

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

**Civil Action No. HBC 05 of 2024**

**IN THE MATTER** of an application by  
**KAVISH YOUNGENDRA** for the Court  
Ordered Sale of ITaukei Lease No 31044

AND

**IN THE MATTER** of section 119 of the  
Property Law Act Cap 130

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**BETWEEN** : **KAVISH YOUNGENDRA** of Nuisawa Lane, Tacirua in the  
Republic of Fiji, Technician

**PLAINTIFF**

**AND** : **NAR DEO** of Nuisawa Lane, Tacirua in the Republic of Fiji,  
Retired

**DEFENDANT**

**Coram** : Banuve, J

**Counsels** : Fatiaki Law for the Plaintiff  
Patrick Kumar Lawyers for the Defendant

**Date of Hearing** : 10<sup>th</sup> July 2024

**Date of Ruling** : 12<sup>th</sup> December 2024

# RULING

## A. Introduction

1. The Plaintiff filed an **Originating Summons** on 11<sup>th</sup> January 2024, seeking the following orders:-
  1. *The Plaintiff, and Defendant to obtain a professional valuation for the Property contained and described in ITaukei Lease No. 31044 being Tacirua East Subdivision Stage 3A (part of) Lot 1 on SO 6621 in the province of Naitasiri. If parties are unable to agree to a person or entity to do valuation, Deputy Registrar to name such entity or person for valuation of the Property.*
  2. *The Defendant to purchase the Plaintiff's half share in ITaukei Lease No 31044 at the said valuation price.*
  3. *In the event that the Defendant does not wish to purchase the Plaintiff's half share, an order that all that land and building comprised in ITaukei Lease No. 31044 be sold by tender and;*
    - (i) *That the advertisement and sale of the said property comprised in ITaukei Lease No. 31044 and the tender process be conducted by Solicitor, Messrs. Fatiaki Law of Suva;*
    - (ii) *The Plaintiff and the Defendant to execute all instruments of Transfer and all other necessary documents pertaining to the sale of the said property comprised in ITaukei Lease No.31044.*
    - (iii) *In the event any party fails to execute the transfer of ITaukei Lease No.31044, the Deputy Registrar of the High Court of Fiji at Suva do execute all instruments of Transfer and all other necessary documents pertaining to the sale of the said property comprised in ITaukei Lease No.31044.*
    - (iv) *Costs of this application and the legal costs on the sale of the said property be paid out of the sale proceeds and the balance sale proceeds be divided equally between the parties.*

## **B. Narration**

2. In an affidavit filed in support of the Originating Summons, the Plaintiff deposes he is the biological son of the Defendant, who with his then wife, Malvina Reddy purchased a vacant lot described as *ITaukei Lease No. 31044 being Tacirua East Subdivision Stage 3A (part of) Lot 1 on SO 6621* (hereinafter the '*Property*'), in the Province of Naitasiri.
3. The Plaintiff and the Defendant hold a half undivided share *each* over the property. They are *registered co-owners* of ITaukei Lease No 31044.
4. The Defendant, a retired resident of Labasa financed the purchase of the property in the sum of \$62, 256.00, with the balance of \$16, 963.75, provided by the Plaintiff.
5. In 2019, the Bank of Baroda provided the Plaintiff with a loan of \$164,000.00 for the construction of a double storey house, for which all parties (including the Plaintiff and his current wife), initially occupied the top flat.
6. Due to domestic issues, the Defendant and his wife moved into the bottom flat and have been living there since, contrary to the initial objective of having it rented out, to assist the Plaintiff in servicing loan repayments.
7. The Defendant then made alterations to the bottom flat converting part of it into a separate flat, which he rents out in addition to constructing two illegal garage/sheds, without the approval of ILTB.
8. As a consequence of the illegal structures, built by the Defendant, the Plaintiff has been unable to renew the insurance cover for the building as required by Bank of Baroda.
9. The Plaintiff instructed his then solicitors to write to the Defendant requesting that the property be sold at the current market value and proceeds be divided equally, or that the Defendant purchase the Plaintiff's share in the property, at the current market value.
10. The Defendant has refused to engage with the Plaintiff on the sale proposal for the property.

