

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: **HBC 112 of 2023**

IN THE MATTER of an application for
partition proceedings under Section
119(2) of the Property Law Act 1971

BETWEEN : **SHIU KUMAR** of Ballarat Street, Verata, Nausori, Tradesman as
the Executor and Trustee of the Estate of Indar Wati a.k.a Indra
Wati.

PLAINTIFF

AND : **MOHINI LATA** as beneficiary in the Estate of Indra Wati a.k.a
Indar Wati of Lokia, Nausori, Domestic Duties.

1st DEFENDANT

AND : **RANILITA** as beneficiary of the Estate of Indra Wati a.k.a Indar
Wati of Ballarat Street, Verata, Nausori, Machinist.

2nd DEFENDANT

AND : **BINA WATI** as beneficiary in the Estate of Indra Wati a.k.a Indar
Wati of Visama Feeder Rd, Nausori, Machinist

3rd DEFENDANT

AND : **AJAY NANDAN** as beneficiary of the Estate of Indra Wati a.k.a
Indar Wati of Ballarat Street, Verata, Nausori, Machinist.

4th DEFENDANT

AND : **PRAMILA WATI** as beneficiary in the Estate of Indra Wati a.k.a
Indar Wati of Wainibokasi, Waitress.

5th DEFENDANT

BEFORE : **Banuve, J**

Counsel : P.Kumar with Mr N. Sharma for the Plaintiff
Mr A. Chand for the Defendants

Date of Hearing: 11th April 2022

Date of Judgment: 1st May 2024

JUDGMENT

A. Introduction

1. The Plaintiff, as Executor and Trustee of the Estate of Indar Wati a.k.a Indra Wati filed an Originating Summons on 6th April 2024, seeking the following orders:-
 1. *The property comprised in the Certificate of Title No. 22753 comprised on Lot 49 Section IV known as Verata (Part of) situate in the District of Rewa on Deposit Plan No. 126 comprising an area of one rood be sold.*
 2. *The Plaintiff to appoint a reputable valuer, to carry out valuation of the property.*
 3. *First opportunity to purchase the property be given to the Defendants at market value or valuation whichever is the greater.*
 4. *If neither party is in the position to purchase, the property is to be sold at the best price obtained by either of the parties, to sell to an outsider, the lowest price should be the valuation price.*
 5. *The Plaintiffs Solicitors to attend to the transfer of the said property on behalf of the Defendants.*

6. *The Plaintiff and the Defendants to execute the Transfer of Certificate of Title No. 22573 comprised of Lot 49 Section IV known as Verata (Part of) situate in the District of Rewa on Deposit Plan No. 126 comprising an area of one rood and all other incidental documents.*
7. *In the event if any of the parties fail to execute the transfer and all other incidental documents the Deputy Registrar, High Court of Fiji to execute the Certificate of Title No. 22753 comprised of Lot 49 Section IV known as Verata (Part of) situate in the District of Rewa on Deposit Plan No. 126 comprising of an area of one rood and all other incidental documents for and on behalf of the defaulting party as being one of the registered proprietors of Certificate of Title No. 22753*
8. *Proceeds received from the sale of the said property be used to clear the arrears of town rates with Town Council (if any) and utility bills and costs associated with the sale of the said property including the legal fees for estate administration after which proceeds are to be shared.*
9. *The net proceeds of sale be shared as follows:*
 - a. *An equal share of the proceeds to all the beneficiaries from the value of land only; and*
 - b. *From the improvement to the land derived from the valuation sum, two shares in equal of which one goes to the Plaintiff as beneficiary while the other to the Estate which shall then be divided among the 5 beneficiaries.*
10. *Costs of the action to be paid by the Defendants.*

2. The late Indar Wati a.k.a Indra Wati died on 22nd April 2022. The Plaintiff and the 5 Defendants are her children.
3. The Plaintiff was appointed as the Administrator of the Estate of Indar Wati a.k.a Indra Wati, on 9th December 2021. The Estate property consists of CT No 22753, Lot 49, Section IV, Verata, (Part of), District of Rewa on DP No. 126, which was said

to have been purchased by Indar Wati and her husband¹, as Joint Tenants (both deceased), and parents of the parties to this proceeding. It has an area of 1 rood. The family residence is constructed on the property.

4. The Plaintiff, with the Defendants are all beneficiaries of the Estate, having equal shares in it, although no formal distribution of shares have been made pursuant to the grant of letters of administration.
5. The Plaintiff has taken steps to discharge his duties as Administrator of the Estate including, attending to the discharge of the mortgage over the property², the Record of Death and Transmission by Death.
6. The Plaintiff has filed an Originating Summons pursuant to section 119 of the *Property Law Act* [Cap 130] (*In action for partition court may direct land to be sold*), which states;

(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,

¹ The Second Defendant in the Affidavit in Opposition of 25 August 2023 deposed on behalf of the 1st to 4th Defendants that it is the 3rd Defendant who personally took over the bank loan repayments (\$6,000) after their father suffered a heart attack, which is denied by the Plaintiff in the Affidavit in Reply.

