

**TALANOA FUKA KITEKEI' AHO v ATELAITE TANGIMOUSA KAVA
(HBC0211 of 2011S)**

5 HIGH COURT — CIVIL JURISDICTION

BALAPATABENDI J

10 April, 29 November 2012

10 Real Property — co-ownership — order for transfer of title — no interest in property — failure to assist in repayment of mortgage — whether legal basis for transfer — substituted service — address of defendant — High Court Rules O 11 r 1(g)

15 The plaintiff and defendant were the registered proprietors of certain property. The plaintiff alleged that the sale of a share of the property to the defendant was done with the agreement that the defendant would help the plaintiff with mortgage repayments. The plaintiff sought an order for the transfer of the title to his name on the basis that the defendant has no interest in the property, because she had never contributed to the mortgage repayments and had bought a house in the USA.

20 **Held –**

(1) In order for the court to transfer an undivided half share of one co-owner to the other co-owner, an acceptable legal basis needs to be established. Lack of interest in the property and failure to assist in repayment of mortgage would not be sufficient to grant reliefs sought by the plaintiff.

25 (2) The application for substituted service was without sufficient supporting material. It is important to adduce material as to how the defendant's address was acquired by the plaintiff.

(3) In the event of default of the loan, a mortgagee could exercise the right of sale and recover any outstanding amount and distribute the balance among the owners as per the certificate of title. The grounds averred are not sufficient to grant the relief sought.

30 Summons struck-out.

S. Lateef for the Plaintiff.

No appearance for the Defendant.

Balapatabendi J.

35 **Introduction**

[1] The Plaintiff filed an ex-parte summons dated 29 July 2011 seeking following orders:-

40 1. *A declaration that the Plaintiff is entitled to be registered as the sole proprietor in fee simple of the land contained in Certificate of Title No 14504, presently registered in the names of the Plaintiff and the Defendant.*

2. *An order that the Defendant cause her interest in the land contained in Certificate of Title No 14504 to be transferred to the Plaintiff pursuant to a Court Order, subject to such charge or recording of any other interest in the said land.*

45 3. *That Pursuant to O 11 r 1(g) of the High Court Rules. Summons and Affidavit herein be permitted to be served out of the jurisdiction and in the United States of America.*

50 4. *That service be affected by delivery of the Summons and Affidavit by registered courier service or by registered Air Mail at the last known address of the Defendant being 2115 Pulas Avenue, East Pao Alto, CA 94303, California, United States of America.*

5. *That the Registry accept any such Orders and effect registration of a transfer lodged pursuant to the Order.*
6. *That the Defendant pays the Plaintiff's cost of the Summons.*
7. *Any further orders that this Honourable court considers appropriate.*

5 [2] This application was supported by an affidavit of Satya Chandra sworn on 25 July 2011.

[3] The deponent is legal executive of Lateef and Lateef Lawyers and has deposed that he was authorized by the Plaintiff to make an affidavit on behalf of
10 him and annexed a letter of authorization of the Plaintiff to the affidavit.

[4] On the day that this matter was first listed for mention, Mr Lateef, counsel for the Plaintiff moved for an order for substituted service out of jurisdiction of the summons and affidavit by registered courier or registered air mail to the last known address of the Defendant being 2115 Plugs Avenue, East Palo Alto CA
15 945303 California, USA. Court also granted time for the Plaintiff to file a supplementary affidavit.

[5] An affidavit of Talanoa Fuka Kitekei'aho, Plaintiff in this matter, sworn on 22 August 2011, filed in Court on 15 September 2011, in support of the
20 application.

[6] The return date of the originating summons was on 1 December 2011 and Affidavit of Service by Satya Chandra a law clerk of Lateef and Lateef Lawyers, sworn on 10 November 2011, filed in court on 11 November 2011 with the registered mail slips in proof of service of summons on the Defendant.

25 [7] This matter was thereafter listed for hearing in the absence of Defendant on 10 April 2012 and Oral Submissions were made by Mr S Lateef, counsel for the Plaintiff on that day.

FACTS

30 [8] The Plaintiff and the Defendant are the registered proprietors of the property known as Lot 1, Kula Street, Samabula for the whole of the land as per the copy of the Certification of Title 14504 submitted along with the affidavit.

[9] The Plaintiff in his affidavit deposed that the Defendant bought a half share of the property in 1999 from his former wife, Losa Polini Kitekei'aho, while the
35 Defendant and Plaintiff were in relationship. Transfer of the half share of Polini Kitekei'aho to the defendant was taken place on 8 February 1999 as per the copy of Transfer No 17548, annexed to the affidavit.

[10] The Plaintiff deposed that sale of the share to Defendant was done with the consent that Defendant would help him out in mortgage re-payment which was
40 in existence with Home Finance Co.

[11] The Plaintiff also deposed that his relationship ended in 2005 and the Defendant now resides in USA and refused to assist him with mortgage re-payment.

45 [12] The Plaintiff further deposed that the Defendant's contribution to purchase the property was only \$25,516.30 and Plaintiff continued mortgage payments to Home Finance Co up to date.

[13] The Plaintiff has sought an order for the transfer of the title to his name on the basis that Defendant has no interest in the property because she has never
50 contributed to the mortgage repayment and further she has bought a house in California, USA.

[14] The Plaintiff has annexed some correspondences between the solicitors for Plaintiff and the Defendant, solicitors for Home Finance Co and mortgagor of the property. Plaintiff also has annexed a letter dated 31 July 2009 sent by the solicitors for the Plaintiff to Mr David F. Corbett, solicitor for the Defendant, as
5 'J'.

ANALYSIS

[15] The Plaintiff in the originating summons has sought an order that the one undivided half share of the property owned by the Defendant be transferred to
10 Plaintiff mainly on the premise that the Defendant now resides in USA and no longer interested in the property and the Defendant has refused to assist him with mortgage repayment in spite of several reminders.

[16] It is noted that solicitors for the Plaintiff has replied to the letter dated 10 July 2009 and received via e-mail on 17 July 2009 a letter of Mr David F Corbett,
15 Legal Practitioner in Tonga, on behalf of the Defendant.

[17] However the two affidavits filed by Satya Chandra, legal executive of Lateef & Lateef lawyers and Plaintiff himself in support of the application, has not annexed the said letter.

[18] It is observed from the letter of solicitors for the Plaintiff dated 31 July
20 2009 referred to as 'J' in the affidavit that Defendant has disputed the contents of letters of Plaintiff's solicitors.

[19] In my view, the letter of Mr David F. Corbett is the only document which could be of some assistance to court to ascertain the position of the Defendant in
25 relation to the property owned by Plaintiff and Defendant, which the Plaintiff has failed to submit along with the affidavit.

[20] Although the Plaintiff in his affidavit deposed that Defendant is no longer interested in the property as a ground for an order to transfer the half share to
30 plaintiff, although the response letter dated 31 July 2009 marked as 'J' clearly demonstrates otherwise.

[21] The application has caused some concerns of the court as there is no indication in the summons as to the legal basis of the application. The substantive application is in my opinion is vague. In order for the court to transfer undivided
35 half share of one co-owner to the other co-owner needs to be established with an acceptable legal basis. Lack of interest in the property and failure to assist in repayment of mortgage would in my view not be sufficient to grant reliefs sought by Plaintiff in the summons.

[22] It is further observed that the application for substituted service was without sufficient supporting material. In my view, it is important to adduce
40 material to indicate as to how the address of the Defendant was acquired by the Plaintiff.

At the hearing of this matter, on enquiry of the court, counsel submitted that Plaintiff provided the address of the Defendant. No independent verification to establish that the defendant resides in the address provided by the Plaintiff.

45 It is further observed in paragraph 11 of the affidavit of Satya Chandra and paragraph 12 of the affidavit of Plaintiff deposed as follows:-

*That the Plaintiff seeks orders for the transfer of the title into the Plaintiff's name solely. The Plaintiff has entered into a caretaker arrangement for the property and he is currently paying for that the Plaintiff lives in Tonga. The Mortgagee has re-advertised
50 for sale and the Plaintiff wishes to preserve the property. The payment of the debt to date is being paid by the Plaintiff.*

[23] However, the letter of solicitors for the Plaintiff dated 26 June 2009 marked as 'F' and submitted along with the affidavits stated as follows:-

5 *"We are instructed that despite several requests from our client to you to commit to the said payments, alternatively to provide him a power of attorney to sell the property in order to meet the said payments, you have continued to neglect and/or refuse to provide an answer.*

10 *TAKE NOTICE that we demand you to pay the said arrears in the sum of \$4,711 (Four Thousand Seven Hundred and Eleven Dollars) within fourteen (14) days upon receipt of this letter failing which we will take your continued silence to mean that you are surrendering your partnership and responsibility on the property and sales will proceed immediately so that the arrears could be settled."*

[24] In view of the above, the position of the Plaintiff is somewhat unclear to court. In the event of default of the loan, the mortgagee could exercise the right of sale and recover the outstanding amount and distribute the balance among the
15 owners as per certificate of title.

[25] For the aforementioned reasons and after considering the submissions advanced by counsel, I do not consider the grounds averred to be sufficient to grant reliefs as sought in summons.

20 **ORDERS**

1 Summons dated 29 July 2011 is struck-out.

2 No order as to cost.

Orders accordingly

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Summons struck out.

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