IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 17 OF 2024

BETWEEN	:	**NELI MATADOLE SENIVATALALA MAY**
		Plaintiff
AND	:	**SALLY LOUISE SENIVATALALA**
		Defendant
Counsel	:	Mr S. Raikanikoda for the Plaintiff
Date of Hearing	:	**9 February 2024**
Date of Judgment	:	**15 February 2024**

JUDGMENT

[1] The Plaintiff has filed an Ex-Parte Summons seeking urgent injunctive orders restraining the Defendant from selling the family home.[1]

[2] The Plaintiff and the Defendant are related by marriage through the Plaintiff's father, the late Alisio Samu Senivatalala. The Plaintiff's mother was Mr. Senivatalala's first wife. They had, it appears, six children. They divorced and Mr. Senivatalala later married the Defendant, the Plaintiff's stepmother.

[1] The Plaintiff's claim is supported by six of her siblings, including, it appears, the daughter of the Defendant; Annexure NMSM1 to the Plaintiff's affidavit. While the Plaintiff resides in Fiji her siblings reside in Australia.

[3] In or about 2010, Mr Senivatalala and the Defendant purchased a property at lot 52, Tamusua Place, Nailuva Road, Raiwai, Suva, legally described as CT 17893, Lot 52, DP No 4209, Raiwai (hereinafter referred to as the 'Suva property'). Mr Senivatalala and the Defendant owned the Suva property as joint tenants. It appears that Mr. Senivatalala's family lived in the Suva property for a time. The Plaintiff describes it as *'where we were all raised up in'*.[2] Over the years, the Suva property came to be important to Mr. Senivatalala as well as the Plaintiff and her siblings. When he was alive, Mr. Senivatalala spoke of the Suva property remaining as a family home after his death. He conveyed this wish to his children and, it appears, this was also conveyed during his lifetime to the Defendant.

[4] Sadly, Mr. Senivatalala passed away in 2022. Before he passed away, it appears he arranged for the Plaintiff to move into the Suva property.[3] The Plaintiff deposes that she was *'entrusted to look after the said property after the death'*[4], making arrangements for the maintenance of the property. Before their father died, the Plaintiff and her siblings helped him with the outgoing and renovation costs on the Suva property. The Plaintiff's commitment since 2022, to looking after the Suva property and paying outgoing costs, no doubt reflects her, and her siblings, understanding that the property would remain a family home as their father had intended.

[5] Evidently, the Defendant does not share this vision. She has found a third party buyer for the property and entered into a Sale and Purchase Agreement. The sale is news to the Plaintiff who was surprised to learn of the sale and the fact that settlement is imminent – she learned this upon being informed that the Defendant's solicitors wish to serve a notice to vacate the property on the Plaintiff.[5]

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[2] Paragraph 3 of Plaintiff's affidavit.
[3] Annexure NMSM4, letter by Makitelena Saukiwai Senivatalala dated 21.02.2024.
[4] Paragraph 5 of the Plaintiff's affidavit.
[5] I note that the Plaintiff arranged for a caveat to be placed on the Suva property on 18 April 2023, and that there is an application for removal of the caveat dated 9 January 2023; this must in fact be 2024. The timing of the caveat in 2023 suggest the Plaintiff was concerned almost a year ago that the property may be sold.

The Plaintiff has brought this urgent Summons to prevent the sale. The Plaintiff and her siblings have written to the Defendant and her Fiji solicitors offering to purchase the property from the Defendant so that it remains in the family.[6] They have received no response to this offer.

Present Proceedings

[6] These proceedings have been commenced by way of an Originating Summons and supporting affidavit from the Plaintiff. The documents were filed on 2 February 2024. The Plaintiff applies for an order that the '*Defendant do show cause why they should be refrained and restricted from executing the sale and purchase of the Family property*'. The Plaintiff relies on ss 6 and 7 of the Land Sales Act, Cap 137 and s 11 of the Land Transfer Act, Cap 131.

[7] On the same date, the Plaintiff filed an Ex-Parte Summons seeking the following urgent injunctive orders:

i. That the execution and settlement of a Sale and Purchase Agreement of the family property legally described as CT 17893, Lot 52, DP NO 4209 Raiwai (Part of) is put on hold with immediate effect.

ii. That first priority be granted to the six children of the deceased to buy the family property.

iii. That the Defendant is not a Fiji Citizen and she be restricted and refrained from selling the Matrimonial property until further determination of this matter.

