

IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

Civil APPEAL NO.ABU 0083 OF 2014
(High Court Case No. HBC 374 of 2008)

BETWEEN : **KORESI TOASI AND KORESI TUIVANUAVOU TOAIS**
(as executors of the deceased plaintiff Camari Tirikula)
Appellants

AND : **PENI TIRIKULA**
1st Respondent

: **ATTORNEY GENERAL OF FIJI**
2nd Respondent

: **REGISTRAR OF TITLES**
3rd Respondent

Coram : Basnayake, JA
Lecamwasam, JA
Prematilaka, JA

Counsel : Mr. A. R. Matebalavu for the Appellant
Ms. L. Tabuakuro for the 1st Respondent
Mr. J. Pickering for the 2nd and 3rd Respondents

Date of Hearing : 11 November 2016

Date of Judgment : 29 November 2016

JUDGMENT

Basnayake, JA

[1] This is an appeal against the judgment of the learned High Court Judge dated 24 April 2012. By this judgment the learned Judge had dismissed the plaintiff's originating summons. In an application made to the Court of Appeal, the learned President of the

Court of Appeal on 7 November 2014 (2014 FJCA 195: Misc 19.2012 (7 November 2014) had granted enlargement of time to appeal subject to conditions. A notice of appeal with 10 grounds was thereafter filed in the Court of Appeal.

The plaintiff's case

- [2] The plaintiff (deceased whilst the case was pending and substituted) filed this case by way of originating summons inter alia for a declaration that the joint tenancy over lot 23 on Deposited Plan No. 2583, comprised in Certificate of title 10975 be converted into a Tenancy in Common.
- [3] The plaintiff, her husband and the 1st defendant became joint tenants of the disputed property in 1994 (CT 2 at pg. 21 of the Record of the High Court (RHC)). The plaintiff states that in 1997 her husband died leaving the plaintiff and the 1st defendant as joint tenants. The plaintiff states that due to a deterioration of the relationship between the plaintiff and the 1st defendant that the plaintiff wished that the joint title be converted into a common ownership. The 1st defendant did not agree to such conversion.
- [4] The plaintiff states that she noticed the 1st defendant through her solicitor to have the joint ownership severed. The plaintiff also states that the 1st defendant had obtained a loan from the Fiji National Provident Fund (FNPF) by charging 1/3rd of the property. In the circumstances the plaintiff claims to have the joint ownership severed in equity and the ownership to be converted into a common ownership.

The defence

- [5] The 1st defendant has acknowledged receipt of the notification declaring the intention of the plaintiff to sever the joint ownership. However he has categorically refused to give up the joint ownership to embrace common ownership.

[6] The 1st defendant has also admitted to mortgaging 1/3rd share to the FNPF. The 1st defendant states that this was done together with the plaintiff. The plaintiff denies it and states that her signature had been forged into a document.

[7] The learned High Court Judge in his judgment finds that the property is under a joint tenancy, and the originating summons does not substantiate a claim for severance. The learned Judge has based his judgment on section 34 of the Land Transfer Act (Cap 131) in terms of which, any two or more persons registered as owners are, unless a contrary intention is disclosed, presumed to hold the property in common.

“Section 34 (1) Subject to the provisions of any law for the time being in force relating to trusts and to the provisions of Part XV, unless the contrary intention is expressed in the instrument of title, where two or more persons are registered as proprietors of any estate or interest in land subject to the provisions of this Act, they shall be deemed to be entitled to the same as tenants in common, and on the death of any one of such proprietors there shall be no right of survivorship in the other or others and the share of such deceased proprietor shall pass to his personal representative”.

(Sub section 2 is not reproduced as not being relevant).

[8] It is common ground that the property was a joint tenement. As the plaintiff died during the pendency of the action, the 1st defendant being the sole surviving partner became the owner of the property according to law. With that the plaintiff's action was dismissed.

Grounds of Appeal and Submission of the learned counsel for the plaintiff

[9] I have decided to have the grounds and the submissions of the learned counsel for the appellant be considered together to avoid repetition. Although several grounds were mentioned in the notice of appeal, the learned counsel for the appellant addressed court mainly with regard to two matters, covering grounds 1, 2, 3 & 4.

[10] The two matters in a nutshell are as follows:

1. The unilateral notification of the plaintiff to the 1st defendant had severed the joint tenement.
2. The charge created by the 1st defendant in 2001 with the FNPF brought the joint ownership to an end.

[11] The learned counsel submitted that there is no statute in Fiji similar to the Law of Property Act of 1925 in England. By section 36 (2) of that Act, a new method of severance was introduced where joint ownership was severed with a notice in writing given by the joint tenant to the other (**Burgess v Rawnsley** [1975] 3 All ER 142 at 154 cited in Halsbury's Laws of England 4th Edition Volume 39 para 540 (pg 356)).

Law in Australia

[12] In **Corin v Patton** (1990) 169 CLR 540 a joint tenant had executed her interest to a trustee to be held on trust for herself. She died before the transfer was registered. The High Court of Australia held that the execution of the transfer did not sever the joint tenancy. A unilateral declaration of intention or other unilateral act inconsistent with the continuation of a joint tenancy does not sever joint tenancy.