² The Defendants (2nd – 4th Defendants) depose that they have no knowledge of the Plaintiff 's discharge of mortgage.

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 to 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 all such parties may have liberty to attend the proceedings, and any such person may, within the 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 setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters.-*

7. The Plaintiff's application is made pursuant to section 119 (2) of the Act.³ It is not an application for partition⁴ but, for the sale of land. The Court is, vested under this provision, with a discretion, (may, if it thinks fit), on the request of any party interested, notwithstanding the dissent or disability of any other party to 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

³ This is of some significance because the Defendants had initially contested the application as if it was brought by the Plaintiff for partition pursuant to section 119(1) as having one moiety or upward

⁴ *Maharaj v Wati*-Civil Action No 102 of 2017 (*per* Amaratunga J)

therein, or of the absence or disability of those parties, or for any other circumstance, a sale of the land would be for the benefit of the parties interested.

B. Analysis

Whether the Court, in the exercise of its discretion, ought to grant the orders sought in the Originating Summons, pursuant to section 119(2) of the *Property Law Act* [Cap 130]?

8. The primary issue of contention between the parties, is the appointment of the Plaintiff as the Administrator of the Estate of Indar Wati a.k.a Indra Wati and the manner these duties are being administered.
9. The Plaintiff's position, is that as the eldest sibling, who is the Administrator of the Estate and who resides on the estate property and responsible for discharging the mortgage over it and for improvements to the property, he is entitled to seek that the Court direct a sale of the Estate property pursuant to section 119(2) of the *Property Law Act* [Cap 130], on terms outlined in the Originating Summons, filed on 6th April 2023. The Plaintiff/Administrator seeks the Court's discretion to sanction a sale, as he is unable to persuade his siblings, the Defendants, to consent to the sale of the property.
10. The main issues of contention that the Court can extract from the Summons and the affidavits filed by the parties, is the appointment of the Plaintiff as the Administrator of the Estate of Indar Wati a.k.a Indra Wati and whether the estate property ought to be sold and the proceeds be distributed as contended by the Plaintiff or should the estate property be administered in another manner which the 2nd Defendant would determine, should she be appointed to replace the Plaintiff as administratrix of the Estate.
11. In relation to the proceeds of the sale, the Plaintiff seeks;
 - (a) *An equal share of the proceeds to all the beneficiaries from the value of land only; and*
 - (b) *From the improvement to the land derived from the valuation sum , two shares in equal of which one goes to the Plaintiff as beneficiary while the other to the Estate which shall then be divided among the 5 beneficiaries.*
 - (c) *Costs of this action to be paid by the Defendants.*

12. The Plaintiff seeks the orders sought in the Originating Summons despite the dissension of the Defendants.
13. The Defendants seek that the Summons be dismissed and the Plaintiff be removed as the Administrator of the Estate and the Second Defendant be appointed as the Administratrix, instead. The grounds on which their opposition is premised are laid out in the Affidavit of Opposition filed on 25th August 2023 ;
 - (a) *The appointment of the Plaintiff as the Administrator of the Estate of Indar Wati a.k.a Indra Wati was done without the consent of the Defendants.*
 - (b) *The repayment of the bank loan that was taken out over the Estate property was completed by the Third Defendant, not the Plaintiff.*
 - (c) *The Second and Third Defendants reside on the family residence, on the Estate property with the Plaintiff and have contributed to the improvements made to it such as replacement of roofing iron, painting of the kitchen whilst the Plaintiff only moved onto the family residence in 2011 after demolishing his own residence and has carried out maintenance work on the balcony, only after the demise of their mother.*
 - (d) *The Plaintiff is trying to benefit as the Administrator of the Estate by seeking to offer only a minimal amount to the Defendants, in lieu of the whole property being transferred to him and as such is acting in his own interest.*

C. Preliminary Review

14. After a review of the position expressed by the parties the Court notes these issues.

The Plaintiff's Position

15. There has been no distribution of shares in the Estate made by the Plaintiff/Administrator amongst the beneficiaries, pursuant to section 6 of the *Succession, Probate and Administration Act* [Cap 130]. Settled authority on the distribution of estate property indicate that the Court would consider exercising its discretion to direct a sale, pursuant to section 119(2) of the *Property Law Act* [Cap 130], provided a formal distribution of shares had already been made to the beneficiaries and the Court's intervention is sought, rather to sanction a sale of the estate property, in the interest of the parties, after a breakdown in relations

between them- Pratap v Sen-Civil Action HBC 174 of 2018 , Khanum v Kumar –Civil Action HBC 405 of 2015 Kumar v Kumar –Civil Action HBC 398 of 2019, Subhan v Subhan –Civil Action HBC 274 of 2021. In the present case, no formal distribution of shares amongst the beneficiaries has been made, by the Plaintiff/Administrator of the Estate. There is also no evidence provided by the Plaintiff to substantiate the claim that he has been responsible for paying for the improvements to the Estate property as well as other outgoings such as mortgage and utility payments.