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[6] Financial information for the Plaintiff's siblings has been annexed to the affidavit to demonstrate that the siblings have sufficient income to raise and service a loan to purchase the property. I note that the Plaintiff's brother in particular, Kolinio Senivatalala who is employed with the Australian Navy, earns about $150,000 AUSD. The Plaintiff identifies their collective annual income as $1,417,263.04 FJD.

[8] The Plaintiff deposes to the facts outlined above and has supplied documentation in support, including an authority from six of her siblings to represent them in this claim.

Ex-Parte hearing on 9 February 2024

[9] Mr. Raikanikoda made the following arguments in support of the Plaintiff's application:

i. He clarified that the relief being sought in the Originating Summons is the same three orders as being sought in the Ex-Parte Summons.

ii. The Plaintiff does not have a copy of the Sale and Purchase Agreement and is not aware when settlement will occur. Nevertheless, the Plaintiff is aware that settlement is imminent by virtue of the Defendant's desire to serve a Notice to Vacate the Suva property on her.

Law and Principles

[10] The power to provide injunctive relief is contained at Order 29 Rule 1 of the High Court Rules 1988. The provision reads:

> *(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in the party's writ, originating summons, counterclaim or third party notice, as the case may be.*
>
> *(2) Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as*

aforesaid such application must be made by notice of motion or summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.

[11] The law is settled on where the Court may make an order for an interim injunction. Pathik J provided a helpful summary of the principles and authorities in *Korovulavula & Anor v Fiji Development Bank* [1997] FJHC 197. The High Court was considering whether to extend or dissolve an injunction already granted. His Lordship stated:

The principles to be followed in considering the granting of injunctive relief are set out in the leading case of American Cyanamid Co v Ethicon Ltd (1975) A.C. 396. The House of Lords there decided that in all cases, the Court must determine the matter on a balance of convenience, there being no rule that an applicant must establish a prima facie case. The extent of the court's duty in considering an interlocutory injunction is to be satisfied that the claim is "not frivolous or vexatious", in other words, "that there is a serious question to be tried".

In Cyanamid (supra) at page 406 Lord Diplock stated the object of the interlocutory injunction thus:

*"**....** to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies".*
(emphasis mine)

A similar view was expressed by McCarthy P in Northern Drivers Union v Kuwau Island Ferries (1974) 2 NZLR 61 when he said:

"The purpose of an interim injunction is to preserve the status quo until the dispute has been disposed of on a full hearing. That being the position, it is not necessary that the Court should have to find a case which would entitle the applicant to relief in all events: it is quite sufficient if it finds one which shows that there is a substantial question to be investigated and that matters ought to be preserved in status quo until the essential dispute can be finally resolved ... "
(ibid, 620)

"It is always a matter of discretion, and ... the Court will take into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted ... and that which the plaintiff,

on the other hand, might sustain if the injunction was refused ..." (ibid, 621).

...

As to "balance of convenience" the court should first consider whether if the Plaintiffs succeed at the trial, they would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction.

...

In Hubbard v Vosper (1972) 2 WLR 359, Lord Denning at p.396 gave some guidance on the principles of granting an injunction which I think is pertinent to bear in mind in this case when he said:

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and, then, decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant but leave him free to go ahead. For instance in Fraser v Evans [1969] 1 QB 349, although the plaintiff owned the copyright, we did not grant an injunction because the defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

[12] These same principles have been consistently applied up to the present time. In *Alizes Ltd v Commissioner of Police [2013] FJHC 596*, Tuilevuka J noted:

11. Interim injunctions are a powerful discretionary remedy. But

they are not lightly granted. They are granted ex parte only if there is urgency. In other words, if to proceed normally (i.e. inter partes by Notice of Motion or Summons) would be a delay entailing irreparable or serious mischief, (see Order 29 Rule 1(2) as amended in 1991 in LN 61/91).

12. *The applicant must show a strong enough case to justify the Court not hearing the other side's case. Usually, to show "urgency", the applicant must show that, unless the court intervenes with a restraining order, he has a legal right in the subject-matter of the case which is under an immediate threat of being violated. Apart from that, the applicant must convince the court that the balance of convenience favours the granting of the injunction ex-parte.*

[13] Balapatabendi J succinctly identified the test as follows in *Vanualevu Muslim League v Hotel North Pole & Ors* [2013] NZHC 151, at 17.4:

> *What could be deduced from Lord Diplock's rulings in American Cyanamide Case are in fact tests to be adopted in dealing with an application for interim injunction. The tests could be summarized as follows:-*
>
> 1. *Is there a serious question to be tried?*
> 2. *Is damages an adequate remedy?*
> 3. *Where does the balance of convenience lie?*

Decision

[14] In order for the Plaintiff to be entitled to an interim injunction she must satisfy the tests identified above. Even should she do so, careful consideration needs to be

had to the interim orders that this Court can make in the present case. The orders must be made to preserve the status quo. The Plaintiff has not yet succeeded in her claim and cannot receive the fruits of her claim before establishing her entitlement to the same.

