

IN THE HIGH COURT
AT SUVA
APPELLATE JURISDICTION

Civil Appeal No: HBA 11 of 2015
(Civil Action No: 404 of 2009)

BETWEEN : Priya Prakash Mati Chand a.k.a Prakash Mati
Appellant

AND : Solochana Bharti
Respondent

BEFORE : The Hon. Mr Justice David Alfred

Counsel : Ms S Daven for the Plaintiff
Mr S Kumar for the Defendant

Date of Hearing : 8 July 2015
Date of Judgment : 15 February 2016

JUDGMENT

1. This an Appeal from the decision of the learned Master delivered on 21 November 2014 whereby he refused, and dismissed the Plaintiff's Originating Summons dated 18 March 2014 and awarded the Defendant costs of \$1,000.00. In the said Summons, the Plaintiff (the Appellant) had applied for an order under section 169 of the Land Transfer Act (Cap 131) (LTA) that the Defendant (the Respondent) show cause why she should not give the Plaintiff immediate vacant possession of the land held under Certificate of Title No. 28127 being Lot 19 on Deposit Plan No. 5521.

2. The Notice of Appeal filed by the Appellant (the original Plaintiff) sought the setting aside of the Master's Judgment or alternatively such further or other orders as the (appellate) court considers appropriate.
3. There were 9 Grounds of Appeal which included, inter-alia, the following:
 - (1) The Master erred or misdirected himself in law and in fact in holding that the Order of the Family Court dated 19 June 2007 (the Order) had severed the joint tenancy of the property held under Certificate of Title No. 28127 (the property).
 - (2) The Master erred or misdirected him in law and in fact in failing to take into account that the burden of proof of the severing of the joint tenancy which was on the Respondent had not been discharged by her.
 - (3) The Master erred or misdirected himself in law when holding the joint tenancy had been severed when the Appellant had not signed and lodged for registration any document to sever the joint tenancy.
 - (4) The Master failed to apply section 37 of the LTA.
 - (5) The Master erred in law and in fact when he held the Order severed the joint tenancy when he failed to consider that the Applicant (the Appellant) had made a unilateral application and the Order was not made with the consent of both joint tenants and the Family Court had no jurisdiction to sever a joint tenancy on the unilateral application of one joint tenant.
 - (6) The Master erred in law and in fact in dismissing the Appellant's application for vacant possession of the property.
 - (7) The Master erred in law and in fact in holding the ownership of the property had been changed from a joint tenancy to a divided ownership.
4. When the Appeal came up for hearing before me, the Counsel for the Appellant submitted there had been no severance of the joint tenancy by either party or at law and therefore by the law of survivorship the property devolved on the Appellant. There had never been any relationship between the Appellant and the

Respondent. The Respondent based her right on her marriage with the deceased who was a joint tenant of the property with the Appellant. The Respondent had never contended that the Family Court has severed the joint tenancy and the Master's decision was based on the Order. The documents had to be lodged with the Registrar of Titles if severance were to be effected. The Order cannot effect severance of a joint tenancy. There was a subsisting mortgage on the property. The Appeal should therefore be allowed as all 4 unities had not been destroyed and a unilateral declaration was not sufficient.

5. The Counsel for the Respondent then submitted. He said the Appellant had chosen the section 169 LTA procedure which does not mention joint tenants or tenants in common or the right of survivorship. The decisions quoted by the Appellant were decided before the Family Law Act 2003 (FLA) and therefore not applicable. He said, however, section 161 of the FLA is applicable and the joint tenancy is destroyed. The Order has determined the joint tenancy and since there was no appeal, it is binding on the Appellant. The Order was made on 19 June 2007 whereas the record of death was filed by the Appellant on 24 April 2013. The registration of death was caught by Section 41 of the LTA. Counsel said he was asking for the Appeal to be dismissed. The cases decided prior to 2003 cannot override the FLA, which itself overrides the common law. The issue of severance of a joint tenancy should be done by way of a writ of summons and not by way of a section 169 application.
6. In her reply the Counsel for the Appellant said as the Appellant is a joint tenant, the right of survivorship applies and she is the 100% owner and thus entitled to file the application under section 169 of the LTA as the last registered proprietor. The Family Court order is not effective.
7. At the conclusion of the hearing, I reserved my judgment to a date to be announced. In the course of reaching my decision I have perused:
 - (1) The Appellant's written submission.
 - (2) The Skeleton submission of the Respondent.

- (3) The Decision of the Family Court dated 19 June 2007.
- (4) The Originating Summons filed on 17 March 2014.
- (5) The Affidavit in Support of the Appellant (Plaintiff) sworn on 14 March 2014, with Annexure.
- (6) The Affidavit in Reply of the Respondent (Defendant) sworn on 3 April 2014, with Annexure.
- (7) The Affidavit in Reply by the Appellant to the Defendant's Affidavit in Reply, sworn on 9 May 2014 with Annexures.

8. I now proceed to deliver my judgment. The two issues for me to decide are:
 - (A) Whether the Family Court Order has the legal effect of severing the joint tenancy and creating a tenancy in common.
 - (B) Whether the non-registration with the Registry of Titles of any document having the effect of severing the joint tenancy means that the joint tenancy is extant.
9. I will deal with (A) first and will adopt what is appended below from "Land Law" by Peter Butt (Professor of Law, University of Sydney) Fifth edition (Butt).