There is a dispute between the Plaintiff and the Defendants as to who has been responsible for these payments.

The Defendant's Position

16. The Defendants oppose the orders sought by the Plaintiff for the sale of the Estate Property pursued in the Originating Summons filed on 16th April 2023 premised on the grounds outlined in paragraph 13 herein, and instead seek the following orders in the Affidavit in Opposition they filed on 25th August 2023;
 - (a) *That Plaintiff's Originating Summons be struck out/dismissed.*
 - (b) *That the Plaintiff be removed as Administrator in the Estate of Indar Wati a.k.a Indra Wati.*
 - (c) *That the Second Defendant (Ranilita) be appointed as the Administrator in the Estate of Indar Wati a.k.a Indra Wati*
 - (d) *That the Plaintiff hand over the original Certificate of Title No.22753 to the Second Defendant (Ranilita) within seven (7) days from the service of the order to the Plaintiff for the purpose of administration of the Estate of Indar Wati a.k.a Indra Wati*
 - (e) *That the Second Defendant (Ranilita) carry out the administration of the estate within 6 months upon receiving the original Certificate of Title No. 22753.*
 - (f) *That the Plaintiff to pay the legal costs of the First, Second, Third and Fourth Defendants on a solicitor client indemnity basis.*
17. The Defendants seek the revocation of the appointment of the Plaintiff as the Administrator of the Estate of Indar Wati a.k.a Indra Wati and the appointment of the 2nd Defendant to replace him, as Administratrix, on the grounds outlined earlier. Order 76(2)(1) of the *High Court Rules 1988* mandates that as a "probate

action”⁵ the revocation of a grant of letters of administration, must be begun by Writ⁶. Before a Writ is issued out of the Probate Registry, it must be indorsed pursuant to O.76, r.2(2)with-

- (a) *A statement of the nature of the interest of the plaintiff and of the defendants in the estate of the deceased to which the action relates; and*
- (b) *A memorandum signed by the Registrar showing that the writ has been produced to him [or her] for examination.*

- 18. The Defendants have not complied with the requirements of Order 76, rules 2(1) and (2)
- 19. There is also no evidence provided by the Defendants to substantiate their position that the Second and Third Defendants were actually responsible for much of the improvements on the property, and that the Third Defendant, not the Plaintiff, completed the loan payments to the Bank, over the Estate property.

D. Conclusion

- 20. The Court finds that it cannot, in the exercise of its discretion, direct that a sale be carried out pursuant to section 119(2) of the *Property Law Act* [Cap 130] as sought in the Originating Summons filed on 6th April 2023 nor can it sanction the orders sought by the Defendants in their Affidavit of Opposition filed on 25th August 2023, for the following reasons;
 - 1. As a contentious administration matter, the Plaintiff and/or the Defendants ought to have sought redress for their grievances by way of Writ of Summons in compliance with Orders 76, rules 1 and 2 of the *High Court Rules 1988*. Neither parties have complied with this requirement.
 - 2. Neither the Plaintiff nor the Defendants have provided evidence to substantiate their respective claims on the discharge of the loan over the Estate property, the payment of utility bills, town rates or the improvements carried out on the Estate property. As stated in *Thomas v Estate of Eliza Miller*

⁵ O.76, r.1 (2) “probate action” means an actionfor the revocation of such a grant (of letters of administration)

⁶ Particularly in contentious probate matters- *Philip Jagdishwar Singh v Uma Kiran Krishna* (1990) FCA Reps 99/180

[1996]⁷ with regard to an application for sale of property to the Court, pursuant to section 119 (2);

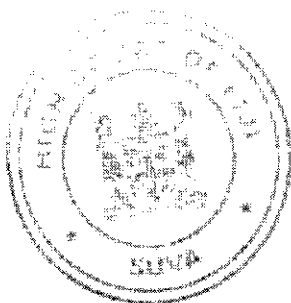
*“In any consideration of the issue in this case the court acts on evidence and decisions will have to be reached on the basis of the evidence”
(meaning affidavit evidence)*

3. The Court has noted the Plaintiff has mistakenly initiated this matter as a probate matter rather than a matter involving the administration of the Estate.. The Court considers this an oversight, and no party is under any illusion that the issues they were dealing with pertained to the grant of letters of administration over the Estate of Indar Wati a.k.a Indra Wati.

E. Findings

The Court orders;

1. **The Plaintiff’s Originating Summons filed on 6th April 2023 is dismissed.**
2. **The Plaintiff or the Defendants, may initiate contentious proceedings by way of Writ of Summons pursuant to Orders 76, rules 1 and 2 of the *High Court Rules 1988*, within 14 days of the issue of these orders.**
3. **Parties to bear their own costs.**



**1st May, 2024
At Suva.**

Savenaca Banuve
**Savenaca Banuve
Judge**

⁷ per Pathik J