11. The Plaintiff's current wife is sickly and needs medical attention in India, however, the Defendant, as co-owner of the Property refuses to endorse the Plaintiff taking a further loan over the property to cover medical expenses.
12. The Defendant has deposed an Affidavit and a Supplementary Affidavit in Response, filed respectively on 19<sup>th</sup> March 2024 and 10<sup>th</sup> April 2024.
13. Despite the kinship ties of the parties, there is marked dissention between the parties on certain issues, leading to the Plaintiff filing the Originating Summons pursuant to section 119 (2), (3) and (4) of the *Property Law Act* [Cap 130] and Order 31 of the *High Court Rules* 1988.
14. The Court is, vested under these provisions, with a discretion, 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 therein, or of the absence or disability of those parties, or for any other circumstance, a sale of land would be for the benefit of the parties interested.*
15. Section 119 of the *Property Law Act* [Cap 130] 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, 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 such a sale or valuation to be made, the court may give also all or necessary or proper consequential directions.*

### C. Analysis

- 16. **Whether the Court, in the exercise of its discretion ought to grant the orders sought in the Originating Summons, pursuant to section 119(1)-(4) of the *Property Law Act* [Cap 130]?**
- 17. The main issues of contention between the parties include;
  - (i) The *reason* for the Defendant relinquishing his retirement property in Labasa and relocating to Suva, to reside with the Plaintiff.
  - (ii) The terms of the arrangement, *if any*, with the Plaintiff on how the Defendant was to be compensated for giving up his retirement property in Labasa and using his savings to relocate to Suva to assist the Plaintiff in acquiring the Property.
  - (iii) The *division of shares* between the Plaintiff and the Defendant over the Property, purchased in Suva.
  - (iv) The *funding of construction work* on the Property in Suva and whether construction work was designed for partial occupation to facilitate mortgage repayment and/or to cater for the special needs of the Defendant and his wife, as retirees who had used their savings to relocate to Suva to assist the Plaintiff, in purchasing the Property.
  - (v) Whether construction works were sourced wholly from loan funds or did the Defendant contribute from his retirement savings?
  - (vi) Refusal to endorse further loans to cover medical expenses.

18. The Plaintiff seeks the orders sought in the Originating Summons, despite the dissent of the Defendant.
19. The Defendant, on the other hand, seeks that the Originating Summons be dismissed forthwith with costs and that the following order be granted instead;
  - (i) *The Plaintiff refund the sum of \$178,019.17 the amount spent by the Defendant for the purchase of the property.*
  - (ii) *Apart from the sum of \$178,019.17 the Plaintiff shall also pay 50% of the balance of the sale proceeds.*
  - (iii) *The Defendant be given the first option to purchase the Plaintiff's share based on the current valuation and after deductions.*

#### **D. Preliminary Review**

20. 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](*hereinafter* the Act), provided, a formal distribution of shares had already been made to the parties, preceding a subsequent 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.
21. The application by the Plaintiff, (if the Defendant is unable to purchase the Plaintiff's half share in *ITaukei Lease No 31044*, (the 'Property')), is that the subject property be sold, pursuant to section 119(2) of the *Real Property Act* [Cap 130], *notwithstanding*, the dissent or disability of the Defendant, provided the Court is assured that the sale would be for the benefit of the parties. The Court, acts on evidence and the Court will have to be satisfied on the evidence that a sale pursuant to section 119(2) is available to the Plaintiff-*Thomas v Estate of Eliza Miller & Tessa Goulding*-Civil Action No 136 of 1994
22. This Court has been oft asked, to endorse a sale pursuant to section 119(2), and there have been differences expressed on the conditions for the sale of leasehold interests, for example, in *Pratap v Sen* –Civil Action No HBC 174 of 2018, the Court refused to

authorize a sale of a leasehold interest which had not been sanctioned by the Lessor, whereas in *Khanum v Kumar* –Civil Action No HBC 405 of 2019, the Court took the view that there was nothing mandatory, in relevant legislation, for the consent of the lessor to be first obtained, before seeking an application for sale pursuant to section 119(2), of the said Act.

23. Whilst the Court may seek guidance from previous cases where such a sale has been considered, it is necessary, that it exercise its discretion and reach a determination, on the facts before it.
24. The Court has borne in mind, that the main issues of contention between the parties are primarily about *relative contribution* of the parties towards the purchase of the subject property, the *construction costs* and *mortgage repayments*. There is no evidence available that the intransigent position of the parties will change for the better despite their kinship ties or will be resolved, with better evidence.
25. The other issue that the Court finds critical is that the Defendant is retired and is primarily relying on his limited retirement savings to fund his side of the litigation and for daily sustenance *nor* has there been any indication on his part, how he would source funds for the purchase of the Plaintiff's share of the property, should an order be granted to that effect, now that he is aware that the Plaintiff seeks the sale of the Property
26. The Court is not in a position on the evidence to make concrete findings on the identified issues of contention between the parties, other than note the intransigent position of the parties, *however*, the Court has borne in mind in particular, *the nature of the issues of contention* and the issue of '*disability*' raised by the Defendant, particularly that he is a retiree with limited prospects, and is of the view that this is an appropriate case to exercise the discretion to sell, as the benefits that would accrue from it, would *outweigh* any advantage that may flow from delaying the resolution of the issues of contention pending a hearing based on *viva voce* evidence.
27. The Court is of the view that the width of the discretion vested on it by section 119(2), allows it to reach the aforesaid conclusion.
28. After the hearing of the Summons, but prior to the delivery of this ruling, the Plaintiff filed a Summons on 3<sup>rd</sup> September 2024, seeking leave to rely and adduce

further evidence on the valuation of the subject Property which Professional Valuations PTE Ltd estimated at \$890,000.00 VEP.

29. In addition, the Plaintiff obtained a current and up to date Bank Statement from the Bank of Baroda revealing a a current balance as of 6<sup>th</sup> August 2024, at \$132, 798.56.
30. Despite the objection of the Defendant, the Court on 7<sup>th</sup> October 2024 allowed the introduction of the new evidence on the basis that it did not raise any new issues which would take the Defendant by surprise *nor* prejudice him, and that the Court would in the interest of justice allow for the admission of the evidence-*Myers v Bavadra*-Civil Action No. 183 of 1993; *Prasad v Dominion Insurance Ltd* –Civil Action No. HBC 87 of 2011L

**ORDER:**

1. **The Property comprised in ITaukei Lease No.31044, being Tacirua East Subdivision Stage 3A (part of) Lot 1 on SO 6621 in the province of Naitasiri be sold to the highest tender subject to the consent of the ITaukei Land Trust Board.**
2. **The parties are required to follow these directions;**
  - (i) **The valuation provided by Professional Valuations PTE Ltd dated 6<sup>th</sup> August 2024, fixed at \$890,000 VEP (Eight Hundred and Ninety Thousand Dollars) is to be used as a base price.**
  - (ii) **If the Defendant requires another valuation to be taken, then solicitors must agree upon a valuer, within 28 days of this judgment.**
  - (iii) **The Plaintiff's solicitors must obtain the necessary approvals for sale.**
  - (iv) **The Property is to be advertised by the Plaintiff's solicitors in two newspapers in consultation with the Defendant's solicitors. Bids are to be opened in the presence of the respective solicitors.**
  - (v) **The parties must agree on a selling price, not below the valuation.**



- (vi) The Plaintiff or the Defendant may offer through their solicitors to purchase the half share of the other party.
- (vii) The Chief Registrar is to execute the conveyance if the Defendant does not cooperate in transferring his share to the purchaser.
- (viii) The Plaintiff's solicitors must deposit settlement monies in Court together with an account of sale related expenses.
- (ix) Sale related expenses must be agreed between the respective solicitors and to be supported by evidence, including the cost of valuation charged by Professional Valuations PTE Ltd.
- (x) Within two weeks after payment of settlement monies into Court, the outstanding loan amount owed to the Bank of Baroda should be settled in full from the settlement amount and each party shall be paid half of the settlement money, remaining.

3. Parties to bear their own costs.



*Savenaca Banuve*  
Savenaca Banuve  
Judge

At Suva  
12<sup>th</sup> December 2024