Is there a serious question to be tried?

[15] It is not necessary for the Plaintiff to demonstrate that she will succeed with her claim. It suffices, for the purposes of the present interlocutory application, that the Plaintiffs' claim is not hopeless. Ajmeer J noted in *Deo v Hans* [2018] FJHC 1113 at [31]:

> *...the Court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality...*

[16] In *Andrews v Prasad* [2019] FJHC 904, Nanayakkara J stated:

> *...there is no requirement that before an 'interlocutory injunction' is granted the plaintiff should satisfy the Court that there is a 'probability', a 'prima facie case' or a 'strong prima facie case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried.*

[17] According to the Certificate of Title annexed to the Plaintiff's affidavit, the late Mr Senivatalala and the Defendant held the Suva property as joint tenants. The nature of this ownership was discussed by Amaratunga J in *Ram v Sarita* [2022] FJHC 278. His Lordship stated:

4. *Joint Tenancy is defined in Hinde McMorland & Sim Land Law in New Zealand as*

A joint tenancy arises whenever land is transferred inter vivos or devised by will to two or more persons without any words to show that they are to take distinct and separate shares or, to use the technical term, without "words of severance".1 Thus, if a parcel of land is transferred "to A and B" without the addition of any explanatory words, a joint tenancy is created.2 By contrast, if a transfer "to A and B equally" or "to A and B in equal shares" is registered, the result is the creation of a tenancy in common, not a joint tenancy.

There are two essential attributes of a joint tenancy, namely:
(1) The right of survivorship, or jus accrescendi;4 and
(2) The existence of "the four unities" (foot notes deleted)

5. *The Right of Survivor ship in Hinde McMorland & Sim Land Law in New Zealand state*

The right of survivorship is the most important feature of a joint tenancy. ***On the death of one joint tenant his or her interest is extinguished and accrues to the surviving joint tenants by virtue of the right of survivorship.*** *This process goes on until there is only one survivor, who then holds the land as sole owner, or, to use the technical term, in severalty. For example, if A, B and C hold a parcel of land as joint tenants, and A dies, B and C then hold the land as joint tenants. When either B or C dies, the survivor holds the land as sole owner.*

The death of a joint tenant does not sever the joint tenancy. Therefore a joint tenant cannot alienate, or devise, his or her interest in the land by will, and an interest under a joint tenancy cannot pass to the successors on intestacy if any joint tenant dies intestate.

.....(foot notes deleted)(emphasis added)

[18] In *Chand v Bharti* [2016] FJHC 103, Alfred J explained the distinction between a joint tenancy and a tenancy in common, stating:

> *10. A joint tenancy, in contrast to a tenancy in common, is a tenancy where each joint tenant is seized of the whole, along with the other joint tenants. Joint tenants do not hold proportionate shares in the property. Each has a share shared with the others to the whole property but no individual right to any particular share in it.*
>
> *11. To create a joint tenancy requires 4 characteristics to be present viz the 4 unities of title, interest, possession and time. Unity of title requires all joint tenants to hold their title to the land under the same instrument. Unity of interest requires the joint tenants' interest in the property to be identical in nature, extent and duration. Unity of possession requires each joint tenant to be entitled to possession of the whole property, not exclusively but together with the other joint tenants.*
>
> *12. Finally, unity of time requires the interests of all joint tenants vest at the same time. However this applies only to*

the creation of the joint tenancy.

