one forth share of the property in issue.
12. Plaintiff as trustee qualifies as a party interested to make an application in terms of Section 119(2) of Property Law Act 1971.
13. The Plaintiff not precluded from making this application for sale as a party interested but had failed to satisfy court that sale would benefit all the parties interest. The maxim "*Generalia specialibus non derogant*" is not applicable for this matter. Plaintiff is trustee of one of the beneficiaries of the last will of late Taramati and Section 119(2) of Property Law Act 1971 is not in conflict with the provisions of Trustees Act 1966 and or Succession Probate and Administration Act 1970 to apply such a maxim to exclude general provisions which are supplementary to such special provisions applicable as trustee.
14. Defendant contend Property Law Act 1971 has no application to the Plaintiff as he was only a trustee of deceased beneficiary to the estate of late Tarawati. Defendant counsel stated Section 23 and 24 of Trustee Act 1966 applies. Section 23 of Trustee Act 1966 deals with sale of trust property but it is obvious that provision cannot be applied when the trust property is under tenancy in common.
15. When there are more than one owner to the Property, such property right can be exercised by a legatee through partition of the Property or sale depending on the circumstances of the case. In this case one beneficiary who is entitled to one forth share is dead and trustee of the estate desire to sell the Property and distribution of shares to the beneficiaries.
16. Section 23 of Succession Probate and Administration Act 1970 states,
 - (1) *Subject to the provisions of this section, every trustee, in respect of any property for the time being vested in him, may-*
 - (a) *sell the property,*
 - (b) *dispose of the property by way of exchange for other property in Fiji of a like nature and a like or better tenure, or, where the property vested in him consists of an undivided share, concur in the partition of the property in which the share is held and give or take any property by way of equality of exchange or partition.*
 - (c) *postpone the sale, calling in and conversion of any property that he has a duty to sell, whether or not it is of a wasting speculative or reversionary nature, but, in the case of property of a wasting or speculative nature, for*

no longer than is reasonably necessary to permit its prudent realization,

17. Section 24 of Succession Probate and Administration Act 1970

“Where the instrument creating a trust to sell property or a power to sell property does not expressly limit the duration of the trust or power, then, notwithstanding any lapse of time or that all of the beneficiaries are absolutely entitled to the property in fee simple or full ownership in possession and are not under any disability, the trustee may sell the property ; but in all other respects the authority conferred by the provisions of this section is subject to any restrictions to which the trust or power created by the instrument is subject to an order of any court restraining any such sale.”

18. There is nothing in Section 23 and Section 24 of Trustee Act 1966 that prevents a trustee of an estate under this law seeking sale of co-owned property.
19. Apart from the Trustees Act 1966 Defendant relied on Sections 10, 37, 38 and 41 of Succession, Probate and Administrative Act 1970.
20. Sections 10 and 37 of Succession, Probate and Administration Act 1970 state;

10. All property held by any person in trust shall vest as aforesaid, subject to the trusts and equities affecting the same.

*“37. An executor or administrator **shall not be bound to distribute** the estate of the deceased **before the expiration of one year** from the date of grant of probate or administration as the case may be.” (emphasis added)*

21. It is axiomatic that Property is held in trust by the trustee namely Defendant. A time period of one year is granted to the trustee to collate all estate property. This applies to distribution and not for sale of property.

22. Section 38 of Succession Probate and Administration Act states,

“Subject to the provisions of section 37, if an executor who has obtained probate or an administrator with the will annexed, after request in writing neglects or refuses to-

(a) execute a transfer or land devised to a devisee; or

(b) transfer, pay or deliver to the person entitled any bequest, legacy or residuary bequest,

such devisee or person may apply for an order such executor or administrator to comply with such request, and the court may make such order as it thinks fit.”

23. There is express provision to come to court after expiration of one year if transfer of shares in the property is refused by the administrator or executor. Admittedly there is no refusal by Defendant to transfer the shares to the beneficiary and had taken steps to that effect. So Section 37 and 38 cannot be applied by Plaintiff to seek sale of the Property.
24. Defendant relied on Section 41 of Succession Probate and Administration Act 1970. In my judgment said provision of law does not preclude this application. This is supplementary provision and not any specific provision for sale of property co owned by beneficiaries. Section 41 of Succession Probate and Administration Act 1970 states,
- “41-(1) The court may make such order with reference to any question arising in respect of any will or administration, or with reference to the distribution or application of any real or personal estate which an executor or administrator may have in hand, or as to the residue of the estate, as the circumstances of the case may require.*
- (2) Such order shall bind all persons whether sui juris or not.*
- (3) No final order for distribution shall be made except upon notice to all the parties interested, or as the court may direct.”*
25. Having rejected preliminary objections to this application, Plaintiff may seek to invoke discretion of, sale of co-owned land in terms of Section 119(2) of Property Act 1971. The paramount consideration to order sale is whether it would benefit parties interested in the Property. For that Plaintiff needs to adduce evidence. The Property in issue is more than 68 ha and why a sale is more suitable is not explained. So I cannot exercise my discretion to order sale when the executor and equal share beneficiary is objecting to sale. All the orders sought in originating summons are related to sale of the Property. So originating summons is struck off.

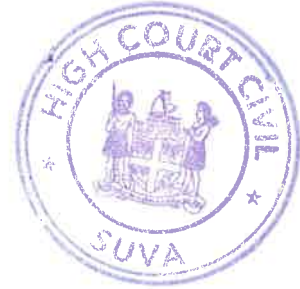
CONCLUSION

26. Plaintiff who is an administrator of the estate of late Rajendra Prasad instituted this action seeking sale of property in issue even before distribution of shares to the beneficiaries. Defendant is not bound to distribute property before twelve months from obtaining the probate, but this action was instituted within eight months from grant of the probate to Defendant. Though this itself would not prevent from institution of an action this is a ground for consideration as sufficient time is needed for trustee to distribute property. Defendant had objected *locus standi* of Plaintiff to bring this action and I reject that. Defendant does not deny beneficial rights of late Rajendra Prasad. Defendant states that all steps regarding administration was taken. The affidavit in support of the originating summons and also reply to affidavit in opposition are defective as they do not conform to Order 41 rule 5 of High Court Rules 1988 but I did not strike off the action on this technicality due to importance of


the issues raised in the action. Defendant's main contention is that Section 119(2) of Property Law Act 1971, has no application to a trustee of a beneficiary to bring an action for sale. For the reasons given in this decision this position is rejected. Plaintiff had failed to adduce sufficient evidence to seek sale of the Property. Plaintiff needed to prove, that sale of the property was for the benefit of all the parties interested. Considering nature of the case I do not award any costs.

FINAL ORDERS

- a. Originating summons struck off
- b. No costs.



Dated at Suva this 29th day of May, 2020.


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Justice Deepthi Amaratunga
High Court, Suva