A tenancy in common is where 2 or more persons hold land, each with a proportionate interest in the land. Their interests are not identifiable in any physical sense but each has an undivided share meaning a distinct share. Each tenant in common has seisin of his own share only, not of the whole, but the seisin of the property is distributed amongst all the tenants. Seisin is defined by Osborne's Concise Law Dictionary as formal legal ownership.
10. A joint tenancy, in contrast to a tenancy in common, is a tenancy where each joint tenant is seised 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.
14. With the essentials of a joint tenancy out of the way, I turn to the nub of the Appeal. I start with the Family Court Order and only para 1. (i) and (ii) are relevant for our present purposes, and they read as follows:
 - (i) Either party including the wife and son may pay off the share of the other party in the property.
 - (ii) Alternatively, the husband and the wife will take all necessary action to have the matrimonial home to be listed for sale as soon as possible or no later than 19/7/2007 and the proceeds of sale after expenses, to be divided as to 1/3 to the husband, 1/3 to the wife and 1/3 to be held in trust for the child, until he reaches 21 years.
15. It is clear to my mind, that the Family Court, in making the above Order pursuant to Section 161(1) of the Family Law Act 2003, was not making any order altering the interests of the parties in the property, the parties being the Appellant and the Respondent. On the contrary para (i) is clearly only saying

that either joint tenant may pay off the share of the other joint tenant in the matrimonial home. It is crystal clear that the Family Court is contemplating that one joint tenant will then become the sole owner of the property and it is the proceeds of the sale of the other joint tenant's share in the property which are to be paid in the specified proportions. Thus, the word "paying" is used in line 5 of para 1(i).

16. Further in the last lines of the aforesaid para the Family Court is ordering where the son is not a party to the purchase of the property, his 1/3 share is to be held in trust until he is 21 years old. This clearly envisages that the son will receive his share of the proceeds when he reaches the age of 21. It is inconceivable that it could mean he will receive a 1/3 share of the property at age 21.
17. With regard to para 1(ii) the order was for the sale to be effected at the latest by 19 July 2007 which is more than 8 years ago. The sale has not been effected. I therefore find and hold that the efficacy of the order has become spent and its terms cannot be executed because the transfer by sale and purchase of one joint tenant's share of the property by the other joint tenant and alternatively the sale of the property are both impossible of execution due to the demise of the deceased joint tenant.
18. The Family Court Magistrate said she was making the order under the provisions of Section 161 (i) (b) of the Family Law Act 2003 but she clearly did not make any settlement or transfer of the property. What she did was to order one joint tenant to sell his/her share of the property and alternatively the sale of the property by 19 July 2007.
19. Neither of these have been carried out. I therefore do not find any reason why the jus accrescendi should not apply in this case. Butt says if the court order requires a sale there is no severance at law until the documents have been executed and (for Torrens title land) registered. Hence, if one joint tenant dies

before these steps have been completed, at law the survivor takes the whole property. How much more so here when the sale should have been affected before 19 July 2007, and never was.

20. I therefore find and hold there had been no severance of the joint tenancy before the deceased joint tenant died on 2 April 2013.
21. I will now consider (B), whether the non-registration of any appropriate document at the Registry of Titles means the joint tenancy is extant. Section 37 of the LTA provides that “No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.”
22. A perusal of the relevant page of the Certificate of Title shows the last Transfer registered (on 14 November 1995) was to the deceased and the Appellant “As Joint Tenants With Rights of Survivorship” and the Record of Death registered (on 24 April 2013) was that of the deceased “who died on the 2nd April, 2013.” The Appellant is the last registered proprietor of the property occupied by the Respondent and therefore entitled to bring the section 169 LTA application. (See the decision of the Court of Appeal, Fiji in Civil Appeal No. ABU 0069.2004 between: Joseph Jaswant Narayan ... *First Appellant* And Govindamma Narayan ... *Second Appellant* And Shri Ramlu ... *Respondent*.)
23. There is no record of any document purporting to show any severance of the joint tenancy. Therefore applying Section 37 of the LTA, I shall have to find and I so hold that on the demise of the deceased, the Appellant became the sole owner of the property and remains so to-date as the interest of the deceased is extinguished.

24. I do not think section 41 of the LTA can apply to render void the Appellant's registration of the fact of the death of the deceased. There was no fraud established by the Respondent that the Appellant had allegedly committed in such registration of death, and it is specious to so argue.
25. In the result, I am unable to uphold the judgment of the Master and hereby set aside the orders that he made. The Appeal is hereby allowed and I make the following orders in consequence thereof:
- (1) The Respondent is required to vacate and deliver vacant possession of the land held under Certificate of Title No. 28127 being Lot 19 on Deposit Plan No. 5521 to the Appellant by the 29th day of February 2016.
 - (2) The costs of this appeal and in the court below are to be paid by the Respondent to the Appellant and are summarily assessed by me at \$1,500.00 and \$1,000.00 respectively making a total of \$2,500.00.

Dated at Suva this 15th day of February 2016



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David Alfred
JUDGE
of the High Court of Fiji