13. *The right of survivorship (the jus accrescendi meaning the right of accrual) is indispensable for the existence of a joint tenancy. When a joint tenant dies, the whole of the land remains with the surviving joint tenant/s. Thus the right of survivorship cannot be defeated by a joint tenant attempting to leave his interest by will.*

[19] In certain circumstances a joint tenancy may be severed, or it may be converted to a tenancy in common. With respect to the latter, Amaratunga J stated in *Ram v Sarita* (supra):

13. *Unequal contribution, loan or mortgage contribution, and partnership properties were some examples, where equity had stepped in to consider joint tenancy as tenants in common.*

14. *These were instances where joint tenancy was in operation not after death when there was no joint tenancy, and had become a sole proprietor.*

15. *Even if I am wrong, in the affidavit in opposition there was no evidence of unequal contribution or loan or mortgage or this property was subjected to partnership.*

16. *In Malayan Credit Ltd v Jack Chia-MPH Ltd [1986] AC 549 Privy Council held that circumstances of each case can be considered to convert joint tenancy to tenancy in common in*

equity. There were no such evidence in affidavit in opposition.

[20] The case of *Ram v Sarita* involved a claim by the surviving joint tenant, Ram, for vacant possession. Sarita was the widow of the other joint tenant who had passed away and had been living on the property for decades. Sarita stated that she and her husband (before he passed) made improvements to the property and paid outgoings. The Court granted vacant possession to Ram but stayed the order for several months to permit Sarita to find suitable accommodation.

[21] The Defendant, here, is the surviving joint tenant and acquired sole ownership upon the death of Mr. Senivatalala. Such title may in certain circumstances be severed or converted into a tenancy in common. It is not clear at this time whether the same has occurred on the facts of this case. The other feature, which as yet remains unclear, is whether the Plaintiff and her siblings obtain any rights over the property by virtue of living in the property and paying for maintenance and outgoings. These events appear to have occurred in the period from 2022, possibly after Mr. Senivatalala's death, and after the joint tenancy had ended. These matters require proper argument and elucidation before a final determination can be made. It will also be necessary to receive the Defendant's position on these matters.

[22] I am satisfied for the purposes of the present application that the Plaintiff has made out a serious question to be tried, or at least a question that cannot properly be determined at this time.

[23] I should add that Mr. Raikanikoda argues that there are restrictions on the Defendant, as a non-resident of Fiji, selling the Suva property as per the stated provisions in the Land Sale Act and Land Transfer Act. I am, as yet, unsure how, if at all, these provisions apply to the Defendant.

Is damages an adequate remedy?

[24] The purpose of this proceeding is for the Plaintiff and her siblings to retain the property as a family home. It follows that damages will not a suitable or adequate outcome for the Plaintiff.

Where does the balance of convenience lie?

[25] The nub of the proceeding concerns preserving a property as a family home for Mr. Senivatalala's descendants. If interim injunctive orders are not made restraining the alienation of the said property then the proceedings will become redundant upon the sale of the property to a third party.

[26] Certainly, injunctive orders will cause the Defendant inconvenience and potentially financial risk with the present purchaser. This is mitigated by the Plaintiff's undertaking as to damages. The financial information supplied by the Plaintiff for her siblings demonstrate their financial ability to satisfy the undertaking.

Conclusion

[27] The Plaintiff is entitled to temporary injunctive relief.

[28] While I am prepared to grant the first and third order sought, I do not accept that the second order sought is necessary to preserve the status quo and is, therefore, not granted.

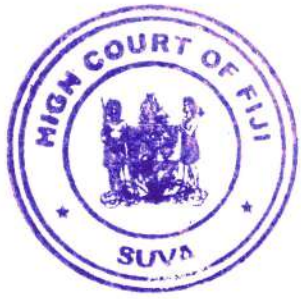
Orders

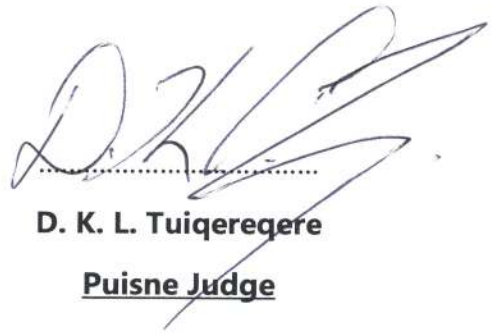
[29] With the aforementioned matters in mind, I make the following orders:

i. The Defendant is restrained, with immediate effect, from execution and settlement of the Sale and Purchase Agreement for the property legally described as CT 17893, Lot 52, DP NO 4209 Raiwai (Part of), until further orders of this court.

ii. The Defendant is restrained, with immediate effect, from selling the property legally described as CT 17893, Lot 52, DP NO 4209 Raiwai (Part of) until further orders of this court.

iii. The costs of the Plaintiff's application to be costs in the cause.





D. K. L. Tuiqereqere

Puisne Judge

Solicitors:

Raikanikoda & Associates for the Plaintiff