[13] In that case the High Court of Australia refused to follow the decision in **Burgess v Rawnsley** (supra). Mason CJ and McHugh J at page 548 said that "*there are powerful reasons for declining to adopt the approach taken in Burgess*". "*First, as the judgment of Sir John Pennycuik makes clear, the decision turned on the construction of section 36 (2) of the Law of Property Act 1925 (UK) which permits the severance of a joint tenancy by notice in writing by one joint tenant to the other, rather than on the state of the pre-existing law. Secondly, as a matter of history and principle, the severance of a joint tenancy can only be brought about by the destruction of one of the so called four unities: See Blackstone, Commentaries on the Law of England (1778), Vol, 2 pp. 185-186. Unilateral action cannot destroy the unity of time, of possession or of interest unless the unity of title is also destroyed, and it can only destroy the unity of title if the title of the party acting unilaterally is transferred or otherwise dealt with or affected in a way which*

results in a change in the legal or equitable estates in the relevant property. A statement of intention without more does not affect the unity of title. Thirdly, if statements of intention were held to effect a severance, uncertainty might follow; it would become more difficult to identify precisely the ownership of interests in land which had been the subject of statements said to amount to declarations of intention. Finally, there would then be no point in maintaining as a separate means of severance the making of a mutual agreement between the joint tenants."

- [14] Fiji too does not have a statute similar to the Law of Property Act in U.K. under which **Burgess v Rawnsley** was determined. Considering the reasons set out in the case of **Corin v Patton**, I am of the view that the position in Fiji is somewhat similar to the situation in Australia and adopting that stance I take the view that a unilateral declaration could not sever the joint tenancy.

The effect of charge with the FNPF

- [15] Did the registration by the 1st defendant of 1/3rd undivided share as a charge sever the joint tenancy in equity? On 22 March 2001 the 1st defendant had registered a charge of 1/3rd undivided share of the property having obtained a loan of \$7650.00 (pg. 34 RHC) The submission of the learned counsel is that the conduct of the 1st defendant by registering a charge with the FNPF against the interests of the 1st defendant, namely 1/3rd undivided share of the property, severed the joint tenancy. The answer to this submission is provided by section 63 of the Land Transfer Act (Cap 131) which states that the effect of a mortgage is to provide security and not to operate as a transfer. The section is as follows:

"63. A mortgage registered in accordance with the provisions of this Act shall have effect as a security, but shall not operate as a transfer of the land, or of the estate or interest therein, charged".

[16] Thus a charge created by one joint owner does not operate as a transfer and does not have any effect of severing ownership. Thus joint ownership remains intact even after 2001 and it is absolutely clear that there was no severance of joint tenancy.

Submission of the learned counsel for the 1st defendant

[17] The learned counsel for the 1st defendant submitted that the correspondence between the plaintiff and the 1st defendant is ample proof against the non-severance of the joint tenancy. The documents are as follows:-

1. *Letter dated 15 April 2008 (pg. 26 of the RHC) by the plaintiff's solicitor to the 1st defendant claiming that charge to FNPF severed the joint ownership.*
2. *Letter dated 20 April 2008 by the 1st defendant to the plaintiff's solicitor refusing to enter into a common ownership (pg. 28)*
3. *Letter dated 4 August 2008 (pg 31) by the plaintiff's solicitor to the 1st defendant seeking consent to convert the ownership into a common ownership.*
4. *Letter dated 15 August 2008 by the 1st defendant to the plaintiff's solicitor refusing to agree to a change (pg. 32).*

[18] The learned counsel also submitted that anyone claiming the benefit of equity should come with clean hands. Being a joint tenant the 1st defendant required the consent of the plaintiff prior to entering into the charge. If the 1st defendant was a common owner, he was free to subject his share to obtain a loan. The learned counsel submitted that the plaintiff's complain of forgery is coming eight years after the execution. Furthermore the learned counsel points to the fact that the plaintiff has not taken any initiative to complain to anyone in authority of the forgery alleged to have been committed by the 1st defendant.

[19] The learned counsel also submitted that the plaintiff made an attempt to have the title released from the FNPF in 2007 (pg. 30 of RHC). Even at that time the plaintiff did not complain of the forgery and have the transaction declared null and void. The learned counsel further submitted that there was no reason for the 1st defendant to forge the

signature of the plaintiff. What the 1st defendant did was to obtain a loan from his FNPF account to redeem an existing mortgage with Home Finance. It was the husband of the plaintiff, the adopted father of the 1st defendant that had mortgaged the property with Home Finance. Having redeemed the mortgage with Home finance, it was the 1st defendant who continued to pay installments to FNPF. At that time it was the plaintiff who was in occupation of this property and it was the plaintiff who benefitted by this charge with FNPF. The learned counsel submitted that it was the 1st defendant who saved the property which otherwise would have gone up in a mortgage sale.

[20] The learned counsel submitted that the plaintiff's complaint about the forgery was to make up a case for the plaintiff to convert the joint tenancy to one of common tenancy. The learned counsel complains that for that reason the plaintiff's hands are not clean and thus not qualified to seek a remedy in equity. The plaintiff was not able to prove forgery. The complaint was also made 8 years later. The learned counsel for the plaintiff could not challenge the stance taken by the learned counsel for the 1st defendant.

[21] Considering all the submissions before court it appears that this claim of forgery was made only to obtain a benefit, namely, to bring the joint tenancy to an end.

[22] Considering the fact that the joint tenancy could not be severed by a unilateral declaration and a mortgage is not capable of transferring ownership, I am of the view that the learned High Court Judge was correct in dismissing the plaintiff's originating summons. Hence I am of the view that this appeal is without merit and should be dismissed with costs in a sum of \$5000 payable by the Appellant to the 1st Respondent (1st defendant).

Lecamwasam JA

[23] I agree with the reasons and the conclusion arrived at by Basnayake JA.

Prematilaka JA

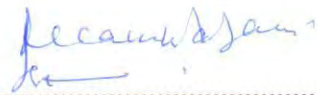
[24] I agree that the appeal should be dismissed.

The Order of the Court:

1. Appeal dismissed with costs in a sum of \$5000.00 payable by the Appellant to the 1st defendant.



.....
Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL



.....
Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL



.....
Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL